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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2137**

Van Pao Thao, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent

**Filed September 16, 2008
Affirmed
Peterson, Judge**

Ramsey County District Court
File No. J3-04-555839; K5-05-3897

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Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

PETERSON, Judge

This appeal is from an order that denies appellant's postconviction petition to vacate the order that revoked his extended-jurisdiction juvenile (EJJ) probation and executed his adult sentence. We affirm.

FACTS

On August 7, 2004, appellant Vang Pao Thao, who was 16 years old and a member of a street gang, was walking with a friend in St. Paul when he saw a member of a rival gang. While appellant's friend held the rival-gang member, appellant stabbed him with a knife. The victim suffered life-threatening injuries but survived.

Appellant was charged with first-degree assault and committing a crime for the benefit of a gang. The state sought presumptive adult certification for appellant, but the district court ordered the matter to proceed as an EJJ prosecution.

Appellant pleaded guilty to the two charged felony offenses.¹ Because first-degree assault is a lesser included offense, appellant was sentenced only for committing a crime for the benefit of a gang. After considering multiple EJJ probation alternatives, the district court ordered appellant to be sent to Boys' Totem Town (BTT) for the Extended Length program and stayed execution of his 98-month adult sentence. In its EJJ placement order, the district court ordered appellant to "successfully complete all programs at [BTT]," "have no contact with known gang members," and "remain law abiding."

¹ The state agreed to dismiss a probation violation.

On October 8th, 2005, appellant was home on a weekend pass from BTT and subject to a 9:30 p.m. curfew. Appellant checked in with BTT at 9:30 p.m., but he was not home when BTT called after 11:00 p.m. At 1:00 a.m. the following morning, St. Paul police found appellant in a garage where a stolen car was being dismantled and arrested him for auto theft. At the time, appellant was in the company of his step-brother, Kon Meng Vang, who was identified in law-enforcement records as a known gang member.

Appellant's probation officer filed a probation-violation report against appellant, and at the contested violation hearing, appellant admitted that he violated the terms of his probation by failing to abide by both the general legal curfew and the 9:30 p.m. curfew established by BTT. He also admitted that he was with Vang, but stated that he believed that his step-brother was no longer in a gang. Following an EJJ disposition hearing on November 2, 2005, the district court revoked appellant's EJJ probation, ordered appellant discharged from BTT, and committed him to the commissioner of corrections for 98 months.

On November 3, 2005, appellant was charged with third-degree burglary. On November 21, 2005, pursuant to a plea agreement, appellant waived his right to appeal his EJJ probation revocation in exchange for the dismissal of the third-degree burglary charge.

In July 2007, appellant filed a petition for postconviction relief requesting that the district court vacate the order that revoked appellant's EJJ probation and executed his adult sentence, arguing that the district court violated the law by allowing appellant to waive his right to appeal his EJJ revocation and that the district court failed to properly

apply the *Austin* factors when it ordered execution of appellant's adult sentence. The district court ordered that appellant's right to appeal the EJJ probation revocation was not waived, but the court denied appellant's request to vacate and dismissed appellant's petition. This appeal followed.

D E C I S I O N

In reviewing a postconviction court's denial of relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007); *cf. Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003) (holding that courts "extend a broad review of both questions of law and fact" when reviewing a denial of postconviction relief).

I.

The Minnesota Supreme Court has established a three-step analysis that must be completed by a district court before revoking probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980); *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). The district court must: (1) designate the specific condition of probation that has been violated; (2) find that the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250. These three *Austin* factors apply to EJJ revocation proceedings, *State v. B.Y.*, 659 N.W.2d 763, 768-69 (Minn. 2003), and any violation of the terms and conditions of probation must be proven by clear and convincing evidence. Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(1). 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.

Any failure to make the three *Austin* findings on the record constitutes reversible error. *Modtland*, 695 N.W.2d at 606-08. Also,

in making the three *Austin* findings, courts are not charged with merely conforming to procedural requirements; rather, courts must seek to convey their substantive reasons for revocation and the evidence relied upon ... [C]ourts should not assume that they have satisfied *Austin* by reciting the three factors and offering general, non-specific reasons for revocation, as it is not the role of appellate courts to scour the record to determine if sufficient evidence exists to support the district court’s revocation.

Id. at 608.

Appellant argues that the district court “was not sufficiently cognizant of its responsibilities under *Modtland* and *Austin*, or . . . the court erroneously believed that a violation while on EJJ probation could only result in execution of the stayed adult sentence.”

A. First Austin Factor

In the EJJ placement order, the district court required appellant to “successfully complete all programming at Boy’s Totem Town,” “remain law abiding,” and “have no contact with known gang members.” The district court found that at the EJJ revocation hearing, appellant admitted the alleged probation violations and that appellant’s in-court statements established a factual basis for the admission. The district court specifically found that the violations occurred while appellant was on a weekend pass from BTT;

appellant admitted breaking both the general legal curfew² and the 9:30 p.m. curfew imposed by BTT; and appellant was with Kon Meng Vang, who law-enforcement records show is a gang member; but appellant did not admit that he knew that Vang was a gang member. These specific findings and the district court's finding that appellant admitted the allegations in the probation-violation petition satisfy the first *Austin* factor requirement to designate the specific conditions of probation that were violated. *See Modtland*, 695 N.W.2d at 607 (holding first *Austin* factor was satisfied where appellant admitted at the probation-revocation hearing that he had failed to fulfill the conditions imposed by the district court).

B. Second Austin Factor

The district court found that “[appellant’s] violation was knowing and intentional and without legal justification or excuse.” Although this finding is stated in conclusory terms, it immediately follows the finding that appellant admitted that he broke both the legal curfew and the BTT curfew and that he was with Vang. Consequently, it can easily be inferred that the district court concluded, based on appellant’s admission, that the probation violations were knowing, intentional, and legally inexcusable. Thus, the

² In St. Paul, between 12:01 a.m. and 4:01 a.m. daily, it is unlawful for any minor who is over 15 years of age and under 18 years of age

to loiter, idle, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds or other public grounds, public places, or public buildings, places of entertainment or amusement, vacant lots and other unsupervised places open to the public in the City of Saint Paul.

St. Paul, Minn., Legislative Code § 229.01(b) (2007).

finding conveys the district court's reasoning and the evidence that the district court relied upon.

C. Third Austin Factor

In making the third *Austin* finding, “[t]here must be a balancing of the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *Austin*, 295 N.W.2d 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 (quoting *United States v. Reed*, 573 F.2d 1020, 1024 (8th Cir. 1978) (other quotation omitted)). A district court should always remain cognizant of the fact that “the purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed.” *Modtland*, 695 N.W.2d at 606 (quoting *Austin*, 295 N.W.2d at 250).

Appellant acknowledges that he made a misstep when he left home after curfew, but he argues that the district court exaggerated the severity of the situation and that his act did not render him unsuitable for probation. Appellant contends that the district court “acted precipitously and reflexively without due consideration for the circumstances of the case.” In making these arguments, appellant attempts to characterize his violation as a one-time, technical curfew violation. But the district court’s findings demonstrate that appellant’s violation was not simply a technical curfew violation. Appellant checked in with BTT at his curfew time. He then left his home in violation of his curfew and within a few hours, he was arrested for auto theft. At a minimum, these facts show that even

though appellant knew that he was under the supervision of BTT, he simply ignored his curfew time and went with others while they engaged in criminal activity.

In concluding that the need for confinement outweighed the policies favoring probation, the district court found that appellant “does not follow through with the conditions of probation when he is in the community,” and that “[b]ecause he continues to disobey the law and court expectations in the community, even when on pass from a correctional facility, further probation is not warranted.” These findings demonstrate that the district court did not act precipitously and reflexively without due consideration for the circumstances of the case and, instead, after considering the facts of appellant’s violation, found that appellant “cannot be counted on to avoid antisocial behavior.” The district court made the findings that are required under *Austin* and *Modtland*, its findings are supported by the evidence, and the district court did not abuse its discretion in concluding that the need for confinement outweighed the policies favoring probation.

Appellant contends that the district court “erroneously believed that a violation while on EJJ probation could only result in execution of the stayed adult sentence,” and that “no intermediate sanctions appeared to have even been considered.” After making the required *Austin* findings, a district court must execute a sentence unless it finds mitigating factors that justify a continuation of the stay. Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(3); Minn. Stat. § 260B.130, subd. 5. Such mitigating factors may include the successful completion of a treatment program, the amenability to treatment, and whether the violation demonstrates possible recidivism. *B.Y.*, 659 N.W.2d at 770. The focus is on

the mitigating factors surrounding the violation, not those surrounding the offense. *Id.* at 769-70.

Rather than finding that mitigating factors justified a continuation of the stay, the district court expressly found that appellant “is not amenable to probation” and that “[t]here are not consequences, programs and services still available within the juvenile system to address [appellant’s] criminal activity.” These findings demonstrate that the district court considered the possibility of intermediate sanctions and did not erroneously believe that the only possible result following a probation violation was execution of appellant’s adult sentence.³

Affirmed.

³ Appellant cites *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005) in support of his argument that juveniles should be treated differently than adults (particularly in the context of an *Austin/Modtland* analysis). But respondent correctly asserts that in *In re Welfare of L.F.G.-L*, No. A07-366 2007 WL 3257190 (Minn. App. Nov. 6, 2007), (cited only for this purpose), this court recognized that *Roper* only “addressed the narrow issue of whether capital punishment for offenders under 18 years of age violates the Eighth Amendment’s prohibition against cruel and unusual punishment.” Appellant’s argument does not identify a basis for relief.

Appellant also contends that the district court should have considered “whether appellant had received sufficient and proper services and treatment to help him complete probation without re-offending and in compliance with the conditions of probation.” But appellant did not raise this issue at the disposition hearing. Generally, this court will not consider matters not raised in the court below. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Appellant has not provided a reason why this general principle should not apply.