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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1775**

State of Minnesota,
Respondent,

vs.

Douglas Paul Pierce,
Appellant.

**Filed June 23, 2014
Affirmed
Stauber, Judge**

Ramsey County District Court
File No. 62CR116011

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin Butler, Assistant State
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from the order revoking appellant's probation and executing his 39-month prison sentence, appellant argues that the district court abused its discretion by

revoking his probation because the evidence was insufficient to show that his need for confinement outweighed the policies favoring probation and instead shows that the decision revoking probation was a reflexive reaction based on the district court's comments at sentencing. We affirm.

FACTS

In August 2011, appellant Douglas Paul Pierce was charged with violation of an order for protection (OFP) and domestic assault. Appellant subsequently pleaded guilty to the OFP violation and, under the terms of his plea agreement, the domestic assault charge was dismissed. The district court then granted appellant's request for a downward dispositional departure and sentenced appellant to 39-months in prison, but stayed execution of the sentence and placed appellant on probation for five years. At the time of sentencing, the district court informed appellant that "I'm not going to give you a second chance, okay. This would be felony number 20, and if you violate and you come to me, you're going to prison."

Three days after he was sentenced, appellant violated the terms of his probation when he was arrested on December 23, 2012, for theft and possession of methamphetamine. Appellant's probation officer filed a recommendation to vacate the stay of execution because appellant failed to report to probation and failed to report his December 23 arrest. Appellant admitted the violations at the probation-violation hearing on June 20, 2013. Although this was appellant's first violation, the probation department did not believe appellant was amenable to probation in light of his extensive criminal record and his new offense committed only three days after sentencing. The district court

agreed and revoked appellant's probation and executed the 39-month sentence. This appeal followed.

DECISION

After an offender violates probation, the district court may continue probation, impose intermediate sanctions, or revoke probation and impose the stayed sentence. Minn. Stat. § 609.14, subd. 3(2) (2012). The district court's determination that sufficient evidence exists to revoke probation is reviewed for abuse of discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). But whether the district court satisfied the requirements under *Austin* in revoking probation is a question of law that is reviewed de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Under *Austin*, the district court must make findings regarding three factors before it can revoke probation: (1) the specific condition of probation that has been violated; (2) the violation was intentional or inexcusable; and (3) the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250. These findings assure that the district court creates a "thorough, fact-specific record[] setting forth [its] reasons for revoking probation." *Modtland*, 695 N.W.2d at 608. The *Austin* findings also "prevent[] courts from reflexively revoking probation when it is established that a defendant has violated a condition of probation." *Id.* The district court may satisfy this requirement by "stating its findings and reasons on the record, which, when reduced to a transcript, is sufficient to permit review." *Id.* at 608 n.4.

Appellant does not dispute that he violated his probation or that the violation was intentional or inexcusable. Instead, appellant's argument focuses on the third *Austin*

factor. Specifically, appellant argues that the district court abused its discretion by revoking his probation because “the evidence was insufficient to show that the need for confinement outweighed the policies favoring probation” and instead shows that the “decision to revoke was a reflexive reaction based upon its promise at sentencing.” He also contends that the district court failed to make a proper finding on the third *Austin* factor.

When assessing whether revocation is proper under the third *Austin* factor, the district court should consider whether (1) “confinement is necessary to protect the public from further criminal activity by the offender”; (2) “correctional treatment . . . can most effectively be provided if [the offender] is confined”; or (3) “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Modtland*, 695 N.W.2d at 607 (quotation omitted). The district court need only find the existence of one of these sub-factors. *Austin*, 295 N.W.2d at 251.

Here, the district court found that appellant’s violation was “intentional and without excuse,” and that the “need for confinement outweighs the policies favoring probation in this case.” The court also found that appellant is “clearly not amenable to probation” and that “it would unduly depreciate the seriousness of the violation if probation was not revoked.”

As the state concedes, the district courts “findings are conclusory in that the court did not point to specific evidence to support them.” But although minimal, the district court made the requisite *Austin* findings, and the record supports the district court’s finding that appellant was not amenable to probation and that the seriousness of the

offense would be undermined if probation were not revoked. The record reflects that, despite this being appellant's 20th felony conviction, the district court gave appellant a break when it sentenced appellant to a downward dispositional departure. Appellant, however, failed to take advantage of the probation opportunity by violating the terms of his probation only *three* days after he was sentenced when he was arrested for possession of methamphetamine. Appellant then not only failed to report the arrest to probation, but he failed to make any contact with probation following his sentencing. Although not clearly stated as reasons for revoking appellant's probation, the record indicates that the district court considered these factors in making its decision. Accordingly, the district court did not abuse its discretion by revoking appellant's probation.

Affirmed.