STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0334

State of Minnesota,
Respondent,

vs.

Frank Jessie LaRose,
Appellant.

Filed January 15, 2008
Affirmed
Minge, Judge

Cass County District Court
File No. KX-05-1182; KX-05-1201

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Earl Maus, Cass County Attorney, Cass County Courthouse, 300 Minnesota Avenue, P.O. Box 3000, Walker, MN 56484-3000 (for respondent)

John M. Stuart, State Public Defender, Philip Marron, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Minge, Judge.

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

MINGE, Judge

Appellant challenges the district court's revocation of his probation, arguing that the district court failed to make adequate findings as required by *Austin* and *Modtland*

and that the evidence is insufficient to show that the need for confinement outweighs the policies favoring probation. *See State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005); *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). Because we conclude that the findings are adequate and that the district court did not abuse its discretion in revoking appellant's probation, we affirm.

FACTS

The dates of, variety of, and hearings on appellant Frank Jessie LaRose's various violations are complicated. For our purposes, it begins in March 2005, when appellant, then a juvenile, was convicted in juvenile court of the felony offense of terroristic threats. The next incident occurred on August 9, 2005, when appellant used a knife to demand money from another juvenile and took a check and $80 in cash from that juvenile. Two days later, appellant was found in possession of a .22 caliber rifle. Appellant was 17 years old and intoxicated at the time of both matters. In September 2005, appellant agreed to be prosecuted as an adult and pleaded guilty to attempted aggravated robbery and felon-in-possession of a firearm.

At sentencing in November 2005, the district court stayed execution of concurrent sentences for the two August violations and placed appellant on probation for ten years. The conditions of probation required appellant to refrain from the use, possession, or purchase of mood-altering chemicals, remain law abiding, complete a chemical-health assessment, and follow the recommendations of that assessment.

On December 1, 2005, appellant committed a fifth-degree assault and made terroristic threats. On December 14, 2005, appellant consumed alcohol, refused to submit

to a breath test, and then failed to report the incident to his probation agent. At a hearing on December 19, appellant admitted that he had violated his probation by failing to abstain from alcohol and remain law abiding. The district court ordered a new chemical-health assessment and continued the matter.

At a hearing on December 27, the district court accepted the recommendation of the chemical-health assessment and ordered appellant to complete a 90-day inpatient chemical-dependency program at Mash-Ka-Wisen, a culturally appropriate treatment program for Native Americans.

In April 2006, appellant next appeared on the December 2005 charges. By then, appellant had completed his inpatient treatment program and was scheduled to go to a halfway house in Duluth. The district court ordered appellant to enter the halfway house.

On May 2, 2006, appellant left the halfway house without staff permission and did not return. Ultimately, appellant was taken into custody. On August 14, 2006, he pleaded guilty to felony escape and admitted that the escape violated the terms of his probation. The district court thereafter ordered a presentence investigation and a psychological evaluation.

On October 9, 2006, a sentencing hearing was held on the escape charge. The prosecutor requested revocation of probation and imposition of a consecutive sentence on the escape conviction. Defense counsel noted that appellant could reside with his sister and work nearby; counsel further noted that the probation office was willing to continue to work with appellant. The district court continued the matter so that it could review the psychological evaluation. On October 23, 2006, appellant pleaded guilty to misdemeanor

fifth-degree assault for the December 2005 incident. On November 13, 2006, revocation of probation and final sentencing hearings were held. The sentencing was for both the December 2005 assault and the May 2006 escape. The state moved to revoke appellant's probation for the August 2005 convictions and for sentencing on the escape and fifth-degree assault offenses. Defense counsel requested that appellant's probation be reinstated and that appellant be placed on probation for the new offenses. Defense counsel again noted that the probation office was willing to work with appellant and that he had the support of family.

At the November 13 hearing, the district court revoked appellant's probation and executed sentence on the August 2005 aggravated robbery and firearm offenses. The district court also imposed sentence on the December 2005 fifth-degree assault and the May 2006 escape offenses. The district court made no separate, written findings, but made the following statement on the court record:

> Mr. LaRose, this is a difficult decision, but I have to be concerned about public safety. And your record of crime does not make me feel comfortable that I can allow you to be a risk to public safety. It's just a matter of time before you really hurt somebody very badly.
>
> Now you have had the psychological evaluation done. That will be given to the Commissioner of Corrections. And there are programs there that you can avail yourself of to obtain help. I hope that you will take advantage of those programs. And I truly wish I did not have to do this, but I do not see an alternative.

This appeal followed.

D E C I S I O N

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." *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). Before revoking probation, the district court must make written findings that (1) designate the specific probation condition or conditions violated; (2) find that the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). "The 'written findings' requirement is satisfied by the district court stating its findings and reasons on the record, which, when reduced to a transcript, is sufficient to permit review." *Id.* at 608 n.4. The issue of whether the district court's findings are sufficient is a legal question that we review de novo. *Id.* at 605.

Here, the district court here made no separate, written findings of fact and did not recite the *Austin* factors. But appellant agrees that he failed to remain law abiding because he consumed alcohol and committed felony escape while on probation, which satisfies the first *Austin* factor. And appellant does not claim that his violations were unintentional or excusable, or otherwise raise any challenges to the second *Austin* factor. Rather, he focuses on the third *Austin* factor and argues that the district court failed to make adequate findings on whether the need for confinement outweighs the policies favoring probation, and that the evidence in the record fails to support such findings.

Consideration of this third factor involves a balancing of public safety, the probationer's interest in freedom, and other alternatives. It is satisfied if (1) confinement

is necessary to protect the public from further criminal activity; or (2) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (3) it would unduly depreciate the seriousness of the violation if probation were not revoked. *Austin*, 295 N.W.2d at 251.

The district court stated that it was concerned about "public safety" given appellant's continuing record of violent behavior and that it "d[id] not see an[y] alternative." Here, it is abundantly clear that the initial felonies, which involved robbing a victim with a knife and felon in possession of a firearm, were both violent in nature. The record shows that appellant violated his probation when he made terroristic threats, committed fifth-degree assault and consumed alcohol in December 2005, and escaped from the halfway house in May 2006. Appellant's long history of criminal behavior has generally been associated with alcohol use. These facts, especially appellant's pattern of continuing to use alcohol and violate probation, support the district court's concern that appellant continues to be a risk to public safety. *See State v. Osborne*, 732 N.W.2d 249, 256 (Minn. 2007) (concluding that district court had discretion to revoke probation after "full review of [offender's] lengthy history of criminal activity and chronic probation and treatment failures").

The district court specifically considered alternatives within the prison system to deal with and treat appellant's emerging mental health problems, which were identified in the psychological evaluation and which have never been addressed or treated. In particular, the psychological evaluation suggested that appellant has Bipolar Disorder and that his mental health problems have never been treated other than by the administration

of seroquel medication during the month prior to the evaluation. The evaluator recommended that appellant be treated for his mental health problems by continuing his medical treatment for Bipolar Disorder, obtaining a psychiatric evaluation, evaluating his level of intellectual functioning, participating in a cognitive restructuring program, and participating in anger management. The district court specifically considered the recommendations and acknowledged that appellant could avail himself of opportunities for treatment within the prison system.

We recognize that the district court's statements regarding probation revocation at the November 13, 2006 hearing are sketchy. However, in the context of this unique record, we conclude that the transcript of the district court's statement is adequate to establish that the "need for confinement outweighs the policies favoring probation," *Austin*, 295 N.W.2d at 250, and that the third *Austin* factor is met. We therefore affirm the decision to revoke appellant's probation.

Affirmed.

Dated: