STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0139

State of Minnesota,
Respondent,

vs.

Forrest Eugene Friberg,
Appellant.

Filed September 3, 2013
Affirmed
Worke, Judge

Anoka County District Court
File No. 02-CR-11-3335

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

Anthony C. Palumbo, Anoka County Attorney, Lisa B. Jones, Special Assistant County Attorney, Anoka, Minnesota (for respondent)

Christopher P. Renz, Nathan J. Knoernschild, Thomsen & Nybeck, P.A., Bloomington, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

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

WORKE, Judge

Appellant argues that the district court abused its discretion by revoking his probation and executing a stayed 172-month sentence for a first-degree criminal sexual conduct conviction. We affirm.

FACTS

In 2011, appellant Forrest Eugene Friberg was charged with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct for sexually assaulting a child. Appellant pleaded guilty to the first-degree offense, and at sentencing the district court imposed the 172-month[1] presumptive sentence, but granted a downward-dispositional-departure by staying the executed sentence and placing appellant on probation for 20 years, with conditions, including a 365-day jail term. Other conditions of probation required appellant to remain law abiding, obey rules of probation, participate in sex-offender treatment and aftercare, have no contact with minors until approved, and participate in mental-health programming as directed.

On April 25, 2012, just over a month after sentencing, appellant absconded from the Anoka County workhouse after being released to attend sex-offender treatment. Appellant drove to Madison, Wisconsin, intending to commit suicide there, but then returned to Minnesota and on April 30 jumped off a parking ramp, causing severe physical injuries to himself that required months of hospitalization.[2] The district court ordered a psychological evaluation; appellant was diagnosed with depressive disorder and Asperger's disorder, but was found competent to participate in legal proceedings.

Appellant was alleged to have violated probation in two respects: (1) he did not serve 365 days in jail and (2) he failed to complete sex-offender treatment and aftercare. At his probation-revocation hearing, appellant admitted that he violated his probation by

[1] The district court initially imposed a 173-month sentence, but later corrected the sentence to 172 months.

[2] Appellant suffered no brain impairment as a result of the fall.

leaving the workhouse and that he did not attend sex-offender treatment, as required. The state asked for execution of appellant's sentence because his conduct caused a new trauma to the victim and the victim's family, who were already concerned about appellant's obsession with the child and had opposed the probationary sentence, and because incarceration was necessary to protect public safety and to provide appellant with mental-health treatment. Appellant's attorney argued at the hearing that appellant's conduct was prompted by mental illness, that he was not trying to be a "burden to anybody," and that he needs treatment rather than incarceration.

The district court revoked appellant's probation and executed his sentence based on the seriousness of the original offense and appellant's refusal to follow the probation order. The district court summed up its ruling by stating,

> I'm finding that based on everything that I've heard this afternoon and your own admissions that you're in need of correctional treatment and sex offender treatment that can only be effectively provided if you are confined. You've done well in the jail. The workhouse you decided to leave after one day. Everything I've read here indicates that you do well in structured environments. And you cannot be safely supervised in any kind of inpatient sex offender treatment. . . . And finally, it would unduly depreciate the seriousness of this violation if probation were not revoked.

This appeal followed. During its pendency, the parties moved to strike or supplement portions of the materials in the appellate record. This court denied both motions.

D E C I S I O N

After an offender violates probation, the district court may, in an exercise of discretion, continue probation, revoke probation and impose the stayed sentence, or impose intermediate sanctions. Minn. Stat. § 609.14 (2012). The 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 deciding whether to revoke probation, the district court must balance the offender's interest in remaining at liberty against the state's interest in rehabilitation and public safety, considering whether

> (i) Confinement is necessary to protect the public from further criminal activity by the offender; or
> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
> (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Id. at 250-51; *see also State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005). The district court must not reflexively revoke probation for technical violations and must determine that the "offender's behavior demonstrates that he . . . cannot be counted on to avoid antisocial activity." *Austin*, 295 N.W.2d at 251 (quotation omitted).

With regard to the first *Austin* factor, protection of the public, appellant argues that his only criminal conduct was failure to report to the workhouse for five days and that his violation was unrelated to the criminal activity for which he pleaded guilty. This is not accurate. Appellant was charged with felony escape from custody for absconding, although the district court did not rely on this fact in revoking probation. Further, appellant's suicide note contained references to the victim, and the victim's family was terrified while appellant remained at large for five days. While this *Austin* factor is not particularly strong, in other probation-revocation cases where the offender committed no new crimes but violated probation, appellate courts have affirmed probation revocations

and executions of a sentence when other *Austin* factors supported such dispositions. *See, e.g., id*. (affirming revocation of probation when offender did not commit new crime but failed to report for treatment or jail); *State v. Rottelo*, 798 N.W.d 92, 94-95 (Minn. App. 2011) (affirming probation revocation when offender did not commit new crime but failed to maintain contact with probation officer), *review denied* (Minn. July 19, 2011); *see also State v. Osborne*, 732 N.W.2d 249, 251-52, 256 (Minn. 2007) (affirming probation revocation when offender convicted of controlled-substance offenses and assault violated probation by failing to report to local probation department after moving and continuing to smoke marijuana).

As to the second *Austin* factor, the need for correctional treatment, appellant concedes that he is in need of sex-offender treatment but argues that the evidence was insufficient to show that treatment could be accomplished only through his confinement in prison. A correction agent testified that the only inpatient treatment program available to appellant was "prohibitively expensive," would not address appellant's mental-health needs, and was "not a viable option." This evidence supports the district court's rejection of this treatment option and the conclusion that sex-offender treatment at a correctional facility is the only option for appellant. *See State v. Morrow*, 492 N.W.2d 539, 543-44 (Minn. App. 1992) (affirming probation revocation when offender could not afford to pay for inpatient sex-offender treatment and county was unwilling to do so). While appellant urges this court to weigh more heavily the statements of appellant's attorney, who stated that appellant's mental-illness concerns are now controlled and that appellant was always compliant with the sex-offender-treatment plan, the record shows otherwise, and the

district court was free to weigh more heavily the testimony of the probation agent. *See State v. Losh*, 694 N.W.2d 98, 102 (Minn. App. 2005) (deferring to district court's witness-credibility determinations in probation revocation matter), *aff'd on other grounds*, 721 N.W.2d 886 (Minn. 2006).

As to the third *Austin* factor, the seriousness of the violation, the district court weighed heavily appellant's unwillingness to follow the court's orders. The court stated,

> [H]ere's what matters to me. You absconded from probation supervision. You made the decision to thumb your nose at the Court's order. And you knew that you were supposed to come back to the workhouse after [sex-offender treatment]. And instead without telling anyone, not even your own attorney, you left the state of Minnesota—also violates your probation, by the way—you left the state without permission, that violates a rule of probation, and remained apparently I've just found out today in Madison, Wisconsin, for four days. I had thought coming into this hearing that this was a situation where you walked away from the workhouse despondent and went to commit suicide. I found out that what actually happened was you . . . miss[ed] . . . your individual therapy . . . and because you appear to be an extremely self-centered individual whose needs were not being met you became angry and decided you just weren't going to go.

Appellant's conduct was a serious violation of many conditions of his probation, although the district court based its findings on only two violations. The record and the district court's findings satisfy the third *Austin* factor. *See Austin*, 295 N.W.2d at 251 (stating that failure to "show a commitment to rehabilitation" was sufficient to support probation revocation when continued probation would denigrate the seriousness of the violation).

Appellant also raises a separate policy argument not specifically related to the *Austin* factors. He claims that it was an abuse of discretion for the district court to

execute appellant's sentence for an isolated probation violation when "the spurring event appears related to a mental condition that is now being controlled by medication." While public policy favors treating offenders who suffer from mental illness humanely, public policy also favors holding offenders accountable for their actions and protecting the safety of all citizens of this state, including appellant. While committing suicide is not a crime in Minnesota, public policy does not favor permitting offenders who are mentally ill to abscond from custody in order to commit or attempt suicide.

Because the district court properly applied the *Austin* factors, we conclude that the district court did not abuse its discretion by revoking appellant's probation and executing his sentence 172-month prison sentence.

Affirmed.