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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0886**

State of Minnesota,
Respondent,

vs.

Terry Allen Lester,
Appellant.

**Filed March 3, 2014
Affirmed
Cleary, Chief Judge**

Waseca County District Court
File No. 81-CR-11-28

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

Paul M. Dressler, Waseca County Attorney, Rachel V. Cornelius, Assistant County Attorney, Waseca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, F. Richard Gallo, Jr., Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Johnson, Judge; and Rodenberg,
Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

Appellant Terry Lester challenges the revocation of his probation and the execution of his sentence, contending that the district court incorrectly analyzed whether his need for confinement outweighed policies favoring probation under the third factor in *State v. Austin*, 295 N.W.2d 256 (Minn. 1980). We affirm.

FACTS

Terry Lester was charged with one count of possession of an explosive/incendiary device, in violation of Minn. Stat. § 609.668, subd. 6(a) (2010), and one count of terroristic threats—explosives/incendiary device, in violation of Minn. Stat. § 609.713, subd. 2 (2010), for his actions on December 29, 2010. Pursuant to a plea agreement, Lester pleaded guilty to the first count, and respondent State of Minnesota dismissed the second. In July 2011, Lester was sentenced to 10 years of probation. His sentence was amended on October 18, 2011, to 45 months of imprisonment with a stay of execution for 10 years.

Lester appeared for probation violation hearings on May 24, 2012, and November 13, 2012, and the district court reinstated his probation after each of these hearings. At the January 29, 2013 hearing after his third probation violation, Lester waived his right to an evidentiary hearing and admitted to violating three conditions of his probation by using intoxicants, failing to provide documentation of completing mental health services,

and changing residence without his agent's approval. The district court continued the disposition portion of the hearing.

At the February 14, 2013 dispositional hearing, the district court executed Lester's sentence. Lester appeals, arguing that the district court erred in its analysis of the third *Austin* factor. This court issued an order on July 24, 2013, requiring Lester to file a brief by August 5, 2013. Lester did not respond, and, on August 21, 2013, this court ordered the filing, by September 19, 2013, of one of the following: Lester's brief, a notice of voluntary dismissal complying with Minn. R. Crim. P. 28.06, or a motion to dismiss indicating Lester had made the decision to dismiss but had failed to sign and return a notice of voluntary dismissal. Lester's counsel was unable to gain Lester's cooperation or response and filed a brief on his behalf.

D E C I S I O N

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* to revoke probation is a question of law we review de novo, *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Before 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.” *Austin*, 295 N.W.2d at 250. In evaluating the third *Austin* factor, the district court should 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 250-51.

Lester first argues that the district court erred by relying on his record in analyzing the third *Austin* factor. Before making its findings as to each *Austin* factor, the district court noted that it had reviewed “the entire file in [the] matter,” including the pre-sentence investigation report and information concerning Lester’s mental-health and chemical-dependency issues. Lester cites no authority for his assertion that “the third *Austin* factor needs to be determined independently of the [s]tate’s proof for the first two *Austin* factors.” The state’s reliance on *State v. Xiong*, 638 N.W.2d 499, 503 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002), to counter Lester’s contention is misplaced, as *Xiong* relates to findings under the first, not the third, *Austin* factor. Nevertheless, the third *Austin* factor is a balancing test requiring the district court to weigh the need for Lester’s confinement against those policies that favor his probation, which necessarily involves consideration of evidence that was used to find that Lester violated his probation and that the violation was intentional or inexcusable. The district court did not err in considering Lester’s record when making its finding on the third *Austin* factor.

Lester also contends that the district court abused its discretion in its analysis of the third *Austin* factor by finding that Lester’s need for confinement outweighed policies

favoring probation. The district court found that confinement was necessary because Lester poses a danger to public safety and because correctional treatment can be provided most effectively by confinement.

Lester argues that the district court erred in finding that he is a threat to public safety because he has not displayed aggressive or threatening behavior since the violation and because his violations indicate only that he has difficulty following probation rules, not that he must be incarcerated. The district court based its conclusion on the serious crime for which Lester was charged, his four previous felonies—one of which involved him holding a knife to another’s throat, and his continued methamphetamine use. It also found that treatment for Lester’s mental-health and chemical-dependency issues could be most effectively provided by confinement. In support of this determination, the district court cited Lester’s longstanding inability to address his mental-health and chemical-dependency issues, his failure to follow through on the recommendations provided to him after a psychological evaluation, and his regular use of methamphetamines. The record supports the facts underlying the district court’s findings that appellant is a threat to public safety and that confinement is the most effective means of treating his mental-health and chemical-dependency issues. For this reason, the district court did not abuse its discretion by finding that Lester’s need for confinement outweighed policies favoring probation.

The district court properly considered appellant’s record in its analysis of each of the *Austin* factors. Because the district court made specific findings as to each *Austin*

factor and the record supports those findings, the district court did not abuse its discretion by revoking appellant's probation and executing his sentence.

Affirmed.