STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0133

State of Minnesota,
Appellant,

vs.

Leroy McGee, Jr.,
Respondent.

Filed July 15, 2013
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-11-9446

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hooten, Judge; and Willis, Judge.*

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

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant State of Minnesota challenges the district court's sentencing order that continued respondent Leroy McGee, Jr.'s probation following a probation violation. The state argues that (1) the district court failed to make findings pursuant to *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980), and (2) revocation is required because the evidence establishes the third *Austin* factor. Because these arguments are without merit, we affirm.

FACTS

In November 2011, McGee was convicted of driving while impaired, received a stayed prison sentence, and was placed on probation. In November 2012, the probation department filed a violation report and arrest warrant, alleging that McGee violated the conditions of his probation by using alcohol, failing to remain law-abiding, possessing a firearm, and failing to notify probation of police contact.

At his probation-revocation hearing, McGee admitted the alleged violations and pleaded guilty to a gross-misdemeanor charge of being in possession of a pistol without a permit. The state argued that McGee's probation should be revoked in light of his extensive criminal history. But the probation department recommended that the district court continue McGee's probation, impose an intermediate sanction of 365 days in the county workhouse, and order an in-custody chemical-use assessment. Defense counsel requested that the district court follow probation's recommendation, reasoning that it is probation's duty to make recommendations based on its assessments of amenability and

because that department would work most closely with McGee during his supervision. McGee asked the district court for "one more opportunity to prove [himself]" and vowed to make a commitment to treatment.

The district court found that McGee violated probation and that his violations were intentional or inexcusable. The district court continued McGee's probation, sentenced him to 365 days in the county workhouse, and ordered an in-custody rule 25 chemical-use assessment. The state appeals that sentencing decision.

D E C I S I O N

The state challenges the district court's decision to continue rather than revoke McGee's probation. The district 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.

Before revoking probation, *Austin* requires that the district court (1) specifically designate the probationary conditions violated, (2) find that the violation was intentional or inexcusable, and (3) find that need for confinement outweighs the policies favoring probation. *Id.* at 250. The state argues that the district court abused its discretion by failing to make findings pursuant to the third *Austin* factor. But findings under *Austin* are not required "before the imposition of any incarceration as a consequence for a probation violation"; they are necessary only when "a defendant's probation is revoked and the underlying sentence is executed." *State v. Cottew*, 746 N.W.2d 632, 637 (Minn. 2008). Because McGee's probation was not revoked, the district court was not required to make findings pursuant to *Austin*.

The state also argues that revocation was required because the third *Austin* factor was met—that is, the need for McGee's confinement outweighs the policies favoring his probation. But revocation is merely permissive when the *Austin* factors exist. *See* Minn. Stat. § 609.14, subds. 1(a), 3 (2010) (providing that the district court "may" revoke a stayed sentence upon a probation violation); *see also Austin*, 295 N.W.2d at 249-50 (recognizing the district court's "broad discretion" to determine whether to revoke probation). Consequently, the decision to continue probation even if the *Austin* factors are present, alone, would not demonstrate an abuse of discretion.

As a related matter, the state accuses the district court of "setting aside" or refusing to consider the relevance of McGee's criminal history in determining whether to revoke probation. The record belies that assertion. At the probation-revocation hearing, the district court heard extensive argument from the state concerning McGee's criminal background. The district court overruled defense counsel's objection to the state's lengthy recitation of that criminal history and allowed the state to continue on the topic. The district court also noted that the state's sentencing argument was "compelling" *because* of McGee's criminal history, commenting that "it's really hard to set that aside." The district court nonetheless decided to give McGee the opportunity "to start all over again" and "chang[e] [his] life." The district court's reference to this potential for "change" would be superfluous, if not illogical, had it, in fact, ignored McGee's past conduct. Rather than revealing the district court's refusal to consider McGee's criminal background, the record instead demonstrates that the district court considered McGee's

criminal history alongside the competing recommendation and arguments in favor of continued probation.

Finally, the state asserts that there is "no evidence" to support continued probation. But the record includes evidence that the probation department wanted to continue "working with" McGee on probation. And McGee admitted the violations, showed remorse, and expressed a desire for treatment and continued supervision. The ultimate determination of whether the evidence is sufficient to revoke or continue probation lies within the district court's broad discretion. *Austin*, 295 N.W.2d at 249-50.

Because the district court was not required to make findings under *Austin* before revoking probation and because the district court acted within its discretion by continuing McGee's probation, reversal is not warranted.

Affirmed.