STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0895

State of Minnesota,
Respondent,

vs.

Michael Allen Chapel,
Appellant.

Filed February 11, 2019
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Kanabec County District Court
File No. 33-CR-15-45

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

Barbara A. McFadden, Kanabec County Attorney, Mora, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Larkin, Judge.

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

REYES, Judge

Appellant challenges the district court's revocation of his probation, arguing that the evidence did not show that the need for confinement outweighed the policies favoring

probation. Appellant also argues that his sentence was based on an incorrect criminal-history score. We affirm in part, reverse in part, and remand for resentencing.

FACTS

This case stems from a series of controlled buys of methamphetamine from appellant Michael Allen Chapel through law enforcement and a confidential informant during late January and early February 2015. The state charged appellant with first-degree sale of a controlled substance, third-degree possession of a controlled substance, fleeing police in a motor vehicle, and possession of drug paraphernalia.

Pursuant to a plea agreement, appellant pleaded guilty to second-degree possession of methamphetamine, and the state agreed to dismiss the additional counts. In May 2016, the district court accepted the plea agreement and sentenced appellant to a top-of-the-box sentence of 129 months[1] with the commissioner of corrections. The district court stayed execution of the sentence for 25 years and placed appellant on probation, a downward dispositional departure.

As reasons for departure, the district court relied on appellant's successful, voluntary completion of the long-term treatment program at Minnesota Teen Challenge, the fact that Teen Challenge hired him to work in their facility, he had long-term housing

[1] The presentence investigation allocated seven criminal-history points to appellant based on his eight prior felony convictions. The 2014 Sentencing Guidelines listed second-degree possession as a level-eight offense, and with appellant's criminal-history score of seven, the presumptive sentence was a prison commitment of 108 months with a range of 92 to 129 months. Minn. Sent. Guidelines 4.A (2014).

there, and that he had remained drug-free for a year and a half. The district court stated that appellant had earned one more chance to prove that he had turned his life around.

In June 2017, appellant's probation officer filed a probation-violation report after the state charged appellant with fifth-degree possession of methamphetamine and third-degree DWI. Appellant admitted to using methamphetamine but refused to take a chemical test, and a police officer found methamphetamine in his car. The probation-violation report listed failure to remain law abiding, failure to abstain from the use and possession of all non-prescribed substances, and failure to submit to chemical testing per law enforcement as the alleged violations. Appellant pleaded guilty to fifth-degree possession of methamphetamine and admitted to the events leading up to the probation violation.

At the disposition hearing, the district court revoked appellant's probation after hearing arguments from the state, appellant's probation officer, and appellant, and executed his 129-month sentence. This appeal follows.[2]

D E C I S I O N

I. The district court did not abuse its discretion by revoking probation.

Appellant argues that the evidence did not support the district court's determination that the need for confinement outweighed the policies favoring probation. Appellant contends that the evidence showed that he has a serious drug problem and has not yet succeeded in overcoming his addiction but not that he should be sent to prison. We are not persuaded.

[2] The state did not file a brief. If respondent fails to file a brief, the case shall be determined on the merits. Minn. R. Civ. App. P. 142.03.

The district court has broad discretion in determining whether sufficient evidence exists to revoke probation, and this court will reverse only if there is a clear abuse of that discretion. *State v. Austin*, 295 N.W.2d 246, 249-250 (Minn. 1980). When revoking probation, a district court must (1) specify the conduct or conditions that the probationer violated; (2) find the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *Id.* at 250. The district court's decision to revoke probation "cannot be a reflexive reaction to an accumulation of technical violations but requires a showing that the offender's behavior demonstrates that he . . . cannot be counted on to avoid antisocial activity." *Id*. at 251 (quotations omitted).

Appellant challenges only the third *Austin* factor. When analyzing this factor, a district court must consider that, while the facts may permit revocation, the purpose of probation is rehabilitation, and revocation should be a last resort. *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). The need for confinement outweighs the policies favoring probation if at least one of three subfactors are met:

> (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.

Austin, 295 N.W.2d at 251.

In considering the first subfactor, the district court stated that, although the new offense was not a sale offense, "it's hard to avoid the thought of where [this] [was] leading if [appellant] hadn't gotten caught again." The district court noted that appellant had an

additional pending case at the time, in which appellant had allegedly fled police officers and hid in the attic of his home.

The record supports the district court's determination that the need for confinement outweighs the policies favoring probation. As the district court noted, appellant has been on and off of felony probation for approximately 20 years and has continued to display the same behaviors he exhibited when he was first placed on felony probation. Five out of eight of his previous felonies have been controlled-substance convictions. Appellant failed to comply with probation requirements and had poor attendance at office visits with his probation officer. Appellant had some relapses within the first few months of his probation, and a rule 25 chemical-use assessment produced a recommendation that appellant enroll in outpatient treatment, which he did, but then he failed to attend treatment sessions for the three weeks prior to his reported violation. Appellant's probation officer believes that appellant is not motivated to remain sober and believes he had been using methamphetamine for at least a few months leading up to the probation violation. Moreover, the probation officer stated that, while this was the first violation filed for the current offense, appellant has had a long history of probation violations on other cases, amounting to at least 12 violations. Finally, revocation is permissible when, as here, the district court "made a downward dispositional departure for the sole reason of affording appellant one last opportunity to succeed in treatment," and appellant failed to comply with probation requirements. *State v. Moot*, 398 N.W.2d 21, 24 (Minn. App. 1986), *review denied* (Minn. Feb. 13, 1987).

The district court's determination was not a reflexive reaction to continued technical violations. The district court made specific findings in support of its determination that the need for confinement outweighed the policies favoring probation. The district court acknowledged that it did not expect appellant to be perfect on probation. It also made clear to appellant that it did not want to revoke probation. Because the record supports the district court's considered and thoughtful determination, we affirm the probation revocation.

II. Appellant's sentence is based on an incorrect criminal-history score.

Appellant argues that this case must be remanded for resentencing because the district court miscalculated his criminal-history score by including 1.5 criminal-history points from two felony convictions that decayed. We agree.

Interpretation of the sentencing guidelines is subject to de novo review. *State v. Campbell*, 814 N.W.2d 1, 6 (Minn. 2012). But we review the district court's determination of a defendant's criminal-history score for an abuse of discretion. *State v. Drljic*, 876 N.W.2d 350, 353 (Minn. App. 2016). This court may correct an illegal sentence at any time. Minn. R. Crim. P. 27.03, subd. 9. An illegal sentence includes one that is based on an incorrect criminal-history score. *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008).

Criminal-history points may not be assigned for prior felony convictions that have decayed. Minn. Sent. Guidelines 2.B.1.c (2014). A prior felony has decayed "if a period of fifteen years has elapsed since the date of discharge from or expiration of the sentence to the date of the current offense." *Id.*

Appellant's criminal-history score included points for an unauthorized-use-of-a-motor-vehicle conviction in 1996 and a fifth-degree-possession conviction in 1997. After appellant violated probation for those convictions, the district court imposed 180-day and 189-day jail sanctions to be served concurrently. The district court then discharged appellant from probation on July 19, 1999. The date of the current offense is late January and early February 2015, which is more than 15 years from the date of discharge. Therefore, these convictions were decayed and should not have been included in the calculation of the criminal-history score.

Appellant received one point for the unauthorized use of a motor vehicle conviction and a half point for the fifth-degree possession conviction. Without these two convictions, appellant had 5.5 points. If the sum of points results in a half point, the point value is rounded down to the nearest whole number, Minn. Sent. Guidelines 2.B.1.i, so appellant's correct criminal-history score is five. On the applicable drug-offender grid,[3] a second-degree drug offense is a level-eight offense, and with a criminal-history score of five points, the presumptive sentence is 98 months, with a range between 84 and 117 months. Minn.

[3] Appellant contends that the August 1, 2016 Sentencing Guidelines are applicable because the district court sentenced appellant on May 19, 2016, and his case was still pending when the 2016 Guidelines came into effect on May 23, 2016, pursuant to *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017). However, the presumptive sentence and range are the same in both the 2014 and 2016 Guidelines for a second-degree controlled substance conviction and a criminal-history score of five. Minn. Sent. Guidelines 4.A (2014); Minn. Sent. Guidelines 4.C (2016).

Sent. Guidelines 4.A. Because appellant's sentence was calculated based on an incorrect criminal-history score and falls outside this range, we reverse and remand for resentencing.

Affirmed in part, reversed in part, and remanded.