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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0274**

In the Matter of the Welfare of: J. P. R., Child

**Filed September 5, 2017
Reversed; motion granted
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-JV-16-1860

Mary F. Moriarty, Fourth District Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, Minnesota (for appellant J.P.R.)

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

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

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

In this juvenile-delinquency appeal, appellant J.P.R. asserts that the district court abused its discretion in finding that he violated two conditions of probation, revoking the stay of adjudication, and adjudicating him delinquent. Because the district court's disposition relies on clearly erroneous factual findings, we reverse. We grant J.P.R.'s

motion to strike portions of respondent State of Minnesota's brief referring to matters not in the record.

FACTS

J.P.R. was charged with fifth-degree drug possession and fifth-degree assault in March 2016. On April 12, J.P.R. admitted to the drug charge pursuant to a plea agreement. The district court dismissed the assault charge and stayed adjudication on the drug charge for 180 days on the condition that J.P.R. complete nine days of sentence to service (STS) and "obey all laws."

A review hearing was held on September 15 after J.P.R. was charged with domestic assault in a separate case. With the agreement of the parties, the district court on that date extended the stay of adjudication for another 180-day period and ordered J.P.R. to complete three additional days of STS "over the next two months." The condition that J.P.R. obey all laws remained in place.

On November 2, J.P.R.'s probation officer filed a probation-violation report recommending that the district court revoke the stay of adjudication because J.P.R. "has not completed his 3 days of STS, and has continued to receive new charges while on probation." The report cited the case number assigned to two new charges against J.P.R.

A probation-revocation hearing was held on January 12, 2017. The probation officer testified that J.P.R. pleaded guilty to disorderly conduct in the matter that led to the September 15 review hearing. The probation officer also testified that two new criminal charges were pending against J.P.R. No evidence was offered regarding whether J.P.R. committed the conduct underlying the new charges, and J.P.R. did not admit to committing

the charged offenses. When asked whether J.P.R. had complied with his other probation conditions, including STS, the probation officer answered in the affirmative.

The district court found that J.P.R. “violated the terms of his probation by failing to remain law abiding and by failing to complete three (3) days of [STS].” Specifically, the district court found that J.P.R. had violated the condition that he obey all laws because he was “charged with committing a new offense.” The district court noted that J.P.R. “did not dispute these facts,” and it found that there was clear and convincing evidence that probation conditions were violated. The district court issued a disposition order revoking the stay and adjudicating J.P.R. delinquent. The order also terminated the juvenile court’s jurisdiction over J.P.R.

J.P.R. appeals.

D E C I S I O N

I. The district court abused its discretion by revoking the stay of adjudication based on clearly erroneous findings of probation violations.

We review a juvenile-delinquency disposition for a clear abuse of discretion. *In re Welfare of R.V.*, 702 N.W.2d 294, 298 (Minn. App. 2005). A district court abuses its discretion if its disposition is arbitrary or based on clearly erroneous factual findings. *See In re Welfare of J.A.J.*, 545 N.W.2d 412, 414 (Minn. App. 1996); *see also In re Welfare of S.J.T.*, 736 N.W.2d 341, 346 (Minn. App. 2007), *review denied* (Minn. Oct. 24, 2007). A factual finding is clearly erroneous if there is no reasonable evidence to support it or if the appellate court “is left with the definite and firm conviction that a mistake occurred.” *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012).

A district court is not required to follow the three-step analysis set forth in *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980),¹ when revoking probation in a juvenile-delinquency proceeding. *R.V.*, 702 N.W.2d at 302.² Instead, to revoke probation in a juvenile case, the district court must follow the rules of juvenile-delinquency procedure. *Id.* at 304. The district court must find that a violation of the terms of probation has been established by clear and convincing evidence. Minn. R. Juv. Delinq. P. 15.07, subd. 4(D).

The district court found that J.P.R. violated two conditions of probation by failing to obey all laws and failing to complete three days of STS. J.P.R. argues the state failed to prove by clear and convincing evidence that he violated either of those conditions.

A. The district court’s finding that the state proved that J.P.R. failed to obey all laws is clearly erroneous.

J.P.R. argues that the district court abused its discretion by revoking probation based on new charges without clear and convincing evidence that he committed the conduct alleged. In finding that J.P.R. violated the condition that he obey all laws, the district court relied solely on statements in the probation officer’s report and testimony that J.P.R. faced

¹ *Austin* held that, before revoking probation in a criminal case, the district court must (1) designate the specific condition that was 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.

² J.P.R. cites *State v. B.Y.* as standing for the proposition that the *Austin* factors apply to juvenile cases. 659 N.W.2d 763 (Minn. 2003). But *B.Y.* held that the *Austin* factors must be considered in extended-jurisdiction-juvenile (EJJ) proceedings; that holding does not extend to this non-EJJ juvenile case. See *B.Y.*, 659 N.W.2d at 768 (applying *Austin* factors in EJJ case); *R.V.*, 702 N.W.2d at 302 (distinguishing *B.Y.* from non-EJJ cases).

two new pending criminal charges. The record contains no evidence that J.P.R. committed the alleged conduct underlying the charges.

The state cites two cases as authority for the proposition that a court can revoke probation based on alleged criminal conduct that has not yet resulted in a conviction. In *State v. Phabsomphou*, this court held that the defendant's due-process rights were not violated when the district court held a probation-revocation hearing before the resolution of criminal charges that led to the revocation hearing. 530 N.W.2d 876, 878-79 (Minn. App. 1995), *review denied* (Minn. June 29, 1995). In that case, revocation was supported by multiple witnesses' testimony about the alleged criminal conduct, so the question of whether the charge alone could have sustained revocation was not raised. *Id.* at 877. In *State v. Spanyol*, this court upheld the revocation of probation based on alleged unlawful activity that did not result in criminal charges. 358 N.W.2d 125, 127 (Minn. App. 1984), *review denied* (Minn. Feb. 27, 1985). In that case, the state offered witness testimony as evidence of the violation. *Id.* Neither *Phabsomphou* nor *Spanyal* addressed the issue in this case, which is whether criminal charges alone constitute clear and convincing evidence that the defendant committed the alleged conduct underlying those same charges.

J.P.R. argues that, instead, this case is governed by *State v. Scholberg*, 393 N.W.2d 247 (Minn. App. 1986). In *Scholberg*, this court held that, without an admission or other evidence of the conduct underlying the charge, the fact that a defendant faces a new criminal charge is not enough to demonstrate an intentional violation of a probation condition against committing the same or similar offenses. *Scholberg*, 393 N.W.2d at 249. Although *Scholberg* was an adult criminal case, and therefore the state in that case had an

additional burden to prove the intentionality of the violation under *Austin*, the same principle is applicable here. *See id.* Following *Scholberg*, we conclude that criminal charges alone do not constitute clear and convincing evidence of the alleged underlying unlawful conduct sufficient to support probation revocation in a juvenile case.

A factual finding is clearly erroneous if there is no reasonable evidence to support it or if the appellate court “is left with the definite and firm conviction that a mistake occurred.” *Rhoads*, 813 N.W.2d at 885. In light of the state’s heightened evidentiary burden to prove a juvenile probation violation by clear and convincing evidence, the district court’s finding that J.P.R. violated probation by failing to obey all laws is clearly erroneous. *See* Minn. R. Juv. Delinq. P. 15.07, subd. 4(D); *Rhoads*, 813 N.W.2d at 885. We therefore conclude that the district court abused its discretion by revoking probation because J.P.R. was charged with new offenses. *See S.J.T.*, 736 N.W.2d at 346; *J.A.J.*, 545 N.W.2d at 414.

The state argues that, even if the unadjudicated charges were not sufficient, J.P.R.’s conviction of disorderly conduct in the case that led to the September 15 review hearing provides sufficient evidence that J.P.R. failed to obey all laws. The district court’s disposition order does not identify the disorderly conduct conviction as a reason for revocation, so the findings are not sufficient to affirm on that ground. *See In re Welfare of N.T.K.*, 619 N.W.2d 209, 211-12 (Minn. App. 2000) (holding that district courts must make sufficient written findings in support of juvenile-delinquency dispositions). Furthermore, that alleged violation was already addressed at the September 15 review hearing resulting in an order of additional STS and an extension of the stay. We are not aware of any legal authority for the state’s assertion that the district court could hold a second hearing and

revoke probation based on an alleged violation that was already resolved at a prior review hearing. Even if it could, J.P.R. would have been entitled to notice that that violation was the subject of another review hearing. *See* Minn. R. Juv. Delinq. P. 15.07, subd. 1. We therefore cannot affirm the revocation based on J.P.R.'s disorderly conduct conviction.

B. The district court's finding that J.P.R. failed to complete STS is clearly erroneous.

J.P.R. argues that the district court abused its discretion by revoking probation based on his failure to complete STS because the record shows that he did not violate that condition. The November 2 probation-violation report noted that J.P.R. had not completed three days of STS. When that report was made, the deadline to complete STS by November 15 had not yet expired. At the probation-revocation hearing on January 12, 2017, the probation officer testified that, aside from remaining law abiding, J.P.R. had complied with all conditions of probation, including STS. The probation officer's testimony indicates that his previous report was no longer accurate and that J.P.R. fulfilled the STS condition sometime between the November 2 report and the January 12 hearing.

The record is silent as to precisely when J.P.R. completed STS. Evidence that J.P.R. completed STS sometime between November 2 and January 12 does not constitute clear and convincing evidence that J.P.R. failed to complete it by the November 15 deadline. Given the state's burden to prove the probation violation by clear and convincing evidence, the district court's finding that J.P.R. violated the STS condition is clearly erroneous. *See* Minn. R. Juv. Delinq. P. 15.07, subd. 4(D); *Rhoads*, 813 N.W.2d at 885. We therefore conclude that the district court abused its discretion by revoking probation based on its

finding that J.P.R. violated the STS condition. *See S.J.T.*, 736 N.W.2d at 346; *J.A.J.*, 545 N.W.2d at 414.

Because both bases relied upon by the district court for revoking J.P.R.'s probation are unsupported by the record, we reverse the district court's order.

II. J.P.R.'s motion to strike portions of the state's brief is granted.

J.P.R. moved to strike from the state's brief references to matters not in the record. In an order dated May 24, 2017, this court referred J.P.R.'s motion to this panel to be considered along with the merits of the appeal.

"[A]n appellate court may not base its decision on matters outside the record on appeal," and "matters not produced and received in evidence below may not be considered." *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977); *see also* Minn. R. Civ. App. P. 110.01 ("The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases."). We therefore grant J.P.R.'s motion to strike portions of the state's brief.

Reversed; motion granted.