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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-143**

State of Minnesota,
Respondent,

vs.

Ohohshecha Defoe,
Appellant.

**Filed August 24, 2010
Affirmed
Worke, Judge**

Washington County District Court
File No. 82-CR-08-8920

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

Doug Johnson, Washington County Attorney, Sarah E. Kerrigan, Assistant County Attorney, Stillwater, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court abused its discretion in revoking his probation by failing to make sufficient findings supporting the determination that his

need for confinement outweighs the policies favoring probation, and finding that he is not amenable to probation and that continued probation would depreciate the severity of his offense. We affirm.

FACTS

Appellant Ohohshecha Defoe, a convicted sex offender, refused to register as a predatory offender. As a result, he was charged with failing to register as a predatory offender. Appellant entered an *Alford* plea on February 2, 2009, and the district court stayed the presumptive 36-month sentence pursuant to the negotiated plea agreement. Appellant appeared before the district court on May 27, 2009, for a probation-revocation hearing. Appellant was alleged to have violated his probation by failing to maintain contact with his probation officer (PO). Appellant admitted the violation and the district court reinstated the terms of appellant's probation, ordering appellant to serve nine months as a punishment for the violation.

Appellant was released on August 20, 2009, and registered a Minneapolis shelter as his primary residence. But appellant never contacted his PO following his release, and his PO confirmed that he never stayed at the shelter that he registered as his primary residence. Appellant was arrested and appeared for a second probation-revocation hearing. The district court found that appellant violated the terms of his probation by failing register a primary residence, thereby failing to register as a predatory offender, and failing to maintain contact with his PO. The district court found that these violations were intentional and inexcusable. The district court noted its leniency at the first revocation hearing when appellant was simply "released with a promise by [appellant]

and [a] lecture from [the court], conditioned on getting with the program, [and] comply[ing] with the terms of probation.” The district court determined that appellant had made “utterly no contact” with his PO, finding that:

from the date of the plea to the date of the last hearing in May to today, [the court has not] heard or observed or read anything to believe [appellant] is amenable to the conditions of probation that have been imposed in this case. . . .

[The court] find[s] further that [appellant] has rendered himself not amenable to probation, based on his actions, lack of actions, and that [this] unduly depreciates the seriousness of the violation if probation [was] not revoked. Further, that confinement is necessary to protect the public.

The district court revoked appellant’s probation and executed the presumptive sentence. This appeal follows.

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). Whether a district court makes the requisite findings to support a probation revocation presents a question of law subject to de novo review. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). In *Austin*, the supreme court set forth a threefold analysis that district courts must conduct prior to revoking probation: “1) designate the specific condition or conditions that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that the need for confinement outweighs the policies favoring probation.” 295 N.W.2d at 250.

Appellant challenges only the district court’s findings pertaining to the third factor, arguing that the district court failed to articulate the reason why executing his

sentence outweighs the policies favoring probation. The supreme court noted that, when making the third *Austin* finding, “courts must balance the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *Modtland*, 695 N.W.2d at 606-07 (quotation omitted). This balance involves consideration of whether: “confinement is necessary to protect the public from further criminal activity by the offender; or [] the offender is in need of correctional treatment which can most effectively be provided if he is confined; or [] it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Id.* at 607 (quotation omitted).

The district court made findings supporting the third factor, specifically finding that appellant is not amenable to probation and, consequently, it would “unduly depreciate[] the seriousness of the violation if probation were not revoked.” Accordingly, the district court did not fail to make sufficient findings to revoke appellant’s probation.

Appellant alternatively argues that the district court abused its discretion by finding that the need for executing his sentence outweighs the policies favoring probation. The parties stipulated to the admission of six evidentiary exhibits at the second probation-revocation hearing: (1) appellant’s probation agreement; (2) appellant’s predatory-offender registration completed upon his release on August 20; (3) the chronological notes of appellant’s probation made by his PO; (4) an e-mail from an investigating officer to the PO regarding appellant’s last contact with the shelter that he listed as his primary residence; (5) a chemical-health report confirming that appellant completed an assessment while in custody; and (6) a letter from an individual at the

Division of Indian Works social-services program. Appellant's probation agreement states that he must register as a predatory offender and maintain contact with his PO. Appellant signed this document and thus was aware of these requirements. The case notes of appellant's PO state that she instructed appellant that he needed to contact her when he was released and that appellant failed to do so. The case notes further indicate that appellant failed to make any contact with his PO from the date of his release in August until he was apprehended. Appellant also registered a shelter as his primary residence, but the e-mail from the investigating officer confirmed that appellant had not checked in at the shelter since his release. This evidence cumulatively demonstrates that appellant made little or no attempt to comply with the terms of his probation.

The thrust of appellant's argument is that he is amenable to probation; he asserts that he struggled to comply with the terms of his probation because he was homeless after his most recent release. Appellant claims that the letter from the social-services agency submitted into evidence indicates that he was making strides to comply with the terms of his probation. But the letter indicates that appellant failed to attend a scheduled meeting and therefore does not illustrate any actual progress made by appellant. Moreover, appellant's contact with a social-services agency demonstrates that he had the ability to contact his PO, and thus his homelessness is not an adequate excuse for failing to make any contact since his release.

The evidence sufficiently supports the district court's decision that appellant made no meaningful effort to comply with the terms of his probation. Given the nature of the charge—failure to register—and appellant's first probation violation for failing to

maintain contact with his PO, as well as the initial leniency he received, the record supports the district court's finding that appellant is not amenable to probation. Thus, the district court did not abuse its discretion in finding that continuing appellant's probation would depreciate the severity of his offense and consequently that his need for confinement outweighs the policies favoring probation.

Affirmed.