STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1484

State of Minnesota,
Respondent,

vs.

Brian Keith Jackson,
Appellant.

Filed April 29, 2013
Affirmed
Worke, Judge

Becker County District Court
File No. 03-K2-04-000941

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

Michael D. Fritz, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, Chelsie M. Willett, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

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

WORKE, Judge

Appellant challenges the district court's revocation of his probation following repeated probation violations, arguing that the district court failed to consider his amenability to probation. We affirm.

FACTS

In September 2005 appellant Brian Keith Jackson was convicted of first-degree driving while intoxicated and sentenced to a stayed prison sentence of 72 months and up to seven years' probation. On January 19, 2007, a probation violation report was filed alleging appellant failed to update his sex offender registration information, and he failed to report to his probation officer. On January 30, 2007, the district court found that appellant violated the terms of his probation and ordered appellant to be reinstated on probation.

On September 28, 2010, another probation violation report was filed, alleging appellant was repeatedly cited for driving without a valid drivers' license and failed to report to his probation officer as directed. On November 16, 2010, the district court found that appellant violated the terms of his probation, and ordered that appellant be reinstated on probation on condition that he serve 90 days in jail.

On November 14, 2011, a third probation violation report was filed, alleging appellant had positive urinalysis tests and admitted to smoking marijuana. Appellant also did not advise his probation officer before changing his employment and he did not report to his probation officer. At a probation violation hearing on May 10, 2012, appellant admitted that he violated probation by using drugs, failing to keep his probation officer advised of his employment, and not reporting to his probation officer. The district court continued the matter to consider appellant's entire record.

On May 24, 2012 the district court revoked appellant's probation and executed his 72 month prison sentence. The district court expressed concern that, although appellant

had only about five months of probation remaining, reinstating him on probation would send the message that there were no consequences near the end of his probationary period. The district court concluded that appellant was "clearly not amenable to probation" because he repeatedly violated the same conditions of probation. The district court stated, "I can't see that this is anything but intentional and inexcusable," because behavior expectations were clearly discussed with appellant following the two prior probation violations but appellant "just did it all over again," and because accommodations were made for appellant's occasional homelessness.

Finally, the district court concluded,

> I just think at this point, Brian, the need for confinement does outweigh the policies favoring probation. You tried it. You're nonamenable. You know, just is [sic] it's a fruitless procedure anymore in your case. At this point in time . . . the . . . need for – for confinement . . . just outweighs the probationary requirements.
>
> And this was a serious offense from the beginning, Brian. And if we just continue to put you in jail, regardless of your failure to cooperate, I think that clearly – clearly depreciates the seriousness of this process.

Appellant challenges the revocation of his probation, arguing that the district court failed to sufficiently weigh the factors favoring probation against the factors favoring revocation, and that there was insufficient evidence to justify revoking his probation.

D E C I S I O N

When a probationer violates a condition of probation, the district court may continue probation, revoke probation and impose the stayed sentence, or order intermediate sanctions. Minn. Stat. § 609.14, subd. 3 (2012). To revoke probation, the

district court must make findings on the three "*Austin*" factors: "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." *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (quoting *State v. Austin*, 295 N.W.2d 246, 251 (Minn. 1980)). "[C]ourts should not assume that they have satisfied *Austin* by reciting the three factors and offering general, non-specific reasons for revocation . . . ." *Id.* at 608. Rather, the district court 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 607 (quotations omitted). Whether the district court made the findings required for revocation of probation is a question of law, to be reviewed de novo. *Id.* at 605.

Appellant argues that the district court erred when it determined that he was "unamenable" without first addressing the factors from *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). In *Trog*, the Minnesota Supreme Court affirmed the district court's departure from a presumptive sentence and its imposition of a stayed sentence and five years' probation. *Id.* at 30. The court stated: "[J]ust as a defendant's particular unamenability to probation will justify departure in the form of an execution of a presumptively stayed sentence, a defendant's particular amenability to individualized treatment in a probationary setting will justify departure in the form of a stay of execution of a presumptively executed sentence." *Id.* at 31. The court went on to state that,

"[n]umerous factors, including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting." *Id.* But, *Trog* deals with the factors a district court should consider when deciding to depart dispositionally from a presumptive sentence, and does not address whether to revoke probation. There is no precedent within the context of an adult probation revocation proceeding that requires the district court to consider the *Trog* factors. Moreover, an offender's amenability to probation is not among the factors to be considered in a probation revocation case. *Austin*, 295 N.W.2d at 251. Therefore, the district court did not err when it did not consider the *Trog* factors in deciding whether to revoke appellant's probation.

Appellant also argues that the district court did not sufficiently consider the *Austin* factors. A court's failure to address each *Austin* factor requires reversal and remand, even if the evidence was sufficient to support revocation. *See Modtland*, 695 N.W.2d at 606, 608 (rejecting the "sufficient evidence" exception).

The first two *Austin* factors are not in dispute. Appellant admitted, under the first factor, that he violated the conditions of his probation by using drugs and by not reporting to his probation officer. The district court concluded, under the second factor, that the violations were intentional and inexcusable because appellant repeatedly violated these conditions, even after being warned that doing so would result in revocation of his probation.

Appellant argues that, under the third factor, the district court failed to sufficiently weigh the need for confinement against the policies favoring probation. We disagree. Although the district court's statement was somewhat abbreviated, the record is sufficient to show that the district court considered this factor. The district court specifically stated that "the need for confinement does outweigh the policies favoring probation." The district court supported this conclusion with reference to appellant's repeated probation violations involving the use of illegal drugs and not informing his probation officer of his whereabouts. The district court also stated that continuing appellant's probation would "clearly depreciate[] the seriousness" of the underlying offense—first-degree DWI. This statement addresses one of the factors the Minnesota Supreme Court has advised district courts to consider when weighing the competing interests under the third *Austin* factor. *See Modtland*, 695 N.W.2d at 607 (advising district courts to consider whether "it would unduly depreciate the seriousness of the violation if probation were not revoked"). Because these statements demonstrate that the district court's decision to revoke appellant's probation was not reflexive, we conclude the district court did not err.

Appellant also argues that the facts in the record are insufficient to support revocation of his 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." *Austin*, 295 N.W.2d at 249-50.

Appellant argues that he is not a threat to public safety because his last felony conviction occurred in 2001 for possession of a controlled substance and he has not been convicted of a crime against a person since 1993. The district court should exercise

greater restraint when considering revoking probation where the probationer's criminal record is short or where the underlying offense is less severe. *State v. Osborne*, 732 N.W.2d 249, 254 (Minn. 2007) (quotation omitted). However, the failure to maintain contact with a probation officer is serious enough to justify revoking probation, even if the probationer's criminal record is not lengthy. *See State v. Rottelo*, 798 N.W.2d 92, 94 (Minn. 2011) (affirming probation revocation although the probationer committed no new crimes because he failed to stay in contact with his probation officer). Moreover, the underlying offense, first-degree DWI, is a severe offense justifying a lower threshold for revocation.

Appellant also argues he does not require treatment in confinement because he successfully completed treatment outside of prison. This claim is not supported by the facts. Appellant only completed a 24-hour relapse prevention program, and four months later he again admitted to smoking marijuana. The failure to complete chemical dependency treatment justifies revoking probation so that the probationer may complete treatment in confinement. *See Rottelo*, 798 N.W.2d at 94 (concluding that revocation was necessary to ensure appellant received chemical dependency treatment because he failed to maintain contact with his probation officer).

Finally, appellant argues that the seriousness of his probation violations—using marijuana, not reporting his employment to his probation officer, and failing to maintain contact with his probation officer—would not be depreciated by reinstating him on probation. However, merely failing to maintain contact with a probation officer is a sufficiently serious violation to justify revocation. *See id.* Also, failing to complete drug

treatment or "to show a commitment to rehabilitation" is sufficient to require revocation so that the seriousness of the violation would not be denigrated. *Austin*, 295 N.W.2d at 251. For all of these reasons, we conclude that the district court did not abuse its discretion by finding the evidence sufficient to revoke appellant's probation.

Affirmed.