STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2143

State of Minnesota,
Respondent,

vs.

Robert Sterling Allison,
Appellant.

Filed June 3, 2013
Reversed and remanded
Chutich, Judge

Ramsey County District Court
File No. 62-CR-11-2538

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Smith, Judge.

U N P U B L I S H E D O P I N I O N

CHUTICH, Judge

On appeal from an order revoking his probation, appellant Robert Sterling Allison argues that the district court abused its discretion when it based the revocation on

violations of probationary conditions that were not actually imposed. He also contends that the evidence conclusively demonstrates that the policies favoring probation outweigh the need for confinement. We reverse and remand.

FACTS

In July 2011, the district court sentenced Allison to the custody of the commissioner of corrections for 21 months after he pleaded guilty to one count of terroristic threats for threatening to kill several of his family members. Allison's sentence was stayed, and he was put on supervised probation for five years with the conditions that he (1) successfully complete any chemical-dependency treatment or other psychological treatment as required by probation; (2) refrain from alcohol and drug use, and submit to regular testing; (3) successfully complete an anger-management program; (4) serve 75 days in the workhouse with credit given for six days; (5) have no contact with the victims; and (6) remain law abiding. Allison was not specifically instructed to establish or to maintain contact with the probation offers; ordered to obey the standard terms and conditions of probation; or required to sign a written probation agreement.

After Allison was released from the workhouse in late August 2011, his probation officer was unable to contact him at the addresses or phone numbers that he provided. The probation officer then contacted Allison's emergency contact who promised to have Allison call probation. Allison left a phone message with probation in late October, but did not provide a phone number or address where he could be reached. Approximately two weeks after receiving the message from Allison, his probation officer filed a report in which she alleged that Allison had violated two conditions of probation by failing (1) to

keep probation informed of his current address and phone number and (2) to maintain contact.

The district court held a probation violation hearing on January 4, 2012. Allison admitted to violating the identified conditions, but alleged that he did not have reliable contact information because he was homeless and had been struggling with mental and physical health issues. Probation recommended that the district court require Allison to serve 90 days in jail instead of executing the 21-month prison sentence. The district court, however, executed the sentence, finding that Allison had "materially, intentionally violated the conditions of [his] probation" and that he was "not an appropriate candidate for probation" because he had a large number of probation violations in the past for other offenses.

Allison appealed, arguing that the district court erred by failing to address the third *Austin* factor—finding that the need for confinement outweighs the policies favoring probation—for revoking probation. *See State v. Allison*, A12-0569, 2012 WL 5289871, at *2 (Minn. App. Oct. 29, 2012). The state conceded that the district court failed to address the third *Austin* factor, and agreed that remand was appropriate. *Id.*

Allison also argued, for the first time, that the district court erred when it revoked his probation for violating conditions that were never actually imposed. *Id.* at *3. This court noted that "[a]ppellant not only failed to raise this issue at the district court, but he affirmatively admitted that he had violated the terms of his probation." *Id.* Regardless, we emphasized that the responsibility for stating the precise terms of a sentence rests with the district court, and directed the district court to address the issue on remand. *Id.*

At the second revocation hearing held on remand in November 2012, Allison's probation officer testified regarding the "general" or "standard conditions" that are imposed on all probationers. The officer explained that the "main" standard condition is that probationers keep in contact with probation and inform them of any address or phone number changes. The officer testified, however, that she never reviewed any standard conditions with Allison.

The district court concluded that the allegedly violated conditions were a part of Allison's probation requirements because "although it was not stated in open court at the time of that sentencing," Allison was to have contacted probation upon release from the workhouse. The court "assume[d]" that Allison had been given the contact information of his probation officer and emphasized that Allison had admitted to violating the alleged conditions. The court further emphasized that Allison's many prior convictions mean he "knows well the requirements of any probation and is not a stranger to the system."

The district court also addressed the third *Austin* factor. It emphasized that Allison had numerous assault-related prior convictions and that on "most if not all of them he had violated his probation one way or another." The court stated that "the specific facts of this case with serious threats to the family, and his failure to follow through from the get go" led it to conclude that Allison's need for confinement outweighs the desirability of probation, that confinement is necessary to protect the public and Allison's family from further criminal activity, and that not revoking probation would "unduly depreciate the seriousness of [Allison's] violation." After stating that "[t]his is a man who's well

acquainted with the system . . . [who has] acknowledged that he did not do what he should have done," the district court executed Allison's sentence. This appeal followed.

D E C I S I O N

A district court "has broad discretion in determining if there is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion." *State v. Austin*, 295 N.W.2d 246, 249–50 (Minn. 1980). In probation revocation matters, the district court has the duty to develop the record and the state has the burden of proving the probation violation by clear and convincing evidence. *State v. Ornelas*, 675 N.W.2d 74, 81 n.6 (Minn. 2004); Minn. R. Crim. P. 27.04, subd. 3. Before revoking probation, the district court must: "1) designate the specific condition or conditions that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d at 250.

A violated condition cannot serve as a basis for revoking probation unless that condition was actually imposed by the district court. *Ornelas*, 675 N.W.2d at 79–80 (holding that a condition imposed by a probation officer that the probationer have no contact with certain individuals, absent an order from the district court, may not support revocation); Minn. R. Crim. P. 27.03, subd. 4(E)(3) (providing that "[i]f lawful conduct could violate the defendant's terms of probation, the [district] court *must* tell the defendant what that conduct is" (emphasis added)). Even a probationer's actual belief that he has violated probationary conditions is irrelevant if that condition was not actually imposed. *Ornelas*, 675 N.W.2d at 80 ("[T]hat a probationer . . . believes something to be

a condition of probation does not necessarily make it so."); *State v. B.Y.*, 659 N.W.2d 763, 769 (Minn. 2003) (holding that a curfew requirement imposed by a juvenile's probation officer that was not part of the district court's order could not support a probation revocation, even though the juvenile believed he had violated a court-imposed condition).

The state concedes that Allison was never "specifically apprised of his obligation to maintain contact with the probation department and keep the department apprised of his current address and telephone number." The state argues, however, that the district court properly exercised its discretion in revoking probation because, given Allison's extensive criminal and probationary history, he was familiar with the criminal justice system and he admitted to violating the conditions. It further contends that the specific noncustodial conditions imposed in open court clearly required ongoing contact with probation.

Even accepting these factual assertions as true, which we do, *Ornelas* made clear that implicit knowledge of a condition and even admission of a condition's violation is insufficient when the allegedly-violated condition was not actually imposed by the district court. 675 N.W.2d at 80. The state attempts to distinguish *Ornelas* by arguing that the condition at issue there was an "intermediate sanction" and that the probationary condition here is a "standard term[] of probation that [is] not required to be specifically imposed by the [district] court."

We recognize that standard conditions differ from intermediate sanctions and that standard conditions included in a signed probationary agreement need not be specifically

imposed by the district court to be valid. *Compare State v. Henderson*, 527 N.W.2d 827, 830 (Minn. 1995) (stating that intermediate sanctions such as jail time, home monitoring, treatment, and reporting to a day reporting center can only be imposed by the district court), *with State v. Anderson*, 720 N.W.2d 854, 863 (Minn. App. 2006) (upholding terms of signed probation agreement when agreed-upon terms did not impose "any kind of intermediate sanction that would have to come directly from the sentencing court") (quotation omitted), *aff'd*, 733 N.W.2d 128 (Minn. June 14, 2007).

But this authority concerning who may validly impose which type of conditions on a probationer does not answer the basic question of whether Allison, who was not advised in open court or by a written probationary agreement of the standard probationary conditions that he allegedly violated, received fair warning of those acts that may lead to a loss of liberty. *See Ornelas*, 675 N.W.2d at 80. This due process concern is heightened when, as here, the loss of liberty arises from noncriminal conduct. *Id*.

We recognize that district courts should not be "burdened with administrative issues relating to the implementation of conditions of probation," *Henderson*, 527 N.W.2d at 829, and that they need not articulate in open court each and every standard condition contained in a later probation agreement. But the requirement to tell a probationer that he is expected to maintain contact with the probation department and to follow the standard terms and conditions of probation is not onerous. And where the record shows that Allison was neither given verbal nor written instructions about his probationary obligations, the district court abused its discretion by revoking his probation based upon those unstated conditions.

In sum, because neither the district court nor the probation department ever imposed the standard conditions that Allison allegedly violated, we reverse and remand to the district court to reinstate Allison's probationary status. Given this conclusion, we need not address Allison's argument concerning the third *Austin* factor.

Reversed and remanded.