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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0505**

State of Minnesota,
Respondent,

vs.

Zachary Steven Becker,
Appellant.

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

Le Sueur County District Court
File No. 40-CR-08-1122

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

Brent Christian, Le Sueur County Attorney, Jason L. Moran, Assistant County Attorney,
Le Center, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant challenges the district court's revocation of his probation following repeated probation violations, arguing that the evidence does not establish that the need for confinement outweighs the policies favoring probation. We affirm.

FACTS

In 2009 appellant Zachary Steven Becker was convicted of one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b) (2008). The district court stayed adjudication and placed appellant on probation for ten years. Conditions of probation included that appellant "remain law-abiding, [with] no convictions of [any] misdemeanor or greater offense," complete sex-offender treatment, and maintain contact with his probation officer.

In February 2010, the district court found that appellant violated his probation by failing to complete sex-offender treatment and by failing to follow conditions of his probation. The district court reinstated appellant's probation. Another violation report was filed in August 2010. At the subsequent revocation hearing, the district court found that the state failed to prove the violation.

In March 2011, appellant pleaded guilty to two misdemeanor charges. Appellant admitted at a probation violation hearing that these two misdemeanors amounted to a violation of his probation by reason of his having failed to remain law-abiding. Appellant also admitted that he had failed to complete the sex-offender treatment program, and that this was also a violation of his probation. The district court accepted

the admissions, vacated the stay of adjudication, and imposed a 36-month prison sentence. The district court stayed execution of the sentence and reinstated appellant to probation with the additional condition that appellant register as a predatory offender.

In June 2011, appellant was arrested in Waseca County for failing to register as a predatory offender, a felony. Appellant pleaded guilty, and the district court stayed his 16-month prison sentence.¹

In December 2011, appellant pleaded guilty to two new misdemeanor theft charges in Le Sueur County. The district court accepted appellant's admission that he violated his probation by failing to remain law-abiding by virtue of the misdemeanor theft convictions and by failing to report to his agent as directed. The court noted:

I may in the end sign the warrant for your commitment to the Commissioner of Corrections, but the decision to serve this prison sentence has been yours. And you have made it consistently. I look at a file where the sentencing is two-and-a-half years old and there [are] four separate probation violation reports in there. . . . There is only so far this can go. I think confinement is necessary here to protect the public from further criminal activity. . . . [I]t remains a fact, and it is—it is in my mind irresponsible to allow people who are committed of criminal sexual conduct offenses to walk the street without treatment . . . you are in need of correctional treatment, I hope it can be provided in—in confinement. . . . It appears to me that it can't be provided outside the confinement. And this is the same argument I said before . . . you can lead a horse to water . . . but we can't make [appellant] drink. I also believe it depreciates the seriousness of violations here if it were not revoked.

¹ We reversed and remanded that felony conviction in *State v. Becker*, No. A12-0226 (Minn. App. Apr. 22, 2013). However, our decision in that appeal does not affect the outcome of this probation-revocation appeal because, as discussed below, the district court did not consider the Waseca felony conviction in determining whether revocation was appropriate.

The district court revoked appellant's probation and executed the 36-month prison sentence "with a 10-year conditional release period and credit for time served." This appeal followed.

DECISION

When a probationer violates a condition of probation, the district court may continue probation, revoke probation and impose the stayed sentence, or impose intermediate sanctions. Minn. Stat. § 609.14, subd. 3 (2010). 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." *State v. Austin*, 295 N.W.2d 246, 249–50 (Minn. 1980).

Prior to 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." *Id.* at 250, *quoted in State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). A district court's failure to address all three *Austin* factors requires reversal and remand, even if the evidence was sufficient to support revocation. *Modtland*, 695 N.W.2d at 606, 608 (rejecting this court's caselaw that applied a "sufficient evidence" exception to the requirement for *Austin* findings).

When a district court decides to revoke probation, it must provide substantive, fact-specific reasons for doing so. *Id.* at 608. When conducting an *Austin* analysis, it is inadequate to simply recite the three *Austin* factors and offer "general, non-specific

reasons for revocation.” *Id.* Rather, a district court must “convey [its] substantive reasons for revocation and the evidence relied upon,” thereby creating a “thorough, fact-specific record[] setting forth [its] reasons for revoking probation.” *Id.* While written orders are not required, the district court should at least “stat[e] its findings and reasons on the record, which, when reduced to a transcript, is sufficient to permit review.” *Id.* at 608 n.4.

The district court’s analysis of the *Austin* factors is reviewed for abuse of discretion. *Id.* at 605. However, whether the district court made each of the required findings presents a question of law, which we review de novo. *Id.* The first two *Austin* factors are not at issue here. Appellant argues that the district court abused its discretion in finding that the need for confinement outweighs the policies favoring probation.

The district court is required to balance “the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *Austin*, 295 N.W.2d at 250. In doing so, the district court must consider whether

- 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.

Id. at 251 (quotation omitted); *see also Modtland*, 695 N.W.2d at 607 (stating that the subfactors are relevant to the balancing test). Additionally, the district court must not act reflexively to an accumulation of technical violations but rather must determine that the

“offender’s behavior demonstrates that he . . . cannot be counted on to avoid antisocial activity.” *Austin*, 295 N.W.2d at 251(quotation omitted).

The district court found that appellant violated conditions of his probation on three separate occasions by failing to complete sex-offender treatment, failing to report to his probation officer, and failing to remain law-abiding. Immediately before admitting the present probation violations, appellant had entered pleas of guilty to two misdemeanor theft charges. These violations are not merely technical. *See Austin*, 295 N.W.2d at 251 (finding that failure to “show a commitment to rehabilitation” is sufficient to support revocation so as not to denigrate the seriousness of the violation); *State v. Rottelo*, 798 N.W.2d 92, 94–95 (Minn. App. 2011) (affirming probation revocation because the probationer failed to stay in contact with his probation officer even though the probationer committed no new crimes). The district court had previously warned appellant that he was “dancing fast and loose around the edges of [his] probation, which is a mistake.”

At the final probation violation hearing, the district court reviewed the violations and determined that, “it depreciates the seriousness of violations here if [probation] were not revoked.” Thus, the district court satisfied the third *Austin* requirement by finding that at least one of its three elements was met. *See Austin*, 295 N.W.2d at 251. The record establishes that the district court did not act reflexively in revoking appellant’s probation. The district court did not rely on appellant’s failure-to-register conviction from June 2011. Although that conviction was mentioned by counsel, our careful review of the record reveals no reference to that offense by the district court in its decision to

revoke probation. Having previously reinstated appellant to probation twice after probation violations, and in light of appellant's new misdemeanor offenses and his admitted failure to complete sex-offender treatment, which was ordered as a condition of his probation, the district court concluded that "confinement is necessary here to protect the public from further criminal activity." The district court did not abuse its discretion in revoking appellant's probation.

Affirmed.