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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0228**

State of Minnesota,
Respondent,

vs.

Dalfonzo Montreal Thompson,
Appellant.

**Filed September 18, 2017
Affirmed in part, reversed in part, and remanded
Peterson, Judge**

Carver County District Court
File No. 10-CR-13-368

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

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Chaska, Minnesota (for respondent)

Melvin R. Welch, Welch Law Firm, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from his sentence following a probation violation, appellant argues that the district court (1) erred by failing to apply the analysis set forth in *State v. Austin*,

295 N.W.2d 246 (Minn. 1980), before revoking a stay of adjudication and imposing a stay of imposition and (2) incorrectly calculated his jail credit. We affirm the sentence modification as an intermediate sanction for a probation violation but reverse and remand the determination of appellant's jail credit.

FACTS

After being stopped on April 28, 2013, for driving erratically, appellant Dalfonzo Montreal Thompson was charged with fifth-degree possession of a controlled substance and driving while impaired (DWI). Thompson pleaded guilty to both charges. The district court stayed adjudication of the controlled-substance offense and placed Thompson on probation for five years. Among the terms of his probation, Thompson was ordered to complete a chemical assessment and follow recommendations, remain law-abiding, obtain a GED by August 2013, consume no alcohol or controlled substances, and submit to random chemical testing. For the DWI offense, Thompson was sentenced to a stay of imposition and placed on supervised probation for a year, concurrent with the probation for the controlled-substance offense.

The Department of Corrections filed probation-violation reports on January 7, 2014, October 6, 2015, and November 14, 2016. Following the first two reports, the district court found that Thompson violated the terms of his probation. The court imposed intermediate sanctions and reinstated Thompson's probation. Thompson admitted to the facts underlying the third violation report and, at the probation-violation hearing, submitted for the district court's consideration a research study from the Journal of Addiction Research

& Therapy. The study suggests that the presence of a particular protein in the bodies of chronic drug abusers may be linked to high relapse rates.

Following the hearing, the district court revoked the stay of adjudication of the controlled-substance offense and stayed imposition of sentence. The district court reinstated Thompson's probation, ordered him to serve six months in jail "with credit for time served back to November 14, 2016," and ordered Thompson to complete an updated chemical assessment and participate in treatment and aftercare "[i]f required by his agent." In the memorandum attached to its order, the district court expressed concern about Thompson's personal safety and noted "the challenges of heroin addiction." The court determined that because Thompson had three probation violations, continuing the stay of adjudication would "depreciate[] [his] probation obligations." The district court stated that it was not required to make the findings required in a probation-revocation case, as set forth in *Austin*, 295 N.W.2d at 250, but, nevertheless, made some *Austin* findings in determining that Thompson

violated probation by failing to abstain from the use of controlled substances and failing to follow the recommendations of the chemical use assessment. In spite of the challenges of heroin addiction, these violations were nonetheless intentional and inexcusable. The consequences imposed are required to protect the public from further criminal activity by [Thompson], to protect [Thompson]'s personal safety, to provide the opportunity for [Thompson] to receive treatment while in custody, and to recognize the serious nature of [his] continued violative conduct.

This appeal followed.

DECISION

I.

Thompson argues that because a stay of imposition “involve[s] a significant change” in his “level of freedom,” the district court should have applied the *Austin* analysis when it revoked his stay of adjudication and sentenced him to a stay of imposition of sentence. Under the *Austin* analysis, before revoking probation, the district court must find that: (1) a specific condition of probation was violated; (2) the violation was intentional or inexcusable; and (3) given the nature of the violation and the underlying offense, the need for confinement outweighs the policies favoring probation. 295 N.W.2d at 250-51. But the supreme court has held that “the *Austin* analysis does not apply to the imposition of intermediate sanctions” for probation violations. *State v. Cottew*, 746 N.W.2d 632, 638 (Minn. 2008). When an offender violates probation, “the court may either (1) continue to stay execution or imposition of sentence under the previously stayed conditions or under modified conditions, or (2) revoke the defendant’s probation and execute the previously stayed sentence.” *Id.* at 636; *see* Minn. R. Crim. P. 27.04, subd. 3(2)(b)(ii) (permitting the district court to “impose sentence but stay execution and order probation” upon finding that an offender has violated probation).

[T]he term “intermediate sanctions” includes but is not limited to incarceration in a local jail or workhouse, home detention, electronic monitoring, intensive probation, sentencing to service, reporting to a day reporting center, chemical dependency or mental health treatment or counseling, restitution, fines, day-fines, community work service, work service in a restorative justice program, work in lieu of or to

work off fines and, with the victim's consent, work in lieu of or to work off restitution.

Minn. Stat. § 609.135, subd. 1(b) (2016).

Application of the *Austin* factors is required only “before a defendant’s probation is *revoked* and the underlying sentence is executed.” *Cottew*, 746 N.W.2d at 637 (emphasis added). *Cottew* explains why the *Austin* analysis applies when probation is revoked but not when intermediate sanctions are imposed. *Id.* The overall purpose of intermediate sanctions is to encourage rehabilitation by punishing the offender for probation violations. *Id.* at 637-38. The *Austin* factors “ensure that the district court has fully considered any claims by the defendant that *revocation* is not warranted because [the offender’s] probation violation was either unintentional or excusable, or because revocation would be inconsistent with the public policies favoring probation.” *Id.* at 637 (emphasis added). When a district court imposes an intermediate sanction as a consequence for a probation violation, “there is no need for *Austin* findings to ensure that the district court considered any [such] claims by a defendant . . . because the district court necessarily agrees that revocation is not warranted.” *Id.* Because the district court sentenced Thompson to a stay of imposition as an intermediate sanction for a probation violation and the sentence did not result in either revocation of probation or an executed sentence, the district court was not required to apply the *Austin* analysis.

Thompson also argues that the stay of adjudication should not have been revoked because “his failures to abstain from the use of a controlled substance were not intentional and inexcusable, but rather the product of a physical disability.” The district court’s

imposition of an intermediate sanction for a probation violation is subject to the abuse-of-discretion standard of review. *Cottew*, 746 N.W.2d at 638.

The district court was not persuaded by the study that Thompson offered to explain his chronic opioid use and continuing relapses. The study's conclusion is not expressed in definitive terms. At most, the study appears to suggest that a link exists between chronic addiction and the presence of a particular protein in the bodies of long-term addicts. Under these circumstances, the district court did not abuse its discretion by rejecting Thompson's reliance on the study to demonstrate that his controlled-substance use was not intentional. We also note that not all of Thompson's probation violations involved behavior directly related to his controlled-substance use. The district court did not abuse its discretion by revoking the stay of adjudication, sentencing Thompson to a stay of imposition, and reinstating Thompson's probation.

II.

Thompson argues that the district court erred by ordering his jail credit to begin on November 14, 2016, the date that the probation-violation report was filed in the district court, rather than November 10, 2016, the date he was purportedly taken into custody. He claims the right to four additional days of jail credit.

At sentencing, the district court must calculate and deduct from the sentence "the number of days spent in custody in connection with the offense or behavioral incident being sentenced." Minn. R. Crim. P. 27.03, subd. 4(B).

The defendant has the burden of establishing that he is entitled to jail credit for any specific period of time. The decision

whether to award credit is a mixed question of fact and law; the court must determine the circumstances of the custody the defendant seeks credit for, and then apply the rules to those circumstances. [Appellate courts] review the factual findings underlying jail-credit determinations for clear error, but [they] review questions of law de novo. The sentencing court does not have discretion in awarding jail credit.

State v. Clarkin, 817 N.W.2d 678, 687 (Minn. 2012) (quotation and citations omitted).

A probation-violation report dated November 12, 2016, was filed in the district court on November 14, 2016. The report states that when Thompson met with his probation agent on November 10, 2016, he appeared “high on drugs” and admitted to using heroin and methamphetamines during the previous couple of weeks. The report further states that because of the probation agent’s concerns on November 10, 2016, the agent issued “an Apprehend and Detain,” Thompson “was taken into custody,” and Thompson “is currently in the Carver County Jail.”

In its sentencing order, the district court gave Thompson jail credit back to November 14, 2016. Because the probation-violation report dated November 12, 2016, refers to Thompson already having been “taken into custody,” it appears that Thompson was taken into custody on November 10, 2016, the date on which he met with his probation agent, or at least by November 12, 2016, the date of the probation-violation report. Because it is not clear when Thompson was taken into custody, but it appears that he was in custody before November 14, 2016, we reverse and remand this issue to the district court for reconsideration of Thompson’s jail credit. *See State v. Hott*, 426 N.W.2d 423, 425 (Minn.

1988) (remanding for district court to “fully credit defendant’s probationary jail term with time spent in jail between arrest and sentencing”).

Affirmed in part, reversed in part, and remanded.