STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1619

State of Minnesota,
Respondent,

vs.

Anthony Mitchell Spry,
Appellant.

Filed May 5, 2014
Affirmed
Connolly, Judge

St. Louis County District Court
File No. 69DU-CR-12-3318

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

Mark S. Rubin, St. Louis County Attorney, Kristen E. Swanson, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

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

CONNOLLY, Judge

In this appeal, appellant challenges the district court's denial of his request to withdraw his guilty plea and its finding that appellant's probation violations were intentional and inexcusable, requiring revocation of his probation. Because the district court did not abuse its discretion in denying appellant's request and in revoking his probation, we affirm.

FACTS

On December 17, 2012, appellant Anthony Mitchell Spry pleaded guilty to witness tampering in violation of Minn. Stat. § 609.498, subd. 1(f) (2012).[1] Appellant's guilty plea contemplated an immediate release from custody and dismissal of the remaining charges, a pre-sentencing investigation (PSI), and a downward dispositional departure resulting in a stay of execution of the guideline prison sentence for witness tampering. Appellant "would not be required to serve any additional executed probationary jail time, as long as he's compliant with probation." Appellant reviewed his plea petition with his counsel on the record and confirmed that this was the agreement he had discussed with counsel, that he understood the agreement and entered into it voluntarily, and that he was not under the influence of any substance that might inhibit his understanding of the agreement. The plea hearing transcript and plea petition do not specifically mention the number of months of appellant's presumptive sentence.

[1] Respondent State of Minnesota dismissed two additional counts brought against appellant arising from the same incident: assault in the second degree, Minn. Stat. § 609.222, subd. 1 (2012); and terroristic threats, Minn. Stat. § 609.713, subd. 1 (2012).

Appellant was instructed to report to probation the following morning, and his sentencing hearing was scheduled for January 15, 2013.

Appellant failed to appear for his sentencing hearing on January 15, and a memo from probation indicated that appellant failed to appear for a PSI interview on December 28, 2012. The district court issued a bench warrant for appellant to be held over for sentencing without bail. Appellant appeared before the district court on January 30, 2013, at which time he was being held for further criminal acts pending his sentence. At this hearing, appellant asked his attorney to withdraw his plea but the court instructed him to "take that up at another time."

Appellant appeared before the district court on March 4 for his sentencing. Prior to the sentencing hearing, probation completed a PSI on February 13 that included a sentencing worksheet listing appellant's criminal-history score as six with a presumptive, middle-of-box prison sentence of 48 months; the PSI stated that probation was "unable to identify any substantial or compelling reasons to depart from the guidelines sentence of a presumptive commitment to the Commissioner of Corrections for 48 months." Appellant's sentence was issued as follows:

> The court does commit you to the Commissioner of Corrections for a period of 48 months. However, I will grant a downward dispositional departure and stay execution of sentence for a period of five years. . . . The conditions of your probation are that you totally abstain from the use and/or possession of all mood-altering substances that are not prescribed to you to include synthetics and bath salts. . . . You may make no threats or acts of threats towards anyone, have no contact with the victim, make a good-faith effort to seek employment or enroll in school or a combination of both. Abide by all general[] conditions of probation.

In response to this sentence, appellant stated that he understood his original plea agreement was for a 24-month sentence. The district court reviewed the guilty plea petition, which did not stipulate the number of months of the sentence, but rather required a "stay of execution of guideline sentence." Appellant reviewed the plea petition off the record with his attorney and the matter was not discussed further. Appellant raised no further objection to his plea and did not move to withdraw it at this time.

On March 14, his probation officer filed a violation report with the district court alleging that appellant violated the terms of his probation by failing to abstain from the use of alcohol and synthetic marijuana, and not reporting to probation on several occasions. Appellant admitted to the violations and was reinstated on the same conditions of probation imposed March 4. His probation officer filed a second report with the district court on May 22 alleging violation of terms requiring abstention from mood-altering/controlled substances and requiring completion of a Rule 25 evaluation.[2] A May 28 addendum to the report alleged further violations of the conditions that appellant obey all laws and ordinances based on his then pending misdemeanor charges, and that he "[m]ake no acts or threats of violence against anyone;" this violation was supported by appellant's termination from Lake Place Treatment Program, a chemical dependency treatment center, after allegedly threatening an employee. The May 22 report recommended that appellant's probation be revoked because (1) this was his

[2] "[S]ubject was to complete the inpatient chemical dependency at Lake Place Treatment Program. Lake Place Treatment Program is terminating subject on 5/22/13 because he is not amenable."

second violation in a two month period; (2) he has an extensive criminal record and had never completed a probationary sentence; and (3) he continued to use drugs and was terminated from treatment.

Before appearing at a probation-violation hearing on May 31 but after he had been sentenced, appellant submitted a written request to withdraw his guilty plea to his attorney on May 24. The request was filed with the court on May 31. At his probation violation hearing, appellant argued that he did not believe the terms of his original plea agreement had been honored, that he understood he was to receive a dispositional departure for a 24-month sentence, but that instead he received a 48-month sentence. The court responded that the plea petition stipulated to a stay of execution of the *guidelines sentence*. Appellant suggested that he had only four-and-a-half criminal history points at the time of the plea hearing that the court recognized, and that the 24-month sentence was "mentioned in the court." The court then noted that no mention was made of the number of months of the sentence in the plea petition. Appellant's attorney confirmed that the sentencing was in compliance with the plea:

> My notes show that the offer that had been extended was one that had two options, that there was an option for a downward durational departure to 24 months commit, or that there could be a dispositional departure in favor of probation. That [was] the stay of the Guidelines sentence, and then Mr. Spry could be released at the time of his plea. And I believe, according to my notes again, the plea was entered under the dispositional departure agreement with the stay of the Guidelines sentence, rather than the executed 24-month sentence.

The state agreed that the 24-month sentence had been discussed in a previous settlement conversation with appellant's counsel, wherein appellant had the choice to plead guilty prior to trial for the shorter sentence; appellant rejected that offer and the matter was set for trial. The district court denied appellant's request to withdraw his plea.

Appellant admitted to using controlled substances and to being discharged from treatment in violation of the terms of his probation.[3] Finally, while appellant denied the intent to threaten anyone, he did admit to making the allegedly threatening statements to the Lake Place employee. The court found that appellant was in violation of his probation and that the violation was intentional and inexcusable. The state acknowledged that appellant was "laboring under substantial chemical dependency and some mental health issues" and that he appeared contrite at the time of the hearing, but argued that appellant had failed to comply with conditions of probation or his chemical-dependency treatment and was unamenable to probation. Appellant explained his history of chemical dependency and expressed his intent to change his life if he could avoid prison, asking the court to allow him to use the court's resources to help himself. However, the court found that appellant was not amenable to probation or to treatment in the community because he had not "complied with most of the terms" of his probation in the nearly three months since his sentencing. The court revoked appellant's probation and sent him to prison for 48 months with credit for 138 days served.

[3] The state withdrew the alleged violation related to appellant's pending misdemeanor charges.

D E C I S I O N

I. Did appellant knowingly and intelligently enter his guilty plea?

Appellant argues that the district court abused its discretion when it denied appellant's request to withdraw his guilty plea because he did not knowingly enter that plea. We disagree. A defendant does not have an absolute right to withdraw a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). We review a district court's decision to deny a petition to withdraw a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998). A court must permit withdrawal of a guilty plea if a defendant demonstrates that it is necessary to correct a manifest injustice. *Raleigh*, 778 N.W.2d at 93; Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice exists if the plea is invalid because it was not accurately, intelligently, or voluntarily made. *Raleigh*, 778 N.W.2d at 94.

Appellant asserts that his guilty plea was not intelligently made, due to his misunderstanding of the legal consequences of his guilty plea, and in particular that his plea was not knowing or intelligent because the court never informed him how many months he would serve if the stayed presumptive sentence were ever executed. At appellant's sentencing hearing, for the first time, he informed the court that he understood his plea agreement to contemplate a 24-month sentence, as opposed to the 48-month sentence that the court imposed. Appellant consulted with his attorney, who did not address the issue further with the court. Moreover, at this sentencing hearing, appellant did not ask to withdraw his plea. Before appellant's probation-violation hearing and nearly three months after being sentenced, appellant then sent written notice to the court

and his attorney that he wished to withdraw his guilty plea. Appellant requested to withdraw his guilty plea at his probation-violation hearing based on his understanding that he would receive a 24-month sentence. The state and appellant's counsel agreed that they discussed two plea options prior to setting a date for trial and that appellant selected the dispositional departure for stay of execution on a 48-month sentence rather than the shorter 24-month prison sentence.

"To be intelligently made, a guilty plea must be entered after a defendant has been informed of and understands the charges and direct consequences of a plea." *State v. Byron*, 683 N.W.2d 317, 322 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). Consequences mean "a plea's direct consequences, namely the maximum sentence and the fine." *Alanis v. State*, 583 N.W.2d 573, 578 (Minn. 1998), *abrogated in part by Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). "A defendant bears the burden of advancing reasons to support the withdrawal." *Raleigh*, 778 N.W.2d at 97. Appellant argues that, since he did not know the length of his maximum sentence, he did not understand the consequences of his plea.

Here, the record shows that appellant was made aware of the charges against him, of the rights he was waiving, and that a guilty plea could result in execution of his sentence if he violated the terms of his probation at his plea hearing. Although the court did not reference the specific number of months of appellant's presumptive sentence during the plea hearing, the transcripts and the plea petition establish that the plea agreement contemplated stay of execution of the guidelines sentence and that appellant had been counseled on and understood the consequences of the plea agreement.

Appellant chose probation rather than a shorter prison sentence. Further, the district court's failure to inform appellant of the duration of his presumptive sentence does not void appellant's guilty plea. *State v. Brant*, 407 N.W.2d 696, 698 (Minn. App. 1987) ("Although [appellant] argues that he did not understand that he could receive such an onerous sentence for his first-degree burglary conviction, a failure by the trial court to advise a defendant of the applicable presumptive sentence under the Minnesota Sentencing Guidelines is not of itself sufficient to void a guilty plea.").

Although an unfulfilled promise to appellant regarding the conditions of his plea agreement could be grounds permitting him to withdraw his plea, appellant does not allege and the record does not support such a promise in this case. *See Kochevar v. State*, 281 N.W.2d 680, 687 (Minn. 1979) ("It is well settled that an unqualified promise which is part of a plea arrangement must be honored or else the guilty plea may be withdrawn."); *see also Schwerm v. State*, 288 Minn. 488, 491, 181 N.W.2d 867, 868 (1970) ("Although a plea of guilty may be set aside where an unqualified promise is made as a part of a plea bargain, thereafter dishonored, a solemn plea of guilty should not be set aside merely because the accused has not achieved an unwarranted hope."). Appellant's claim that he understood his plea agreement to contemplate a 24-month sentence is contradicted by the plea petition he signed stipulating to a stay of execution of the guidelines sentence, his affirmances that he understood and was counseled on the guilty plea agreement at his plea hearing, and the statements of his counsel at the probation-violation hearing indicating counsel understood the court's sentence of 48 months to reflect the plea agreement. *See State v. Trott*, 338 N.W.2d 248, 252 (Minn.

1983) ("Here, defendant's claim that he was promised probation by defense counsel was negated by the petition he signed, by the statements he made at the time he entered his plea and by his former counsel's testimony at the hearing on defendant's motion."). The record indicates that appellant's counsel and the state discussed two agreements prior to the plea hearing and that the plea was entered under the agreement contemplating a stay of execution of the guidelines sentence.

Finally, as noted in respondent's brief, appellant has an extensive criminal history which indicates a familiarity with the criminal justice system and casts doubt on his claim that he did not understand the consequences of his plea. A district court may consider such a criminal history in determining whether a plea is intelligently given. *See State v. Wiley*, 420 N.W.2d 234, 237 (Minn. App. 1988) ("[Appellant], with five criminal history points, has had extensive exposure to the criminal justice system, a factor which may be considered in determining whether a guilty plea is knowing and intelligent."), *review denied* (Minn. Apr. 26, 1988); *State v. Bryant*, 378 N.W.2d 108, 110 (Minn. App. 1985) ("[Appellant] is not a novice to the court system since this is not his first offense. [His] criminal history makes it unlikely that he did not understand the proceedings."), *review denied* (Minn. Jan. 23, 1986).

II. Did the district court abuse its discretion by revoking appellant's probation?

Appellant argues that the district court abused its discretion when it determined that the need for confinement outweighed the policies favoring probation and revoked appellant's probation. "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). Prior to 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." *Id.* at 250. In making the three *Austin* findings, "[district] courts must seek to convey their substantive reasons for revocation and the evidence relied upon." *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). An appellate court will not interfere with the trial court's decision if the record supports that the offender has intentionally or inexcusably violated a specific condition of probation and the need for confinement outweighs policies favoring probation. *Austin*, 295 N.W.2d at 250. Appellant challenges the district court's finding that the need for confinement outweighed the policies favoring probation on the basis that appellant had relapsed and was then terminated from his chemical-dependency treatment program.

A. Intentional or Inexcusable Violation of Conditions of Probation

The record supports, and appellant does not contest, satisfaction of the first two prongs of the *Austin*/*Modtland* analysis. At the probation-violation hearing, the court stated and appellant acknowledged the conditions which appellant allegedly violated, and the state established the factual basis supporting the alleged violations. Appellant testified that he knew the terms of his probation included not possessing or using alcohol or other controlled substances. Appellant admitted that his possession and use of mood-altering substances violated the conditions of his probation and that the violation was intentional, and that by being terminated from his chemical-dependency treatment

program, he violated the recommendations of his Rule 25 evaluation. Finally, while appellant did not admit to threatening a Lake Place employee, he did admit to making the statements that were the basis of the allegation. When appellant was terminated from his chemical-dependency treatment program, the Lake Place Discharge Summary noted that appellant "appeared to attempt to emotionally manipulate/intimidate the writer/interviewer by extemporaneously verbalizing that he has a history of impulsive and aggressive behavior towards others who disagree with or threaten his ability to get what he wants further stating that he recently attempted to 'cut someone's throat with a knife.'" Appellant acknowledged that he stated his previous charges at intake, but asserted that he did not intend to make a threat but only to explain his previous actions. Based on these admissions, the court found that appellant was in violation of his probation and that the violations were intentional and inexcusable. Therefore, we conclude that the district court's finding that appellant's violation was intentional or inexcusable is supported by sufficient evidence in the record.

B. Need for Confinement

Appellant argues that the district court abused its discretion in concluding that the need for confinement outweighed the policies favoring probation under the third *Austin* factor. We disagree. "In some cases, policy considerations may require that probation not be revoked even though the facts may allow it." *Id.* "The purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Id.* The district court must not react reflexively to an accumulation of technical violations but rather "must take care that the decision to revoke is based on sound

judgment." *Id.* at 251. The district court must balance "the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Id.* at 250. When weighing these competing interests, district courts should consider 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 251 (quotation omitted); *see also Modtland*, 695 N.W.2d at 607 (stating that subfactors are relevant to the balancing test). "The requirement that courts make findings under the *Austin* factors assures that district court judges will create thorough, fact-specific records setting forth their reasons for revoking probation." *Modtland*, 695 N.W.2d at 608.

Appellant argues that the evidence did not support the district court's finding that the need for confinement outweighed the policies favoring probation because the court committed appellant to the Commissioner of Corrections on account of his relapse and termination from his chemical-dependency treatment program. He argued further that the court's rationale for revoking probation was improper "reflexive" decision-making under *Austin*. While the record supports appellant's willingness to seek treatment for his chemical dependency and his desire to change, this does not establish that the district court abused its discretion. The district court found that the need for confinement outweighs the policies favoring probation after considering appellant's record on probation and alternatives short of prison. The district court suggested appellant may be able to change, but concluded,

> I do not believe that you are able to deal with . . . the issues that you have in the community at this time. [It] does not appear to this Court that you are amenable to probation or amenable to treatment in the community. You were sentenced a mere three months ago, and you haven't complied with most of the terms of your probation.

This statement supports the third prong of the *Austin* test through finding that appellant is in need of correctional treatment which can most effectively be provided if he is confined (i.e., appellant is not amenable to correctional treatment provided by probation and treatment in the community).

The district court's conclusions are further supported by the record. The record shows that appellant repeatedly violated the terms of his probation in the short time period after appellant's plea hearing. Moreover, the PSI stated that appellant had difficulty cooperating with the PSI process and concluded that, "[j]udging on the [appellant's] prior history and non-compliance with probation, it is unlikely he will succeed under supervision if he fails to make positive changes in his life." The May 22 and May 28 probation reports further support the court's finding that appellant is not amenable to probation, stating:

> The defendant has an extensive prior criminal record and has been granted probation supervision on many occasions in the past; however, he has never successfully completed any probationary sentence.
>
> . . . .
>
> Given the nature of the current offense and subject's continued unwillingness to comply with the Court's orders, it is believed that the only other option at this point in time is a commitment to prison.

In sum, we conclude that the record supports the district court's finding that appellant is not amenable to probation or to treatment in the community. The record further supports the court's conclusions that appellant intentionally or inexcusably violated the conditions of his probation and that the need for confinement outweighed the policies favoring probation. Therefore, we conclude that the district court did not abuse its discretion by revoking appellant's probation.

Affirmed.