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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-826**

State of Minnesota,
Respondent,

vs.

J.D.D.,
Appellant.

**Filed January 17, 2012
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-JV-08-7618

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

Michael O. Freeman, Hennepin County Attorney, Michael K. Walz, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Susan J. Andrews, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the revocation of his probation, arguing that the district court abused its discretion because there was not clear and convincing evidence that the need for his confinement outweighs the policies favoring probation. We affirm.

FACTS

On June 28, 2008, seven-year-old S.D.B. spent the night at a family friend's house, sleeping on the pull-out couch in the living room with appellant J.D.D.'s 13-year-old sister. The family woke up to S.D.B.'s screams and found her and appellant (then 15 years old) in a small playroom. S.D.B. told appellant's aunt that J.D.D. had dragged her from the couch, choked her, pulled her into the playroom, and touched her "down there." S.D.B. later told one of the responding officers that appellant snatched her out of bed, pulled down her shorts, climbed on top of her, and tried to put his "thing" in her. Appellant was charged with two counts of second-degree criminal sexual conduct: count one for engaging in sexual contact and causing personal injury while using force or while knowing victim is physically helpless; and count two for engaging in sexual contact with a victim under 13 while being more than 36 months older.

The district court designated appellant as an extended jurisdiction juvenile (EJJ). Appellant pleaded guilty to count two of second-degree criminal sexual conduct (victim under 13), and the state dismissed count one. The district court sentenced appellant to 36 months in prison, but stayed the sentence until appellant's twenty-first birthday. The stay was conditioned on several grounds—that appellant complete the Hennepin County

Home School Juvenile Sexual Offender Program (JSOP), have no contact with the victim, have no unsupervised contact with other females under the age of ten, remain law-abiding, provide a DNA sample, and register as a sex offender.

While in treatment, appellant admitted to committing two more sexual assaults prior to his 2008 conviction—molesting his cousin and younger sister. On June 1, 2010, appellant was charged with criminal sexual conduct in the second degree (victim under 13) for his actions against his cousin and gross misdemeanor criminal sexual conduct in the fifth degree for his actions against his sister. Appellant subsequently pleaded guilty to gross misdemeanor criminal sexual conduct in the fifth degree.

Appellant successfully completed the JSOP program on the same day as his new conviction. He was then placed in a transition program at Auburn Lakes Academy. Appellant's placement at Auburn Lakes was terminated two months after it commenced as a result of his disruptive behavior. Appellant got into two fights with residents and intentionally disconnected a staff member's 911 call. Appellant was charged with misdemeanor disorderly conduct and gross misdemeanor interference with a 911 call. In addition, appellant broke into a staff member's office to take items, including cell phones and cigars, that had been confiscated during a routine room check. Appellant was charged with third-degree burglary and misdemeanor theft; he pleaded guilty to misdemeanor disorderly conduct, misdemeanor theft, and gross misdemeanor interference with a 911 call, with two other charges being dismissed.

At appellant's EJJ probation-revocation hearing, the district court found that appellant violated the condition to remain law abiding and that the violation was

intentional and inexcusable. The district court concluded that the need for appellant's confinement outweighs the policies favoring probation. The district court ordered that appellant's EJJ probationary status be revoked, lifted the stay, and executed his 36-month adult sentence, giving appellant credit for 208 days. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion by concluding that the need for his confinement outweighs the policies favoring probation. "The trial 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 *Austin*, the supreme court established a three-step analysis that must be applied by a district court before revoking probation. *Id.* at 250. 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 the need for confinement outweighs the policies favoring probation." *Id.* The policies favoring confinement include public safety, treatment that can most effectively be provided in confinement, and whether probation would unduly depreciate the seriousness of the violation. *Id.* at 251.

The supreme court stated that "[t]he purpose of probation is rehabilitation and that revocation should be used only as a last resort when treatment has failed." *Id.* at 250. "The decision to revoke cannot be a reflexive reaction to an accumulation of technical violations but requires a showing that the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Id.* at 251 (quotations omitted).

Whether probation should be revoked requires a “balancing of the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *Id.* at 250.

The same factors and balancing required under *Austin* apply to EJJ probation revocation proceedings. *State v. B.Y.*, 659 N.W.2d 763, 768-69 (Minn. 2003). The district court can revoke EJJ probation status if it finds by “clear and convincing evidence that any provisions of the disposition order were violated, or if the probationer admits the violation.” Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(1). Evidence is clear and convincing if it is “unequivocal and uncontradicted, and intrinsically probable and credible.” *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 52 (Minn. App. 1994), *review denied* (Minn. Mar. 23, 1994); *see also Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978) (stating that “[c]lear and convincing” means that the truth of the alleged fact must be “highly probable”).

It is undisputed that appellant violated a condition of his probation and that the violation was intentional. Therefore, the only issue is whether the district court abused its discretion in applying the third *Austin* factor. Appellant challenges the district court’s finding that confinement is necessary for public safety. He argues that he did not claim that he was ready to live independently, but instead advocated for a placement that would provide greater structure than Auburn Lakes. Specifically, appellant suggested either (1) placing him on adult probation and ordering him to complete the Re-Entry West Program at RS Eden or (2) revoking EJJ probation and ordering him to serve a year in the adult workhouse and to complete the Re-Entry West Program. Because appellant

contends that Re-Entry West remains an option, he argues that the district court abused its discretion when it ruled that all of the EJJ options have been exhausted. We disagree.

The district court properly weighed the need for confinement and the policies favoring probation. The district court concluded:

[T]he need for confinement outweighs the policies favoring probation. [Appellant]’s failure to comply with the requirements of EJJ probation raise concerns for public safety. Despite two years of out-of-home placement, a placement at [Auburn] Lakes Academy, and offers of resources, [appellant] has demonstrated that he cannot succeed as an EJJ probationer. [Appellant] has committed three new crimes with two separate offense dates in direct violation of his EJJ Probation as well as failing to complete programming at Auburn Lakes Academy. A more-serious consequence is required. His EJJ violations are based on his loss of placement at Auburn Lakes Academy for his failure to remain law abiding and comply with the requirements of probation. He has already had two years of programming and 208 days of incarceration credit, yet has no remorse. Additional stayed or workhouse time would also be ineffective.

(Footnote omitted.)

Because the record contains clear and convincing evidence to support the district court’s conclusion that the need for appellant’s confinement outweighs the policies favoring probation, the district court did not abuse its discretion by revoking appellant’s EJJ probation and executing his 36-month adult prison sentence.

Affirmed.