STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0569

State of Minnesota,
Respondent,

vs.

Robert Sterling Allison,
Appellant.

Filed October 29, 2012
Reversed and remanded
Rodenberg, Judge

Ramsey County District Court
File No. 62CR112538

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

John J. Choi, Ramsey County Attorney, David J. Erickson, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Kirk, Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

In this probation-revocation appeal, appellant argues that the district court erred by (1) revoking his probation without making the third *Austin* finding regarding whether the

need for confinement outweighed the policies favoring probation; (2) revoking his probation on the basis of a condition that was never imposed; and (3) abusing its discretion in applying the *Austin* factors and in exhibiting judicial bias at the revocation hearing. Because the district court did not address the third *Austin* factor, we reverse and remand.

FACTS

On April 5, 2011, appellant Robert Sterling Allison got into an argument with several family members and threatened to kill everyone in the home. The state charged him with three counts of terroristic threats. Appellant pleaded guilty to one count, and the state dismissed the remaining counts.

The district court imposed the presumptive guidelines sentence of 21 months, stayed for five years. As conditions of probation, the court required appellant to (1) successfully complete any chemical-dependency or psychological treatment, as required by probation; (2) refrain from alcohol and drug use; (3) successfully complete an anger-management program; and (4) serve 75 days in the workhouse. These four conditions are reflected in the sentencing order, as are two additional conditions requiring appellant to remain law-abiding and have no contact with the victims.

After appellant was released from the workhouse, the probation department unsuccessfully attempted to contact him. In October 2011, appellant left a voicemail with probation, but he did not provide any contact information. On November 9, 2011, the probation department filed a report alleging that appellant violated two probation

conditions by (1) failing to inform probation of his current address and phone number and (2) failing to maintain contact with probation.

At a hearing on the probation violations, appellant admitted that he had violated both of the identified conditions of probation. Appellant represented that he did not have reliable contact information because he was homeless and unemployed, and he had also been struggling with physical and mental-health issues.

Probation recommended that appellant serve an additional 90 days in the workhouse and continue his probationary status. The state joined in this recommendation. Appellant's counsel advocated a "lesser sanction."

At the conclusion of the hearing, the district court found that appellant "materially, intentionally violated the conditions of [his] probation." The sentencing judge stated that she had warned appellant of the consequences should he violate "my probation." She further advised him, "we don't have time to play games with people who know the system and who game the system, and that's precisely what you are doing."

The district court revoked appellant's probation and executed his 21-month sentence, finding that he was "not an appropriate candidate for probation" owing to his large number of probation violations in the past, for other offenses. This appeal followed.

D E C I S I O N

I.

Appellant argues that the district court erred in failing to address the third *Austin* factor. The state concedes that the district court failed to address this factor, and it agrees that remand is appropriate.

In determining whether to revoke probation, the district court must apply a three-step analysis. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). It 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.* Whether the district court has properly followed this analysis is a question of law, reviewed de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). A court's failure to address all three *Austin* factors requires reversal and remand, even if the evidence was sufficient to support revocation. *See id.* at 606, 608 (rejecting a "sufficient evidence" exception to the requirement for *Austin* findings).

The third *Austin* factor requires courts to consider whether the "need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d at 250. As the purpose of probation is rehabilitation, courts should revoke probation only "as a last resort when treatment has failed." *Id.* The decision "cannot be a reflexive reaction to an accumulation of technical violations." *Id.* at 251 (quotation omitted). Rather, the state must show that the probationer's behavior "demonstrates that he or she cannot be counted on to avoid antisocial activity." *Id.* (quotation omitted).

Additionally, in weighing the reasons bearing on revocation, the district 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. (quoting A.B.A. Standards for Criminal Justice, Probation § 5.1(a) (Approved Draft 1970)). The court should take into account both the original offense and the probationer's intervening conduct. *Id.*

In this case, as the state concedes, the district court failed to address the third *Austin* factor. It did not expressly consider the policies in favor of rehabilitation, the risk to public safety if probation were continued, appellant's need for correctional treatment, or whether continuing probation would depreciate the seriousness of the violation. Although the court did consider the seriousness of the underlying offense, it did not make findings regarding the balancing of that factor against the policies and considerations favoring continuation of probation or make findings regarding whether continuing probation would unduly depreciate the seriousness of the alleged probation violations.

The district court must make the third *Austin* finding before deciding whether revocation is appropriate. *Modtland*, 695 N.W.2d at 606, 608. As the court made no such determination in this case, *Modtland* requires reversal and remand. *See id.*

II.

Appellant argues that the district court erred in revoking his probation based on violations of conditions that were never actually imposed. As noted above, *Austin* requires courts to "designate the specific condition or conditions [of probation] that were violated." 295 N.W.2d at 250. This inquiry requires first determining whether the allegedly-violated condition "was actually imposed as a condition of probation." *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004).

Appellant not only failed to raise this issue at the district court, but he affirmatively admitted that he had violated the terms of his probation. Although the district court found a material and intentional violation, that finding was based on appellant's concession that he had violated probation conditions by failing to maintain contact with probation. Appellant did not argue below that the conditions he is claimed to have violated were never actually imposed. Rather, it appears that both parties assumed at the revocation hearing that the conditions had been validly imposed. The state thus had no occasion to present evidence establishing those conditions. As a result, the record is undeveloped on the first *Austin* factor.

Because the state did not have an opportunity to present evidence regarding the challenged conditions of probation, and because remand is required by reason of the district court's failure to make the third *Austin* finding, the issue of whether appellant violated an announced condition of probation is most appropriately addressed to the district court on remand. *See State v. Staloch*, 643 N.W.2d 329, 332 (Minn. App. 2002) (noting that a defendant's failure to object to the ambiguity of a probation condition at the

revocation hearing did not result in a waiver of the issue, as "the responsibility for stating the precise terms of a sentence rests squarely with the court").

III.

Appellant argues that this court should reinstate his probation because the district court abused its discretion in applying the third *Austin* factor. He also argues that reinstatement is warranted because the presiding judge below exhibited judicial bias. On careful review of the record, we find no judicial bias amounting to plain error.

Defendants have a constitutional right to an unbiased decision-maker at sentencing. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005); *State v. Simmons*, 646 N.W.2d 564, 570 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). "The presence of an impartial judge is critical to ensure the fairness and integrity of the judicial process." *State v. Schlienz*, 774 N.W.2d 361, 368 (Minn. 2009). Thus, judges must disqualify themselves whenever their "impartiality might reasonably be questioned," including when they possess a "personal bias or prejudice concerning a party." Minn. Code Jud. Conduct 2.11(A), (A)(1). Appellate courts apply a presumption that the judge has discharged her duties properly. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998).

Appellant did not challenge the judge's impartiality during the revocation proceedings. As a result, the issue is subject to plain-error review. *See Schlienz*, 774 N.W.2d at 365 (applying plain-error standard where defendant raised impartiality issue for the first time on appeal). To satisfy the plain-error standard, appellant must establish "(1) error; (2) that was plain; and (3) that affected [his] substantial rights." *State v.*

Strommen, 648 N.W.2d 681, 686 (Minn. 2002). Additionally, because appellant failed to challenge the judge's impartiality at the probation hearing, he must demonstrate *actual* bias in order to merit reversal. *See State v. Moss*, 269 N.W.2d 732, 734–35 (Minn. 1978) (recognizing that when a defendant proceeds to trial and sentencing without raising impartiality issue, reversal is appropriate only if the defendant demonstrates actual bias); *State v. Plantin*, 682 N.W.2d 653, 663 (Minn. App. 2004) ("After a defendant submits to a trial before a judge without objecting to the judge on the basis of bias, we will reverse the defendant's conviction only if the defendant can show actual bias in the proceedings."), *review denied* (Minn. Sept. 29, 2004).

Appellant argues that the judge in this case was personally biased against him and exhibited an improper personal stake in the outcome. Appellant cites the following conduct in support of this argument: (1) the judge's repeated references, both at sentencing and at the probation hearing, to appellant's violation of "my probation"; (2) her accusation that appellant was "gam[ing] the system"; and (3) her claim to have given appellant "a break" at sentencing, even though the sentence imposed was the presumptive guidelines sentence.

Taken as a whole, the challenged remarks in this case do not rise to the level of actual bias. The same judge presided at sentencing and at the probation hearing. She was familiar with the case, and it appears that her remarks were based on the facts and procedural history of the case as well as appellant's criminal history. The challenged comments do not convey any favoritism toward the state or a deep-seated antagonism that would hinder fair judgment. *Cf. State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008)

(observing that when a judge's opinions were formed on the basis of facts or events developed in the course of the proceedings, they do not demonstrate bias or partiality absent a "deep-seated favoritism or antagonism that would make fair judgment impossible" (quotation omitted)).

Moreover, the judge's remarks are distinguishable from those in *Simmons*, on which appellant relies. *See generally* 646 N.W.2d at 569–70. In that case, the judge called the defendant an immoral "con man" and compared him to the "people who took down the World Trade Center." *Id.* Here, by contrast, the judge's remarks concerned appellant's lengthy history of probation violations documented by the record, and stated her opinion that appellant was manipulating the system.

Appellant has not satisfied his burden in establishing that the judge presiding at his revocation hearing was actually biased against him. He has not demonstrated plain error.

Appellant's remaining argument, that the record "conclusively demonstrates that the policies favoring probation outweigh the need for confinement," cannot be addressed absent complete *Austin* findings. We review a probation-revocation determination for an abuse of discretion. *See Austin*, 295 N.W.2d at 249–50 ("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."). Without the required *Austin* findings, such review is premature. Since the district court is required to weigh the *Austin* factors before making a revocation determination, and failed to do so here, appellant's argument is properly addressed to the district court on remand.

Reversed and remanded.