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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1937**

State of Minnesota,
Respondent,

vs.

Anthony Earron Campbell,
a/k/a Anthony Farron Campbell,
Appellant.

**Filed May 23, 2011
Affirmed
Hudson, Judge**

Anoka County District Court
File No. 02-KX-04-007398

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

Anthony C. Palumbo, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Johnson, Chief Judge; and Toussaint, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

On this appeal from a remand to the district court to consider the factors set forth in *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980), appellant argues that the district

court improperly issued findings without holding a hearing and failed to make adequate findings on whether the need for appellant's confinement outweighs the policies favoring probation. Because we conclude that the district court on remand did not abuse its discretion by declining to hold an additional hearing, and the evidence supports the district court's finding that the need for appellant's confinement outweighs the policies favoring probation, we affirm.

FACTS

A jury found appellant Anthony Earron Campbell guilty of first- and fifth-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (2004), and Minn. Stat. § 609.224 (2004), after he hit the victim with a wooden board, causing the victim to sustain substantial injuries. At trial, appellant exercised his right to testify on his own behalf and testified that he was drunk on the night of the incident and did not commit the assault. The district court imposed a 98-month sentence, but stayed execution and placed appellant on probation for 20 years with conditions, including “no use of mood-altering substances.”

After several months, the state sought to revoke appellant's probation based on appellant's alleged violation of failure to remain law-abiding by committing a domestic assault. After a hearing, appellant was released from a probation-violation hold on conditions; the probation-revocation hearing was continued, pending resolution of the domestic-assault matter.

During this period, appellant tested positive for THC. The state then alleged additional probation violations; specifically, appellant's failure to abstain from chemical

use, to obtain a chemical-dependency evaluation, and to pay restitution. After several continuances, the district court held a probation-violation hearing. Appellant admitted to marijuana use, and the state agreed not to proceed on the remaining violations, including the violation based on the domestic-assault charges, which were later dismissed. The district court found that appellant had committed an intentional and unexcused violation of probation and that to continue probation “would unduly depreciate the seriousness of the offense.” But the district court made no explicit finding that the need for appellant’s confinement outweighed the policies favoring probation, the third factor required in the analysis under *Austin*.

Appellant challenged the revocation, and this court reversed and remanded, concluding that the district court’s findings did not satisfy the third *Austin* factor. *State v. Campbell*, No. A10-138 (Minn. App. July 8, 2010) (order opinion). We noted that the third *Austin* factor includes consideration of whether continuing probation would unduly depreciate the seriousness of the violation, rather than the offense, and that even if the court meant to say violation, the court did not “convey [the] substantive reasons for revocation.” *Id.* at 3 (quoting *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005)). We concluded that it would be premature to review the merits of revocation without adequate factual findings and remanded to the district court for “findings on the record in accordance with the principles set forth in *Austin* and *Modtland*.”

On remand, the district court declined to hold an additional hearing. The court issued findings of fact and an order, finding that appellant had intentionally violated a condition of probation by using marijuana and that his behavior “posed a public safety

risk in that [appellant's] use of alcohol and marijuana had preceded his violent assault on [the victim]." The district court also found that the public policy favoring probation was outweighed by the need for appellant's incarceration to protect the public and that allowing him to remain on probation under these circumstances "would depreciate the serious[ness] of his conviction." The district court ordered the remainder of appellant's sentence executed. This appeal follows.

D E C I S I O N

Appellant first argues that the district court failed to follow the remand instructions from this court by not holding an additional hearing. Generally, a district court on remand has the duty "to execute the mandate of the remanding court strictly according to its terms" *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988). If a case returns to the district court on remand without specific directions on how the district court should proceed, the district court has discretion "to proceed in any manner not inconsistent with the remand order." *Id.* We review the district court's compliance with the terms of a remand order for abuse of discretion. *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005).

Appellant argues that, because the district court did not hold a hearing with appellant present to consider additional evidence and arguments, the court failed to make "findings on the record" as directed on remand. Under Minn. R. Crim. P. 27.04, subd. 3(3), "[a] verbatim record must be made of the probation revocation hearing. If a contested revocation hearing is held, the court must make written findings of fact." The "written findings" portion of this requirement may be satisfied by the district court stating

its findings and reasons on the record. *Modtland*, 695 N.W.2d at 608 n.4. But although the language of rule 27.04 states that a recorded hearing must be held, this mandate does not necessarily apply when a probation revocation is remanded solely to comply with *Austin*. Here, the remand was based on the district court's failure to explicitly consider the third *Austin* factor before revoking appellant's probation, and, on remand, the district court adequately articulated its consideration of those factors in written findings without holding a new hearing. The district court also informed counsel of its intention to issue findings without conducting an additional hearing, and neither attorney objected to this procedure. We conclude that the district court complied with this court's directive on remand to make findings "on the record" and that the district court did not abuse its discretion by failing to hold an additional hearing.

Appellant also argues that the evidence did not support the district court's revocation of his probation. The district court has broad discretion to determine whether sufficient evidence exists to revoke probation, and this court will reverse that determination only for a clear abuse of that discretion. *Austin*, 295 N.W.2d at 249–50. The district court's findings of fact are accorded great weight and should not be overturned unless clearly erroneous. *State v. Colvin*, 645 N.W.2d 449, 453 (Minn. 2002). But whether the district court made the findings necessary to revoke probation presents a question of law, which this court reviews de novo. *Modtland*, 695 N.W.2d at 605.

The Minnesota Supreme Court has required that before probation is revoked, the district court must specify the condition or conditions violated; find that the violation was intentional or inexcusable; and find that the need for confinement outweighs the policies

that favor probation. *Austin*, 295 N.W.2d at 250. The third *Austin* factor is satisfied if: “(i) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Id.* at 251 (quotation omitted). When making a decision to revoke probation, the district court must “seek to convey [the] substantive reasons for revocation and the evidence relied upon.” *Modtland*, 695 N.W.2d at 608. “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.’” *Austin*, 295 N.W.2d at 251 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 479, 92 S. Ct. 2593, 2599 (1972) (other quotation omitted)).

Appellant maintains that the district court abused its discretion by revoking probation based on insufficient evidence relating to the third *Austin* factor. He maintains that, rather than weighing the need for appellant’s confinement against the policies favoring probation, the district court engaged in reflexive decisionmaking and improperly revoked appellant’s probation because the judge was personally disappointed by appellant’s actions. Appellant bases his argument on the judge’s statement at sentencing that he hoped to “never see [appellant] in the courtroom again.” Appellant also argues that he committed only a single, technical violation, which was five months old at the time of the revocation hearing and thus should be dealt with in the community, rather than by ordering his sentence executed.

We disagree. Although the district court at the revocation hearing expressed disappointment in appellant's behavior, appellant admitted violating the terms of his probation by engaging in chemical use. And the probation-revocation hearing was continued pending the resolution of additional criminal charges against appellant, not because the state waited an unreasonable length of time to proceed on the chemical-use violation.

Appellant also points out that the district court repeated its earlier misstatement of the law by finding that continued probation would unduly depreciate the seriousness of appellant's *offense*, rather than the seriousness of the *violation*, as required by *Austin*. *Austin*, 295 N.W.2d at 251. But we ordered a remand based on our conclusion that the district court had failed to convey the substantive reasons for revocation. On remand, the district court made a more explicit finding that "[t]he [appellant's] use of marijuana posed a public safety risk in that [his] use of alcohol and marijuana had preceded his violent assault." Based on appellant's trial testimony that he was drunk on the night of the offense, the district court's finding is not clearly erroneous, and we conclude that it adequately conveys a substantive reason for revoking appellant's probation.

Finally, we note that the third *Austin* factor may additionally be satisfied if the district court finds that the offender is in need of correctional treatment which can most effectively be provided if he is confined. *Austin*, 295 N.W.2d at 251. Here, the district court expressly found that appellant was "in need [of] chemical dependence treatment which can be most effectively provided while [he] is incarcerated." This finding satisfies the third *Austin* factor. The record sustains the district court's determination that the need

for appellant's confinement outweighs the policies favoring probation, and the district court did not abuse its discretion by revoking appellant's probation.

Affirmed.