STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0280

State of Minnesota,
Respondent,

vs.

Joseph Michael Dax,
Appellant.

Filed September 3, 2024
Affirmed
Connolly, Judge

Morrison County District Court
File No. 49-CR-20-54

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Brian J. Middendorf, Morrison County Attorney, Little Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Cochran, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges the district court's order revoking his probation, arguing that the district court abused its discretion by basing the revocation on appellant's first use of controlled substances, by revoking his probation for an accumulation of technical

violations, and by concluding that the need for appellant's confinement outweighed the policies favoring his probation. Because we see no error in the decision to revoke, we affirm.

FACTS

According to the criminal complaint, in January 2020, a clerk at a Morrison County convenience store reported that:

> a vehicle in the parking lot [was] backing up to other vehicles and the driver [appellant] had a knife in his hand. . . . The vehicle [was] registered to [appellant]. [A deputy responded to the call and] exited his squad car with his M-16 [rifle] and approached [appellant], who was seated in his vehicle. [The deputy] observed that [appellant] had a knife in his right hand. [Appellant] then drove off . . . .
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> [The deputy] followed in pursuit of [appellant's] vehicle with his squad car. . . . [Appellant] drove over the stop sticks [deployed by another officer] and it appeared that all four [of his] tires were hit and were deflating. [Appellant] eventually pulled his vehicle over to the side of the road and [the deputy] exited his squad car and took cover with his M-16 [rifle] and waited for backup units to arrive.
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> [The officer who had deployed the stop sticks arrived] and was able to convince [appellant] to throw the keys out and step out of his vehicle, but [appellant] would not follow any further verbal commands. [A sergeant] was on scene and deployed a less lethal round that struck [appellant] in his back. [Appellant] fell forward towards the vehicle but still would not comply with further orders. [The sergeant] deployed another less lethal round that struck [appellant] in the arm. [Appellant] then took off running on foot through a corn field covered [in] snow. Law enforcement officers gave chase through the field on foot as well as attempting to follow in their squad cars. [Appellant] approached the deputy in the field and [the deputy] deployed his taser and appellant went down to the ground. [Appellant] was finally placed under arrest. It appeared that [he] was under the influence of some type of controlled substance.

> [The deputy] took statements from several witnesses that had been at the [convenience store.] One witness described how [appellant] was in his vehicle and it appeared that he was attempting to drive over an elderly man in the parking lot by driving very fast towards him. Another witness described how [appellant] had flashed a knife at him while he was in the parking lot [and how appellant] had lunged at numerous vehicles. Another witness described how [appellant] had got out of his vehicle with a knife and was approaching another man who had to lock the doors and shut the windows to his vehicle to avoid [appellant].

Appellant was charged with second-degree assault and fleeing a police officer in a motor vehicle. He pleaded guilty to both offenses, and the state agreed to downward dispositional departures. Appellant was sentenced to 54 months in prison, stayed, and put on probation for five years. His probation conditions included "[n]o possession of alcohol or drugs" and random testing. After his fourth positive drug test, appellant was arrested, his probation was revoked, and his sentence was executed. On appeal, he argues that the revocation of his probation was an abuse of discretion.

ANALYSIS

"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). To revoke probation and execute a prison sentence, a 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.* These are known as the *Austin* factors, and a district court errs if it revokes probation without making

findings on all three of the *Austin* factors. *State v. Modtland*, 695 N.W.2d 602, 603, 606 (Minn. 2005).

In regard to the third factor, the district court must find, in the basis of the offender's original offense and intervening conduct, that " (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 607.

Here, the transcript of appellant's revocation hearing shows that the district court made all three findings from the bench.

> I'm looking at [appellant's] felony level history, and he has . . . other than the two felony convictions in this matter, six prior felony convictions. And they aren't for small matters. Two . . . fifth degree drug possession convictions, which tells me he's been through the treatment programs before. He knows his addiction. He knows what needs to be done to address relapse.
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> I'm looking . . . as far as personal safety for the public issues far more serious felony level offenses of felony level domestic assault, another second-degree dangerous weapon assault, a second-degree burglary felony as well. And . . . [appellant] was given the benefit of a downward [dispositional] departure for again, assault, second degree, with a dangerous weapon and then fleeing a peace officer in a motor vehicle.
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> . . . I . . . cannot possibly, looking at public safety, define a span of six months or seven months from January to July of 2023 as a technical violation when [appellant is] utilizing narcotics, given his violent history.
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> He's a danger to the public, clearly, if he is utilizing illicit drugs. Given his history and what has happened . . ., he is a direct and imminent threat to public safety, if he is out there not complying with probation, utilizing illicit narcotics and by

his own admission on the stand, he was using from January of 2023 to July of 2023.

. . . .

. . . [Y]ou have been down this road. You have been down with your history, two prior felony drug convictions. You've been down the treatment road, multiple, multiple, multiple times, and . . . you've been in prison on multiple different occasions, and none of that apparently has caused . . . a permanent change in your behavior where public safety will be protected. Because after all of that, here we sit with two very serious, very dangerous convictions where people could have been horrifically injured, and you get the benefit of a downward [dispositional] departure. . . . [F]or six months you were out using drugs, not addressing that issue, not taking . . . your own initiative to get that matter resolved, and the public was in extreme danger at that . . . time.

So given that history, . . . I have absolutely no way of legitimately relying on what you're telling me. . . . [Y]our actions so far have been that you have not corrected your behavior on a sustained permanent basis.

. . . Your credibility is no longer good on this. . . . [Y]ou had . . . a positive test in January, a positive test in February, a positive test in May, a positive test in July. . . . And then you're in custody and not eligible for treatment anymore, but . . . that's not the issue. The issue is what do you do when you're out and on your own, what decisions do you make, what skills do you utilize in what you've learned from treatment, and you show that you haven't learned anything and haven't done anything to improve the way you address these things.

. . . .

. . . I am finding that the need for confinement does outweigh the policies favoring probation. I do find that confinement is now necessary to protect the public from further criminal activity, . . . based on your lack of utilizing your treatment skills, based on the fact that you utilized illegal narcotics for a period of seven months without seeking out treatment and without getting yourself back on track again.

> . . . I also find that you're in need of correctional treatment, which can most effectively be provided during confinement because these other treatment programs haven't worked.
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> I don't know what you had in prison. Those don't seem to have worked either, but right now, that appears to be . . . the only option . . . because clearly the other treatment plans are not working and have not worked for you on a permanent sustained basis. So the [c]ourt does make that finding as well, and that it would unduly depreciate the seriousness of the violation if probation were not revoked, because, again, this is very, very serious.
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> You were charged and convicted of second-degree assault and fleeing in a motor vehicle. Those are serious offenses where [you are] utilizing drugs . . . and what you seem to do when you're under drugs, it is highly dangerous to the public. And . . . at this point in time sustained drug use is not a technical offense. It's a serious ongoing offense.
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> . . . The biggest concern is the sustained drug use, not getting into treatment, and based upon your history, I just cannot make the finding that you're going to do anything different, that you are any longer . . . amenable to treatment. . . . [T]he court found that the violation was you were ordered to abstain, and you failed to abstain, [and that is] the basis for the court executing sentence at this time.

Appellant argues first that the district court abused its discretion by "revoking [appellant's] probation based on a first violation for using controlled substances." But the revocation of appellant's probation was not based on his first violation for using controlled substances: he had used controlled substances four times, over a period of seven months, when his probation was revoked.

Appellant then argues that the district court revoked his probation "for an accumulation of technical violations." But the district court noted that appellant's violations were not "technical," given his violent history when he was using drugs. A crime "relevant to the crime of which [the defendant] has been convicted . . . as opposed

to mere violations of probation procedure, such as failing to meet with a probation officer or report for a scheduled test," is not a technical violation. *State v. Smith*, 994 N.W.2d 317, 321-22 (Minn. App. 2023), *rev. denied* (Minn. Sept. 27, 2023); *see also State v. Osborne*, 732 N.W.2d 249, 254 (Minn. 2007) (rejecting argument of defendant convicted of controlled-substance crime that "his personal use of marijuana is a technical violation that [did] not justify revoking his probation)"; *State v. Hoskins*, 943 N.W.2d 203, 210-11 (Minn. App. 2020) (failing to timely complete chemical dependency evaluation ordered as a condition of probation was a technical violation appropriately punished by an additional year of incarceration). Appellant's decisions to use controlled substances and, while under their influence, to commit second-degree assault and to flee a police officer in a motor vehicle were not technical violations. As the district court noted, he was ordered to abstain from controlled substances, and he did not abstain.

Appellant argues further that the district court abused its discretion by determining that the need for [appellant's] confinement outweighed the policies favoring his probation. Appellant also argues that he had a relapse. But, as the district court noted, the most essential condition of appellant's probation was that he abstain from drug use on a permanent basis, not unless and until he had a relapse. Finally, appellant argues that he was not a danger to public safety, but drug use by a person who, when using drugs, has engaged in violent behavior, such as assault and fleeing a police officer in a motor vehicle, is "highly dangerous to the public," as the district court observed. That danger outweighed the policies favoring probation.

Affirmed.