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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-198**

State of Minnesota,
Respondent,

vs.

William Bruce Arthur,
Appellant.

**Filed December 1, 2009
Affirmed
Kalitowski, Judge**

Anoka County District Court
File No. 02-K1-06-009755

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

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Marie L. Wolf, Interim Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

On appeal from the order revoking his probation, appellant William Bruce Arthur argues that the district court abused its discretion because the revocation was based on violations of prehearing release conditions and not probation conditions. Alternatively, appellant argues that he was denied due process when he did not receive a probation-violation hearing. We affirm.

DECISION

Appellant pleaded guilty to felony first-degree driving while impaired (test refusal), in violation of Minn. Stat. §§ 169A.20, subs. 2, 3, 169A.24, subs. 1(1), 2 (2006). Pursuant to a plea agreement, appellant was sentenced to 42 months' imprisonment with a stay of execution, five years of conditional release to follow, and seven years of probation. On September 25, 2008, appellant admitted to three probation violations. Instead of immediately executing the sentence, the district court continued the disposition to October 30, 2008, stating that if appellant violated any of the prehearing release conditions set forth at the hearing, including strict compliance with the Intensive Supervision & Alcohol Program (ISAP), it would execute the sentence. At the October 30 disposition hearing, the district court revoked appellant's probation and executed his sentence.

The district court has broad discretion in determining whether there is enough evidence to revoke probation and should only be reversed when there is a clear abuse of discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). But whether a district

court has made the required findings to revoke probation is a question of law, which we review de novo. *See State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

If the court determines that there is clear and convincing evidence that the probationer violated a condition of probation, or if the probationer admits to a violation, the court may continue to stay the execution of the sentence under original or modified conditions, or may revoke the probation and execute the sentence. *State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008) (citing Minn. R. Crim. P. 27.04, subd. 3(3)). The purpose of probation is rehabilitation, and revocation is a last resort only when treatment has failed. *Austin*, 295 N.W.2d at 250. Before a district court revokes probation, it must satisfy the *Austin* factors by: (1) designating the specific condition of probation that was violated; (2) finding that the violation was intentional or inexcusable; and (3) finding that the need for confinement outweighs the policies favoring probation. *Modtland*, 695 N.W.2d at 606.

Violations of Probation Conditions Imposed by the Court

Appellant argues that the district court abused its discretion when it revoked his probation and executed the stayed sentence because the decision to revoke was based on violations of prehearing release conditions, not conditions of his probation. Because the record reflects that the revocation was based on appellant's admissions to three probation violations, not on the violations of the ISAP conditions imposed at the September 25 hearing, we disagree.

Appellant relies on *State v. Ornelas*, where the supreme court reversed the district court's revocation of the defendant's probation for violating a requirement that was not

actually imposed by the court, even though the defendant had notice of the requirement and believed it to be a condition of probation. 675 N.W.2d 74, 80-81 (Minn. 2004). The *Ornelas* court held that the first *Austin* factor was not satisfied because “inherent in [the] consideration of the specific condition designated as having been violated is the question of whether the condition was actually imposed as a condition of probation.” *Id.* at 79. Appellant contends that, similarly, his probation was revoked for violating a prehearing release condition (ISAP rule violations), not a probation condition actually imposed by the court; thus, the violations could not be the basis for revoking his probation.

But the basis for appellant’s probation revocation was not the violations of the prehearing release conditions; it was the three violations of probation conditions that appellant admitted to on September 25, 2008. The district court had a sufficient basis at that time to revoke appellant’s probation and execute the sentence. *See* Minn. R. Crim. P. 27.04, subd. 3(3) (providing that the district court may execute a stayed sentence if the probationer admits the violation). The imposition of the additional conditions on September 25 was an attempt by the district court, at appellant’s request, to allow him one last chance to participate in rehabilitation before executing his sentence. Thus, unlike *Ornelas*, here the first *Austin* factor was satisfied because the district court designated the specific conditions that were violated at the September 25 probation violation hearing, and they were probation conditions actually imposed by the court.

In addition, the district court made specific findings to satisfy all three *Austin* factors. *See Modtland*, 695 N.W.2d at 608 (“The requirement that courts make findings under the *Austin* factors assures that district court judges will create thorough, fact-

specific records setting forth their reasons for revoking probation”). The court discussed appellant’s “long track record of refusing to submit to testing,” referencing the three probation violations, the two ISAP violations, appellant’s failure to continue taking the ISAP tests after October 8, and his history of driving-while-impaired convictions. The district court found that the probation violations were intentional and inexcusable, and that given appellant’s history of convictions for driving while impaired, the need for confinement outweighed the policies favoring probation.

When appellant violated the prehearing release conditions imposed on September 25 by failing to abide by the ISAP rules, the district court had the discretion to execute the sentence or to continue the stay based on appellant’s admitted probation violations. Thus, the district court acted within its discretion when it executed the sentence on October 30, 2008, and made findings sufficient to satisfy the *Austin* factors.

Due Process

Appellant argues that if the ISAP violations were violations of probation conditions, he was entitled to a formal revocation hearing. Specifically, appellant argues that because he was not allowed to present witnesses at the October 30 disposition hearing to testify as to the failure of the ISAP equipment on September 28, he was denied due process, requiring reversal of his probation revocation. We disagree.

Probation revocation results in a loss of liberty, and thus a probationer is entitled to both a hearing to determine probable cause and a revocation hearing under the conditions set forth in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972). *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 1759-60 (1973). At the

revocation hearing, both the probationer and prosecution have the right to offer evidence, present arguments, and call and cross-examine witnesses. Minn. R. Crim. P. 27.04, subds. 2(1)(d), 3. The probationer may also offer mitigating evidence as to why the violation, if proved, should not result in revocation. *Id.* A violation is mitigated where it was unintentional or excusable. *Cottew*, 746 N.W.2d at 636.

Appellant argues that he was entitled to a formal revocation hearing. But appellant had such a hearing on September 25, 2008, at which time he admitted to three serious probation violations. At this hearing, appellant was represented by counsel. He had the right to offer evidence, present arguments, subpoena witnesses, call and cross-examine witnesses, and present mitigating circumstances as to why the violation should not result in revocation. *See* Minn. R. Crim. P. 27.04, subd. 2(a)-(d) (setting forth the due process requirements that apply to all probation-revocation proceedings). Appellant's right to due process was vindicated at the September 25, 2008 hearing.

Furthermore, appellant had an opportunity to address the ISAP violations at the October 30 hearing. Appellant was allowed to testify, and claimed that his September 28 violation was due to a machine malfunction, and he provided a negative urine sample the following day. Appellant explained that with regard to an October 4 missed test, he had overslept, but submitted to a breath test by the police shortly after. As to stopping testing on October 8, appellant explained that he knew there would be a warrant out for him. Notably, appellant's counsel declined the court's offer to proceed with a more formal hearing, at which the court would hear from witnesses under oath. Despite appellant's waiver, the district court took testimony from a corrections agent familiar with ISAP,

who testified that after appellant missed three calls for tests on September 28, the machine's history was examined and it was concluded that nothing was wrong with it. In light of appellant's admissions to three probation violations, the court's warning at the September 25 hearing that appellant be "perfect in terms of everything you are required to do," and the substantive hearing on October 30, 2008, we conclude that appellant's due process rights were not violated when the court revoked his probation.

Because the district court acted properly when it revoked appellant's probation and executed his sentence based on the three probation violations admitted to on September 25, 2008, we conclude that the district court did not abuse its discretion.

Affirmed.