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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1995
A19-0015**

State of Minnesota,
Respondent,

vs.

Cody Padraic Trott,
Appellant.

**Filed August 19, 2019
Reversed
Jesson, Judge**

Freeborn County District Court
File No. 24-CR-17-726

Keith Ellison, Attorney General, St. Paul, Minnesota; and

David Walker, Freeborn County Attorney, Abigail H. Lambert, Assistant County Attorney, Albert Lea, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Schellhas, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

JESSON, Judge

After escaping from custody, appellant Cody Padraic Trott was sentenced to a stayed sentence of 17 months and placed on probation for five years. But the district court

revoked that probation after Trott tested positive for methamphetamine and was charged with crimes in multiple pending cases. Trott challenges the district court's revocation of his probation, arguing that the record was insufficient to support the district court's findings. Because the district court made inadequate findings when considering whether the need for confinement outweighed the policies favoring probation, we reverse.

FACTS

In November 2016, while on intensive supervised release, appellant Cody Padraic Trott ran from his supervised-release agent and subsequently removed his ankle monitoring device.¹ After being apprehended, Trott was charged with and pleaded guilty to escape from custody. In December 2017, the district court sentenced Trott to a stayed sentence of 17 months, placing him on probation for five years.

Seven months later, Trott's probation agent filed a violation report alleging that Trott violated the following conditions of his probation: (1) follow all state and federal criminal laws, and (2) no use of mood-altering chemicals unless prescribed by a medical professional and taken as directed. A contested evidentiary hearing was held in September 2018 on the alleged probation violations.

During the evidentiary hearing, Trott's probation officer testified in support of the alleged probation violations. The probation officer first explained that Trott had 11 pending court files alleging new charges ranging from petty misdemeanors to felonies. The state presented no evidence of the charged conduct, and, at that time, Trott had not

¹ Prior to being on intensive supervised release, Trott was in prison.

been convicted of any of the charges. Trott's counsel stipulated to the existence of the pending charges, which the court accepted. But when considering the pending case files, the district court did not count the petty misdemeanors as crimes.

In support of the second violation, the probation officer testified that Trott failed two urinalysis tests. First, she stated that Trott tested positive for methamphetamine in May 2018. And the second test, administered in July 2018, was positive for amphetamines. The probation officer testified that Trott stated he had a prescription for Adderall, which would have caused the positive test for amphetamine. But Trott's prescription was never verified.

At the end of the hearing, the district court found that Trott violated both of the conditions of probation. The district court identified the first condition as "obey the law and be of good behavior" and found that the existence of nine pending case files demonstrated that Trott violated that condition. But the district court noted that it preferred to see convictions before finding violations on this condition, and that the violation was "tenuous in this sense." The district court further found that Trott violated the second condition, finding that Trott used methamphetamine. And when deciding whether to revoke Trott's probation, the district court stated that it could not ignore the nine pending case files, as well as Trott's dislike of probation. Because of those reasons, it executed Trott's 17-month sentence, with credit for 366 days.

In October 2018, the state filed a motion to reopen the probation-revocation hearing to correct testimony. At the motion hearing, Trott's probation officer testified that she misspoke at the initial probation revocation hearing and that she was not the person who

administered the first urinalysis test. The district court decided to let its previous order stand. Trott appeals the revocation of his probation and seeks reversal of the execution of his sentence.

D E C I S I O N

The district court has broad discretion in deciding whether sufficient evidence exists to revoke probation, and this court will reverse only if there is a clear abuse of that discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). When revoking probation, a district court must: (1) specify the 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.* at 250. These conditions are collectively referred to as the “*Austin* factors.” They dictate that a decision to revoke probation 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 (quotations omitted). It is a question of law whether the district court made the required *Austin* findings, which this court reviews *de novo*. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Trott contends that the district court abused its discretion by revoking his probation because the record was insufficient to support its decision.² Because the district court failed

² Throughout Trott’s argument, he asserts that the probation officer was not credible due to her incorrect testimony, which was the subject of the motion hearing. But the district court found the probation officer credible. And this court defers to the district court for credibility determinations. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff’d*, 508 U.S. 366, 113 S. Ct. 2130 (1993). As a result, we consider the probation officer’s testimony as being credible throughout our analysis.

to make the requisite findings on the third *Austin* factor (that the need for confinement outweighs the policies favoring probation) and impermissibly relied on criminal charges alone, without clear and convincing evidence that Trott committed the alleged conduct underlying those same charges, we agree.

We begin by considering the first two *Austin* factors: the conditions violated were specified and the violation was intentional or inexcusable. Here, the district court determined that Trott violated two probation conditions: (1) follow all state and federal criminal laws, and (2) no mood-altering chemicals unless prescribed by a medical professional and taken as directed. The record supports the determination that Trott used mood-altering chemicals. Specifically, the probation officer testified that Trott's first urinalysis test was positive for methamphetamine and Trott admitted to using methamphetamine. And the district court found that Trott's methamphetamine use was intentional or inexcusable. It noted that "there was some indication of an Adderall prescription but that, to [the court's] knowledge, won't trigger a positive meth test." Nothing in the record demonstrates that the violations were unintentional or excusable. Accordingly, the district court did not abuse its discretion when it considered the first and second *Austin* factors with regard to the condition that Trott not use mood-altering chemicals.

But the record does not support the determination that Trott did not follow all state and federal criminal laws. The district court based its finding that this condition was violated on Trott's criminal charges in nine pending case files. The record contains no evidence that Trott committed the alleged conduct underlying the charges. And criminal

charges alone do not constitute clear and convincing evidence of the alleged underlying criminal conduct. *State v. Scholberg*, 393 N.W.2d 247, 249 (Minn. App. 1986). But because the record supports the finding that Trott violated the probation condition of not using mood-altering chemicals, we move to consider the third *Austin* factor with this condition violation in mind.

The third *Austin* factor requires the district court to assess whether the need for Trott's confinement outweighs the policies favoring probation. In doing so, the district court should consider whether: (1) confinement is necessary to protect the public from further criminal activity, (2) the offender needs correctional treatment that can most effectively be provided in prison, or (3) reinstating probation would unduly depreciate the seriousness of the violation. *Modtland*, 695 N.W.2d at 607.

Here, the district court made specific findings on the third *Austin* factor. After outlining Trott's probation violations and finding that they were intentional, the district court stated:

The third and final factor, and that's where these cases always turn, is the confinement versus probation. And that's the one where it's always difficult for the [c]ourt. The bottom line here is I understand we don't have new convictions here, but we have -- I can't ignore the fact -- that we have nine new files pending. And it appears, from all indications, that -- and maybe Mr. Trott will disagree with me -- in fact, he's made it clear he doesn't like probation and probably isn't, not probably, isn't amenable to probation. For that reason, I'm going to find that the third *Austin* factor has been proven.

Upon review, we conclude that the district court failed to make adequate findings on the third *Austin* factor. It failed to consider the appropriate factors under the third *Austin*

factor, as outlined in *Modtland*. It did not directly tie its analysis on the third *Austin* factor to Trott's use of mood-altering chemicals. Rather, it appears to have based its decision to revoke upon Trott's criminal charges in nine pending case files, none of which were supported by clear and convincing evidence that Trott committed the underlying criminal conduct.

Relying upon pending case files to revoke Trott's probation, without more, was inappropriate. In probation-revocation cases, the state is required to prove a violation by clear and convincing evidence. Minn. R. Crim. P. 27.04, subd. 2(1)(c)b. But a criminal charge need only be supported by probable cause, which "is defined as some showing by evidence which fairly and reasonably tends to show the existence of the facts alleged." *State v. Lopez*, 631 N.W.2d 810, 814 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001). Accordingly, a criminal charge alone is insufficient to support a probation revocation. *See Scholberg*, 393 N.W.2d at 249. As this court stated in *Scholberg*:

By itself, or even where supported by a statement of cause for a complaint, the charge does not fairly demonstrate an intentional act of the probationer. By itself, the act of accusation does not show an act of the probationer, the essential substance of a need for confinement.

Id. Accordingly, if the state proves by clear and convincing evidence that the defendant committed the alleged unlawful conduct underlying a criminal charge, the district court may rely upon that charge in its probation-revocation decision. *See State v. Spanyol*, 358 N.W.2d 125, 127 (Minn. App. 1984) (upholding probation revocation based on alleged criminal conduct that did not result in charges), *review denied* (Minn. Feb. 27, 1985). Here, however, the record contains no substantive evidence to demonstrate that Trott committed

the underlying alleged criminal conduct. And when discussing the third *Austin* factor, the district court acknowledged that there were no new convictions, but stated it could not ignore that there were “nine new files pending.” As such, the district court inappropriately relied upon Trott’s pending charges, without any substantive evidence that Trott committed the underlying criminal conduct, when making the third *Austin* finding.

Still, the state argues that there was ample evidence to support the district court’s decision to revoke Trott’s probation. In support of its argument, the state draws this court’s attention to *State v. Hamilton*, 646 N.W.2d 915, 917-18 (Minn. App. 2002), *review denied* (Minn. Sept. 25, 2002). In *Hamilton*, in reviewing a district court’s probation-revocation decision where it failed to make findings on the second and third *Austin* factors, this court stated, “[w]hile we would prefer that the district court make explicit findings on each element articulated in *Austin*, we conclude on this record that the district court’s decision to revoke [appellant’s] probation was amply supported by evidence and was not an abuse of discretion.” 646 N.W.2d at 918. But subsequently, in *Modtland*, the supreme court held that appellate courts *cannot* affirm a district court’s decision based on sufficient evidence when the district court did not make the requisite *Austin* findings. 695 N.W.2d at 606. Accordingly, the state’s argument is unpersuasive.

In sum, it was inappropriate for the district court to rely upon the existences of Trott’s pending criminal charges when revoking his probation, without clear and convincing evidence that Trott committed the alleged conduct underlying those charges. And because the district court failed to properly balance the need for confinement against the policies in support of probation when it relied upon unproven criminal conduct, its

finding on the third *Austin* factor was inadequate. As a result, the district court abused its discretion when it revoked Trott's probation.

Reversed.