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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2261**

State of Minnesota,
Respondent,

vs.

Erik Dennis Weir,
Appellant.

**Filed August 27, 2012
Reversed and remanded
Johnson, Chief Judge**

Martin County District Court
File No. 46-CR-05-1280

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

Terry W. Viesselman, Martin County Attorney, Michael D. Trushenski, Assistant County Attorney, Fairmont, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Johnson, Chief Judge; and Willis, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

JOHNSON, Chief Judge

Erik Dennis Weir challenges the revocation of his probation on the ground that the district court failed to make adequate findings of fact. We agree that the district court did not make a finding relevant to the second *Austin* factor. Therefore, we reverse and remand.

FACTS

In May 2006, Weir pleaded guilty to first-degree driving while impaired (DWI), a violation of Minn. Stat. §§ 169A.20, subd. 1(1), .24 (2004). The district court imposed a sentence of 42 months of imprisonment but stayed execution of the sentence and ordered Weir to serve 180 days in jail and seven years on probation. Weir's probation agreement forbids him from using or possessing mood-altering chemicals, including alcohol, and also forbids him from entering an establishment that has the primary purpose of selling alcohol.

In May 2008, Weir admitted to violating his probation by entering a liquor establishment and drinking alcohol. The district court executed 180 days of Weir's prison sentence but kept him on probation.

In September 2011, Weir admitted to violating his probation for a second time by drinking alcohol. The state requested that the district court execute Weir's sentence. Weir requested that the district court refer him to drug court. The district court's disposition is reflected in its oral findings on the record:

From the record the Court will make a finding that the defendant has admitted the most current violation. The record should also reflect that based on the information and history of this case, this is at least a second formal probation violation hearing, each which has resulted from the use of mood-altering chemicals and that the defendant has been placed on probation for a felony offense of Driving Under the Influence. That means that he's had numerous prior violations for conduct of Driving Under the Influence and, based on the enhancement provisions of the State of Minnesota, he's now risen to the level of the felony level offense.

It appears to the Court that we have in the record at least four prior treatment opportunities, including both while he was in the United States Air Force, and subsequently as a result of his criminal behavior [H]e's attended intensive inpatient treatment, he's attended outpatient treatment, and he's been afforded the opportunity for local support through NA or AA. The Court finds based on the principles of *State v. Austin*, that at this time the demands for public safety exceed the presumption of any further probation, and therefore the Court orders that his sentence be executed. That's all.

Accordingly, the district court executed Weir's 42-month prison sentence, with credit for 232 days. Weir appeals.

DECISION

Weir argues that the district court erred when revoking his probation because the district court did not make adequate findings to support its revocation decision. Specifically, Weir argues that the district court failed to make findings on the second and third *Austin* factors. Weir asks this court to reverse and remand for additional findings concerning whether his probation should be revoked.

The supreme court has prescribed a three-step analysis for deciding whether to revoke probation. A revocation is proper only if a district court (1) designates the specific condition of probation that has been violated, (2) finds that the violation was intentional or inexcusable, and (3) finds that the need for confinement outweighs the policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980); *see also State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). A district court must make findings in writing or make oral findings on the record. *Id.* at 608 n.4. “The trial court has broad discretion in determining if there is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion.” *Austin*, 295 N.W.2d at 249-50. But a reviewing court applies a *de novo* standard of review to the question of whether the district court made adequate findings. *Modtland*, 695 N.W.2d at 605.

In this case, Weir contends that the district court erred with respect to the second *Austin* factor because it did not expressly find “that the violation was intentional or inexcusable.” *Austin*, 295 N.W.2d at 250. The district court found simply that “the defendant has admitted the most current violation.” But the district court did not find that the violation was “intentional or inexcusable” or make any finding that is the equivalent of such a finding. *See id.* The state contends that Weir’s admission demonstrates that his violation was intentional. In doing so, the state essentially asks this court to look to the record for evidence of intent. This mode of analysis has been expressly rejected by the supreme court, which stated that there is no “sufficient evidence exception” to the requirement that a district court make express findings when revoking probation. *Modtland*, 695 N.W.2d at 606. Rather, the supreme court “reaffirm[ed] *Austin*’s core

holding that district courts must make the . . . three findings on the record before probation is revoked.” *Id.* This court cannot, consistent with *Modtland*, rely on evidence in the record to justify a revocation that was not accompanied by findings on each of the three *Austin* factors. *See id.* at 606, 608. Thus, the district court erred by failing to make a finding on the second *Austin* factor.

Weir also contends that the district court erred with respect to the third *Austin* factor because it did not expressly find that the need for confinement outweighs the policies favoring probation. *See Austin*, 295 N.W.2d at 250. The *Austin* court identified three sub-factors that are relevant to the third *Austin* factor: a district court should consider whether (1) confinement is needed to “protect the public from further criminal activity by the offender,” (2) confinement is necessary to provide treatment, or (3) a further stay of the sentence “would unduly depreciate the seriousness of the violation.” *Id.* at 251 (quoting A.B.A. Standards for Criminal Justice, Probation § 5.1(a) (Approved Draft 1970)). A district court may make findings on the third *Austin* factor by making a finding on any one of the three sub-factors. *See id.*

The transcript of the probation violation hearing shows that the district court considered the evidence and found that the need for confinement outweighs the policies favoring probation. The district court found that Weir had several prior convictions for DWI-related offenses. The district court also found that Weir twice had violated the terms of his probation on the 2006 first-degree DWI conviction. The district court further found that Weir had failed chemical-dependency treatment on at least four prior occasions, beginning with treatment he received while serving in the military and

continuing with court-ordered intensive in-patient treatment and out-patient treatment. For these reasons, the district court found that “the demands for public safety exceed the presumption of any further probation.” This finding is relevant to the first sub-factor identified in *Austin*, which asks whether confinement is needed to “protect the public from further criminal activity by the offender.” *Id.* (quoting A.B.A. Standards for Criminal Justice, Probation § 5.1(a) (Approved Draft 1970)). Thus, the district court did not err with respect to its findings on the third *Austin* factor.

If a district court does not make a finding on each *Austin* factor before revoking probation, the appropriate appellate remedy is to reverse and remand for further fact-finding. *See Modtland*, 695 N.W.2d at 608 (reversing and remanding for “new hearing in which findings are to be made”); *Erickson v. State*, 702 N.W.2d 892, 897 (Minn. App. 2005) (reversing and remanding for district court “to make the necessary findings in support of revocation”). We are compelled by the caselaw to reverse and remand this case to the district court for further findings on the second *Austin* factor.

Reversed and remanded.