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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1716**

State of Minnesota,
Respondent,

vs.

Barry Salvador Rodriguez,
Appellant.

**Filed May 28, 2013
Affirmed
Halbrooks, Judge**

Scott County District Court
File No. 70-CR-06-8708

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney,
Shakopee, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Charles F. Clippert, Special
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the revocation of his probation, arguing that the district court failed to adequately find that the need for his confinement outweighs the policies favoring probation. We affirm.

FACTS

In 2006, appellant Barry Salvador Rodriguez was convicted of felony violation of an order for protection. The district court stayed the execution of a 21-month prison sentence and placed Rodriguez on probation for five years. As conditions of his probation, Rodriguez was required to complete a chemical-dependency evaluation, participate in a domestic-abuse program, abstain from using illegal drugs, submit to random drug testing, and remain law-abiding.

Rodriguez subsequently committed four probation violations. In February 2008, Rodriguez violated probation by using illegal drugs, failing to report to probation, and failing to complete a domestic-abuse program. In May 2009, Rodriguez violated probation, among other reasons, for failing to maintain contact with the probation department, failing to complete a chemical-dependency evaluation, and failing to submit to drug testing. In August 2009, Rodriguez again violated probation for failing to keep in contact with the probation department. After his third violation, the district court ordered Rodriguez to appear at a three-month review hearing and warned him that he would go to prison upon any further violations of his probation.

Rodriguez subsequently absconded from probation, failing to appear at his review hearing. A bench warrant was issued for his arrest. Nearly three years later, Rodriguez was located in Pennsylvania and extradited to Minnesota.

Upon returning to Minnesota, Rodriguez appeared before the district court for a fourth probation-revocation hearing. Rodriguez admitted that, in late 2009, he tested positive for illegal drug use, failed to submit drug-test samples, submitted diluted drug-test samples, and absconded from probation. The district court found that Rodriguez violated several aspects of probation, the violations were intentional and inexcusable, and “the need for confinement in this matter outweighs the policies favoring probation for the reason that it would unduly depreciate the seriousness of the violation if the probation here was not revoked.” The district court revoked Rodriguez’s probation and executed his 21-month prison sentence. This appeal follows.

D E C I S I O N

The district court has broad discretion in determining whether there is sufficient evidence to revoke probation and should not be reversed unless there is a clear abuse of that discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). The sufficiency of the district court’s findings under *Austin* is a question of law, which we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Before the district court may revoke probation and execute a stayed sentence, the district court must (1) identify the specific condition that was violated, (2) find that the violation was either intentional or inexcusable, and (3) “find that need for confinement outweighs the policies favoring probation.” *Austin*, 295 N.W.2d at 250. The district

court must also seek to convey its substantive reasons for revoking probation and the evidence that it relied upon in reaching that decision. *Modtland*, 695 N.W.2d at 608.

Rodriguez argues that the district court abused its discretion by revoking his probation because the district court's finding as to the third *Austin* factor was insufficient and unsupported by evidence. The third *Austin* factor is satisfied if the district court finds that

- (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.

Austin, 295 N.W.2d at 251 (quotation omitted). Here, the district court found that the need for confinement outweighs the policies favoring probation because "it would unduly depreciate the seriousness of the violation if the probation here was not revoked." In support of its decision, the district court cited not only Rodriguez's failure to abide by the conditions of probation, despite having been given "several opportunities to pull it together," but also his unavailability for probationary supervision due to his flight from Minnesota.

On this record, we have no difficulty concluding that the district court made sufficient findings under *Austin* and adequately conveyed its reason for revoking the probation. And, contrary to Rodriguez's contention, the district court's finding as to the third *Austin* factor is supported by ample evidence, namely that Rodriguez had three prior probation violations, he had been given several warnings and opportunities to abide by

probation, he absconded from probation, and he was out-of-state on warrant status for nearly three years.

Despite this record, Rodriguez asserts that the third *Austin* factor cannot be satisfied because he was law-abiding while on warrant status and there is no evidence that he recently used illegal drugs. These arguments lack merit. First, it is simply untrue that Rodriguez was law-abiding while on warrant status—he failed to report to the probation department as he was legally required to do. And the fact that Rodriguez has not failed a drug test since 2009 does not undermine the district court’s findings, especially since Rodriguez was unavailable for drug testing and all other forms of supervision while on warrant status.

Because the district court made sufficient findings under *Austin* and conveyed its substantive reason for revoking probation, the district court acted well within its discretion by revoking Rodriguez’s probation and executing his stayed sentence.

Affirmed.