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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1185**

State of Minnesota,
Respondent,

vs.

Jack Lawrence Schwab,
Appellant.

**Filed December 4, 2017
Affirmed
Cleary, Chief Judge**

Goodhue County District Court
File No. 25-CR-14-2777

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

Stephen N. Betcher, Goodhue County Attorney, Erin L. Kuester, Assistant County Attorney, Red Wing, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Cleary, Chief Judge; and Reyes, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

Appellant Jack Lawrence Schwab challenges the district court's revocation of his probation. We affirm.

FACTS

In November of 2014, appellant sexually assaulted his wife. In March of 2015, he pleaded guilty to one count of fourth-degree criminal sexual conduct. The district court stayed imposition of sentence, and placed him on probation for a period of ten years. The conditions of his probation required appellant to participate in a chemical-dependency evaluation and domestic-abuse evaluation, refrain from possessing or using illegal drugs or alcohol, submit to random chemical testing, provide a DNA sample, cooperate with his case plan, maintain a separate residence from his wife, and remain law abiding.

In May of 2016, police responded to reports of an episode of domestic violence involving appellant, his wife, and his children. At a meeting with a department of corrections agent the next day, appellant admitted to using methamphetamine prior to the incident and tested positive for methamphetamine. At his May 31, 2016 probation-violation hearing, appellant admitted the probation violation and the district court accepted his admission. On June 2, 2016, the district court held a second violation hearing, revoked the stay of imposition, and executed appellant's sentence. He appealed the execution of his sentence, arguing that the district court abused its discretion by revoking his probation. This court reversed the execution of his sentence and remanded after determining the district court failed to satisfy the *Austin* factors.

On remand, the district court made a series of more detailed findings. The district court found that appellant admitted intentionally using methamphetamine, a violation of a specific condition of his probation. The district court found that the use of methamphetamine was "another indication of continued criminal activity while . . . on

probation” and his drug use “sabotages the efforts” made by members of his family and probation staff to address his serious mental health and chemical dependence issues. The district court found that appellant was not amenable to probation and that his continued use of methamphetamine made him a danger to himself, his family, and the general public. Appellant objected to the execution of his sentence and the district court reiterated its findings: “[T]he violation has been identified. It was the use of meth. That it was intentional. And that the need for confinement outweighs the policies in favor of probation.” This appeal follows.

D E C I S I O N

Appellant asserts that the district court abused its discretion in revoking his probation and executing his sentence because the evidence did not establish that the need for confinement outweighed the policies favoring probation.

A district court has broad discretion in determining whether there is sufficient evidence to revoke probation and will only be reversed if there is a clear abuse of discretion. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). Before revoking a probationary sentence, a district court must: (1) specifically identify the conditions or condition violated; (2) find that the violation was intentional or inexcusable; and (3) find that the policies favoring probation no longer outweigh the need for confinement. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). When making the three *Austin* findings, “courts are not charged with merely conforming to procedural requirements” and “should not assume that they have satisfied *Austin* by reciting the three factors and offering general, non-

specific reasons for revocation.” *Modtland*, 695 N.W.2d at 608. “[R]ather, courts must seek to convey their substantive reasons for revocation and the evidence relied upon.” *Id.*

Appellant challenges the district court’s findings on the third *Austin* factor. When making a finding on the third *Austin* factor, district courts “should refer” to three additional considerations: (1) whether confinement is necessary to protect the public from further criminal activity by the offender; (2) whether the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (3) whether it would unduly depreciate the seriousness of the violation if probation was not revoked. *Modtland*, 695 N.W.2d at 607. Here, the district court found that appellant’s continued use of methamphetamine was evidence of continued criminal activity and made him a danger to himself, his family, and the general public. These findings are supported by the record and demonstrate that the need for confinement outweighed the policies favoring probation because confinement was necessary to protect the public from continued criminal activity.

Appellant contends that there was no evidence presented that he used methamphetamine when he committed the November 2014 sexual assault and therefore there is no link between the probation violation and a risk to public safety. But there is ample evidence in the record documenting appellant’s history of domestic violence and use of methamphetamine. The probation violation itself presents the most recent link between his drug use and domestic violence: appellant used methamphetamine, became abusive toward his family, and the police were called to intervene. The district court concluded that appellant’s family were victims of his repeated abuse and that his “abuse is typically associated with [the] use of methamphetamine.” The district court found that he could not

control his chemical use and continued to pose a risk to his family, himself, and the public. These findings are supported by appellant's past history of domestic violence and use of methamphetamine and the conduct underlying the probation violation.

Appellant argues that the district court failed to consider his mental health and chemical dependence treatment needs. Appellant has a documented history of substance abuse and mental health issues. The district court acknowledged appellant's mental health and chemical dependence issues but concluded that his continued use of methamphetamine sabotaged any effort made to address those issues and therefore he was not amenable to probation. The district court emphasized that there was not a specific treatment plan or program available for appellant to address his mental health and chemical dependence issues and his past pattern of self-medication made him unamenable to probation. At the original probation violation hearing, the district court discussed the lack of mental health and chemical dependence resources available in the county and stated that they were essentially the same as the services offered by the commissioner of corrections. Given the lack of treatment programs available to appellant and his history of self-medication and domestic violence, the district court adequately considered appellant's mental health and chemical dependence treatment needs as mitigating factors and concluded that the need for confinement outweighed the policies favoring probation.

Finally, appellant asserts that the district court made a reflexive decision in revoking his probation after his first violation involving the one-time use of methamphetamine. But there is no requirement that a district court allow an offender to violate the terms of his probation multiple times before executing his sentence. And the district court had broad

discretion in determining whether there was sufficient evidence to revoke probation and will not be reversed absent a “clear abuse of that discretion.” *Modtland*, 695 N.W.2d at 605 (quotation omitted). The district court reviewed appellant’s lengthy history and current pattern of self-medication, drug abuse, and domestic violence and determined that the need for confinement outweighed the policies in favor of probation. The district court did not abuse its discretion in revoking appellant’s probation and executing his sentence.

Affirmed.