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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1445**

State of Minnesota,
Respondent,

vs.

Kim Kevin White,
Appellant.

**Filed April 2, 2012
Affirmed
Stauber, Judge**

Winona County District Court
File No. 85CR1089

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

Karin Sonneman, Winona County Attorney, Steven R. Ott, Assistant County Attorney, Winona, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from the revocation of his probation, appellant argues that the district court abused its discretion by revoking his probation and executing his sentence because the

evidence did not establish that the need for confinement outweighed the policies favoring his probation. We affirm.

FACTS

In January 2010, appellant Kim Kevin White was charged with two counts of driving while impaired (DWI) after an intoxilyzer test showed that appellant operated a motor vehicle with an alcohol concentration of .21. Appellant subsequently pleaded guilty to one count of felony DWI and, pursuant to a plea agreement, received a guidelines sentence of 36 months with a stay of execution. Appellant was also placed on probation for a period of seven years. Conditions of appellant's probation included abstinence from alcohol and compliance with the law.

While he was on probation, appellant was charged and convicted in Iowa of the following offenses: (1) driving while suspended; (2) harassment of a public officer and trespass; (3) public intoxication; and (4) operating a motor vehicle while intoxicated. A probation violation hearing was held at which appellant admitted to the Iowa offenses as a basis for his Minnesota probation violation. Based on appellant's admissions, the district court found that (1) there was a sufficient factual basis for appellant's admissions; (2) his admissions were "knowing, intelligent, and voluntary;" (3) appellant violated his probation by committing new offenses while he was on probation; and (4) appellant's violations were "intentional and inexcusable." At the subsequent probation violation dispositional hearing, the district court found on the record that appellant's violations were "serious" and "that the need for confinement does outweigh the policies favoring probation." The court also found that "there is a need to protect the public from criminal

activity” and that correctional treatment can be best offered if appellant was confined. The court further noted that “to do something other than revoke [appellant’s] probation would definitely undermine the severity of [his] violations.” Therefore, the court revoked appellant’s probation and executed his sentence. This appeal followed.

D E C I S I O N

To revoke probation, the district court must (1) identify the specific 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. *State v. Austin*, 295 N.W.2d 246, 250–51 (Minn. 1980). This court reviews de novo whether the district court made the findings required under *Austin*. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). But this court reviews for an abuse of discretion whether the record contains sufficient evidence to revoke probation. *Id.*

Appellant concedes that he willfully violated his probation and that the district court made a finding that the violations were intentional and inexcusable. But appellant argues that the district court abused its discretion by revoking his probation because the evidence did not establish that the need for confinement outweighed the policies favoring probation. Instead, appellant contends, treatment is the appropriate option.

In determining whether the offender’s need for confinement outweighs the policies favoring probation, the district court must consider whether: (1) “confinement is necessary to protect the public from further criminal activity by the offender;” (2) “the offender is in need of correctional treatment which can most effectively be provided if he is confined;” or (3) “it would unduly depreciate the seriousness of the violation if

probation were not revoked.” *Id.* at 607. This procedure ensures that the district court does not “reflexively revoke[]” probation when a probation violation is established. *Id.* at 608. The district court is to bear in mind that “policy considerations may require that probation not be revoked even though the facts may allow it.” *Id.* at 606 (quotation omitted).

Here, the district court addressed the relevant factors enumerated in *Modtland*. These findings were based on evidence that appellant violated his probation four times by failing to remain law abiding. The violations were not technical violations, but involve four separate offenses, including one offense for DWI, which was the underlying offense of appellant’s probation. Appellant’s repeated failure to remain law-abiding supports the district court’s finding that confinement is necessary to protect the public from further criminal activity by appellant. Moreover, the record reflects that despite being on probation for DWI, with a condition of probation requiring that he refrain from using alcohol, appellant continued to drink alcohol. Appellant’s repeated use of alcohol while on probation supports the district court’s finding that not revoking appellant’s probation would unduly depreciate the seriousness of the violations. Therefore, the evidence is sufficient as to the third *Austin* factor, and the district court did not abuse its discretion by revoking appellant’s probation.

Affirmed.