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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1646

State of Minnesota,
Respondent,

vs.

Robert William Gallahar,
Appellant.

Filed May 20, 2013
Affirmed
Rodenberg, Judge

Scott County District Court
File No. 70-CR-10-21234

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

Appellant challenges the district court's decision to revoke his probation, arguing that the evidence does not establish that appellant's violations were intentional or

inexcusable, or that the need for confinement outweighs the policies favoring probation. Because the district court made sufficient findings under *Austin* and the record supports those findings, we affirm.

FACTS

Appellant Robert W. Gallahar was charged with eleven counts of criminal sexual conduct stemming from incidents with two minor children occurring between December 2009 and March 2010.[1] The sexual conduct took place while the minors, C.H. and H.N. (then ages 11 and 9), were visiting appellant's house. During separate but repeated incidents while appellant's wife was out shopping or taking a shower, appellant touched and rubbed the girls' genitals over their clothes.

Appellant waived his right to a jury trial and agreed to a court trial. The district court found appellant guilty of all but two counts of second-degree criminal sexual conduct, imposed consecutive sentences of 90 months, 48 months, and 70 months, stayed the execution of the sentences, and placed appellant on probation for 15 years. At sentencing, the district court dispositionally departed from the presumptive prison sentence under the Minnesota Sentencing Guidelines, placed appellant on probation, and stated that it would "test amenability by starting [appellant] in treatment, and should he fail to take sufficient responsibility for his actions or fail to make sufficient progress, then the Court may impose the prison sentence that's available." Conditions of probation

[1] Appellant was initially charged with an additional count of possession of pornographic material. The state dismissed that charge prior to trial.

included appellant serving one year on electronic home monitoring and completing sex offender treatment.

While awaiting entry into sex offender treatment, and just over two months after having been sentenced, appellant failed a required polygraph test. He then entered treatment and regularly participated in group therapy sessions with nine other sex offenders, a therapist, and his probation officer. Appellant initially denied his offenses and did not admit to any sexual conduct against the victims. He later admitted that he may have accidentally touched the genital area of one of the victims but maintained that there was no sexual intent. He also admitted putting his hand down the pants of one of the victims, but stated that he did so only to retrieve a $100 bill that the victim had taken from him. The group members and his therapist encouraged appellant to be honest and to continue to work towards passing his next polygraph test. Appellant later made some partial admissions to the group. Appellant also attended an individual session with an intern to facilitate honesty in a private setting. Afterward, appellant "sounded as though he was going to be honest about his offense" but followed his statements with, "it's hard to admit to something I didn't do."

Appellant took and failed a second polygraph test. During a later group session, he told the group that he had failed the test "because [he] did it," referring to the offenses. The therapist asked appellant three questions regarding acts involving C.H. Although appellant admitted the acts, he "was smiling the entire time." He also continued to deny his offense against H.N. The therapist then asked appellant why he changed his mind about being honest and appellant answered, "Well I am saying what everyone has told me

to say." The therapist also asked if he was being sincere and appellant responded, "I say I didn't do it and then I say I did and you aren't happy either way." Appellant then returned to his previous claims of "accidental" touching, became upset and left mid-session. Prior to his departure, the group therapist asked appellant to write and present an essay to the group on the reasons why he should be allowed to continue treatment.

Appellant did not attend the following group session. When confronted about this absence, appellant told his probation agent that he was terminated from treatment because he had failed his polygraph test and that he felt threatened because the treatment group members were upset with him. The following day, appellant's therapist terminated appellant from treatment, indicating that appellant had violated treatment conditions by failing to address his offenses honestly and make "adequate progress toward completion of the program."

The probation officer recommended that appellant's sentence be executed, noting that "[t]he need to confine him outweighs those policies favoring probation based on the fact that he was a presumptive commit to begin with, was given an opportunity at probation and has . . . violated his court ordered conditions by being terminated from his outpatient sex offender treatment program."

At the revocation hearing, the district court revoked appellant's probation and executed his sentence. The district court explained:

> I have every reason to doubt [appellant]'s going to get in [treatment] because he's not making any valid admissions, and no treatment program is going to accept you based on how—what your behavior has been. I think I was really clear with you at sentencing that the number one thing that has to

> happen is for you to take responsibility in order to start treatment. I can see nothing here but manipulation.
>
> So, I don't know how it is that you anticipate the Court is going to say, oh, let's try again without any sort of plan, without any sort of program in which you are admitted to enter with full admissions and a passed polygraph. I don't see any way short of that that this Court could continue this departure that appears to be a farce.
>
> . . . I am going to find that you have, in fact, violated your probation, and that your violations are intentional and inexcusable. I will also find that there is no indication that there was an impossibility of you to comply with the conditions of your probation.
>
> I will note that the specific condition I am finding is that you failed to successfully complete sex offender treatment. I will find that your intentional and inexcusable failure to do that was based on your failure to follow the simple directives and be honest and forthright with the treatment providers. That's supported by the polygraphs, and it's supported by your admissions here in court today.

This appeal followed.

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 (2010). 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 the need for confinement outweighs the policies favoring probation." *Id.* at 250, *quoted in State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). A district court's failure to address all three *Austin* factors requires reversal and remand, even if the evidence was sufficient to support the revocation. *Modtland*, 695 N.W.2d at 606, 608 (rejecting this court's caselaw that applied a "sufficient evidence" exception to the requirement for *Austin* findings).

When district courts decide to revoke probation, they must provide substantive, fact-specific reasons for doing so. *Id.* at 608. When conducting an *Austin* analysis, it is inadequate for district courts to simply recite the three *Austin* factors and offer "general, non-specific reasons for revocation." *Id.* District courts must instead "convey their substantive reasons for revocation and the evidence relied upon," thereby creating "thorough, fact-specific records setting forth their reasons for revoking probation." *Id.* While written orders are not required, the district court should at least "stat[e] its findings and reasons on the record, which, when reduced to a transcript, is sufficient to permit review." *Id.* at 608, n.4.

The district court's analysis of the *Austin* factors is reviewed for an abuse of discretion. *Id.* at 605. However, whether the district court has made each of the required findings presents a question of law, which we review de novo. *Id.* Appellant disputes the district court's findings on all three *Austin* factors, arguing that appellant did not violate his probation, but if he did it was not intentional or inexcusable, and that the need for confinement does not outweigh the policies favoring probation.

Appellant first challenges the district court's finding that he violated one or more conditions of his probation. Appellant argues that the district court failed to consider that he had been in treatment for only two months, that he regularly attended therapy sessions, that he had made some progress, that he had complied with all other terms of probation, and that alternative programming was available.

Here, the district court specifically found that appellant had "failed to successfully complete sex offender treatment," after hearing testimony from appellant and appellant's probation officer, reading treatment reports, and considering the availability of alternative treatment programs. The district court noted that, although the importance of appellant's successful completion of treatment was emphasized at sentencing, appellant failed to take responsibility for his actions and was terminated from treatment after several instances of noncompliance with the programming. Therefore, the record supports the district court's finding under the first *Austin* factor that appellant violated one or more specific terms of his probation.

Appellant next argues that any violation of his probation was unintentional or excusable. The district court found that appellant intentionally and inexcusably violated his probation by failing to follow the directives to be honest and forthright with the treatment providers as supported by the polygraphs and his admissions before the district court. In its revocation order, the district court also noted that appellant "persistent[ly]" failed to participate in a "meaningful way" in treatment, despite attempts by both the probation officer and his therapist to motivate his progress, because progress was "necessary to continue in sex offender treatment." The record adequately supports the

district court's finding that appellant's probation violation was intentional and inexcusable under the second *Austin* factor.

Appellant also contends that the district court failed to find that the need for appellant's confinement outweighed the policies favoring probation. "In some cases, policy considerations may require that probation not be revoked even though the facts may allow it . . . ." *Austin*, 295 N.W.2d at 250. "The purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Id.* The district court is required to balance "the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Id.* To do so, the court must 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 the subfactors are relevant to the balancing test). Additionally, the district court must not act reflexively to an accumulation of technical violations but rather must determine that the "offender's behavior demonstrates that he . . . cannot be counted on to avoid antisocial activity." *Austin*, 295 N.W.2d at 251 (quotation omitted).

Although the district court did not make detailed findings on the record regarding the third *Austin* factor during the revocation hearing, it stated in its written order that, "[w]ithout successful sex offender treatment, [appellant] is a risk to reoffend and thus a

risk to public safety." Citing to *Austin*, the district court concluded that, "[w]ithout successful treatment, the need for confinement outweighs the policies favoring probation." The written order complies with the requirements of *Modtland*.

We also observe that the probationary sentence here was a downward dispositional departure from the sentencing guidelines, which the district court intended as an incentive to appellant to undergo and succeed in treatment. Appellant violated the terms of his probation almost immediately, despite those terms having been clearly pronounced and despite appellant's expressed understanding of the terms. Appellant's failure to avail himself of the downward dispositional departure was a relevant consideration, and the district court considered it in revoking appellant's probation. *Cf. State v. Moot*, 398 N.W.2d 21, 24 (Minn. App. 1986) (affirming probation revocation where the record was clear that the district court had "made a downward dispositional departure for the sole reason of affording appellant one last opportunity to succeed in treatment for chemical dependency"), *review denied* (Minn. Feb. 13, 1987).

The record supports the district court's findings on all *Austin* factors. Therefore, the district court did not abuse its discretion in revoking appellant's probation.

Affirmed.