STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2264

State of Minnesota,
Respondent,

vs.

Nicholas John Olson,
Appellant.

Filed September 30, 2013
Affirmed
Huspeni, Judge[*]

Jackson County District Court
File No. 32-CR-10-167

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

Robert O'Connor, Jackson County Attorney, Jackson, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Young Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Cleary, Judge; and Huspeni, 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

HUSPENI, Judge

Appellant alleges that in revoking his probation the district court abused its discretion. Because our review of the record convinces us that the district court acted within its discretion, we affirm.

FACTS

On November 17, 2010, 19-year-old appellant Nicholas John Olson pleaded guilty to third-degree criminal sexual conduct after having sex with a 13-year-old girl. The district court stayed imposition of Olson's sentence and placed him on probation subject to several conditions, including that he have no contact with minor females except relatives. On June 30, 2011, the district court found that Olson had violated the terms of his probation by having direct contact with an 11-year-old girl and a 15-year-old girl and by failing to complete out-patient treatment as recommended by a psychosexual assessment. The district court revoked the stay of imposition, sentenced Olson to 36 months in prison, stayed execution of this sentence, and again placed Olson on probation subject to numerous conditions, including that he have no unsupervised contact with minor females.[1]

On May 9, 2012, Olson told his probation officer that he had visited his cousin's home where an infant girl lived. Further, as part of an interview occurring prior to a polygraph test required before entering a treatment program, he also admitted having sex

[1] In its probation-revocation order, the district court noted that it was unclear "whether the court intended to remove the relative and family exception from the minor female no contact provision."

with two 17-year-old girls in December 2010 and January 2011.[2] Following a hearing, the district court revoked Olson's probation. This appeal follows.

D E C I S I O N

Olson argues that the revocation of his probation was an abuse of discretion by the district court. The state has the burden of proving an alleged probation violation by clear and convincing evidence. Minn. R. Crim. P. 27.04, subd. 2(1)(c)b. When revoking probation, the district court must: "(1) designate the specific condition or conditions that were violated; (2) find that the violation was intentional or inexcusable; and (3) find that need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). A district court's failure to address these three factors requires reversal and remand, even if the evidence was sufficient to support revocation. *See State v. Modtland*, 695 N.W.2d 602, 606, 608 (Minn. 2005) (rejecting this court's caselaw that applied a "sufficient evidence exception" to the requirement for *Austin* findings). A district court may find that the third *Austin* factor is satisfied if it finds that any of three sub-factors are present: (1) "confinement is necessary 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." *Austin*, 295 N.W.2d at 251 (quotation omitted).

[2] Olson argued in district court that he only admitted having sex with the 17-year-old girls because he was required to submit to a polygraph examination. The district court concluded that Olson's "Fifth Amendment right against self-incrimination was not violated by the impending polygraph examination, because the polygraph examination was not imposed or threatened as a sanction to compel [Olson] to waive his right to remain silent." Olson does not challenge admission of this evidence on appeal.

A 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." *Id.* at 249-50. But a district court should revoke probation "only as a last resort when treatment has failed" or when the probationer has demonstrated that he or she "cannot be counted on to avoid antisocial activity." *Id.* at 250-51 (quotations omitted). Whether the district court made the proper findings before revoking probation is a legal question we review de novo. *Modtland*, 695 N.W.2d at 605.

The district court revoked Olson's probation after considering all three *Austin* factors. Olson's argument focuses on the third *Austin* factor. He argues that the district court erred because it failed to "weigh the competing interests as required under *Austin*" when concluding that the need for confinement outweighed the policies favoring probation. Olson's argument lacks merit. The district court determined that Olson was "not amenable to probation because [he] violated his probation on at least two occasions" and further noted that Olson "violated the core condition of his probation on multiple occasions by having contact, including sexual conduct, with minor females." And at the revocation sentencing hearing, the district court explained that revocation was necessary because any other action would unduly depreciate the seriousness of the violations. Although somewhat abbreviated, the district court's findings are sufficient for this court to conduct meaningful review and to sustain the revocation.

Olson also argues that "[w]hile the court considered the factors which weighed against keeping [him] on probation, it failed to consider the reasons favoring a continued, amended probation." While recognizing that the district court relied substantially on the

sexual contact with two 17-year-old girls,[3] Olson argues that such contact demonstrates his continuing need for treatment rather than being a factor supporting revocation. There is no merit to this argument. In addition, Olson cites no authority requiring the district court to explicitly consider any reasons favoring continued probation. *See State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (stating that an assignment of error in brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection), *aff'd* 728 N.W.2d 243 (Minn. 2007). In fact, Olson cites the three *Austin* sub-factors as the guideline for "deciding the third-prong of the *Austin* test."

Olson argues, nonetheless, that the district court failed to "consider [his] interest in freedom." *See Austin*, 295 N.W.2d at 250 ("There must be a balancing of the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety."). But the fact that Olson would prefer to be on probation, rather than imprisoned, is implicitly a common-sense conclusion and requires no specific acknowledgement by the district court.

In conclusion, the district court properly considered each of the *Austin* factors and found that a further stay of Olson's sentence would unduly depreciate the seriousness of his probation violations. The district court therefore acted within its discretion by revoking Olson's probation.

Affirmed.

[3] The district court appeared to place little reliance on Olson's contact with the infant as a basis for the revocation and explicitly noted that Olson's "probation would not be revoked for" his alcohol use.