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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

**A06-2093**

State of Minnesota,  
Respondent,

vs.

Raymond L. Semler,  
Appellant.

**Filed January 8, 2008  
Affirmed in part, reversed in part, and remanded  
Shumaker, Judge**

Crow Wing County District Court  
File Nos. K1-96-1530 & K1-00-1601

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Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and  
Worke, Judge.

## UNPUBLISHED OPINION

**SHUMAKER**, Judge

In 2001, the Crow Wing County District Court accepted appellant's guilty plea to gross misdemeanor driving while impaired (DWI) and revoked his probation stemming from two prior convictions. In 2006, appellant moved to withdraw his guilty plea because it was invalid. The district court denied appellant's motion and later denied appellant's motion to reconsider. Appellant challenges the district court's denial of his motion and its decision to revoke his probation. Because appellant's motion to withdraw is untimely and without merit, the district court properly denied it, and we affirm. Because the district court revoked appellant's probation without making findings required by *State v. Austin*, 295 N.W.2d 246 (Minn. 1980), however, we reverse and remand.

### FACTS

In March 1997, appellant Raymond L. Semler was found guilty of fourth-degree criminal sexual conduct and kidnapping. The district court sentenced him to 42 months in prison, execution stayed, and 50 years of supervised probation that required him to complete an outpatient sex-offender treatment program and abstain from alcohol. In July 2000, appellant was charged with two counts of gross misdemeanor DWI. He was also accused of violating his probation for using alcohol and failing to complete the sex-offender treatment program.

At the January 2001 hearing, appellant admitted violating his probation. The district court questioned him and verified that he knew his rights and that a factual basis existed to support the conclusion that these violations occurred. The court then stated, "I

do on that basis accept [appellant's] admissions and I find you to be in violation of your probation in this matter.” After the court heard from the state and appellant regarding disposition, it revoked appellant's probation and executed his sentences on both 1997 convictions. Appellant next pleaded guilty to one count of gross misdemeanor DWI. The court sentenced him to serve one year in jail concurrently with the executed sentences.

In August 2006, appellant moved to withdraw his guilty plea to gross misdemeanor DWI, arguing that he was misinformed and coerced by counsel. The district court denied appellant's motion on the bases that (1) the motion was untimely because he had fully served his sentence, and (2) he failed to show manifest injustice because the record indicated his plea was voluntary, knowing, and intelligent. In September 2006, the district court denied appellant's motion to reconsider its August order. This appeal followed.

## **D E C I S I O N**

### **I.**

Appellant argues that the district court abused its discretion when it denied his motion to withdraw his guilty plea to gross misdemeanor DWI. Because “a motion to withdraw a guilty plea made after sentencing is analogous to a postconviction petition,” a district court's order denying a motion to withdraw is analogous to an order denying postconviction relief and is appealable as of right. *State v. Saliterman*, 431 N.W.2d 590, 591 (Minn. App. 1988). A district court's postconviction decision ““will not be disturbed unless the court abused its discretion.”” *Black v. State*, 725 N.W.2d 772, 775 (Minn.

App. 2007) (quoting *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001)). “The court shall allow a defendant to withdraw a plea of guilty upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1.

Here, the district court concluded that appellant’s motion was untimely because he brought it five years after his sentence was imposed and completely served. This five-year lapse does not by itself prohibit relief. *See id.* (stating that a defendant’s motion to withdraw his guilty plea “is not barred solely because it is made after sentence”). But “timeliness is a relevant consideration in determining whether that relief should be granted.” *James v. State*, 699 N.W.2d 723, 728 (Minn. 2005). We conclude that the district court properly considered the untimeliness of appellant’s motion as a factor in denying withdrawal of his guilty plea.

The district court also concluded, based on its review of the January 2001 hearing, that appellant failed to show that a manifest injustice occurred when he pleaded guilty. “A manifest injustice occurs when a guilty plea is not accurate, voluntary, or intelligent.” *State v. Prax*, 686 N.W.2d 45, 49 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Dec. 14, 2004). Appellant has the burden to prove by a preponderance of the evidence that the facts warrant withdrawal. *State v. Lopez*, 379 N.W.2d 633, 636 (Minn. App. 1986), *review denied* (Minn. Feb. 14, 1986). According to the hearing transcript, appellant testified that he reviewed the petition to enter his guilty plea with his attorney, that he understood and signed it, and that he wanted the court to accept it. Upon examination by the state, appellant further testified that he was operating a motor vehicle

after consuming alcohol and that he had no reason to doubt the accuracy of the .17 test result. Appellant presents no evidence indicating that he was confused by the proceedings, was misled by counsel, or was coerced into pleading guilty. The record supports the district court's conclusion and shows that appellant's guilty plea was valid and properly accepted. We affirm the district court's denial of appellant's motion to withdraw his guilty plea.

## II.

Appellant also argues that the district court abused its discretion in 2001 when it failed to make the requisite *Austin* findings before revoking his probation. Although this issue is not properly before us on this appeal, we will exercise our discretion to address it because justice requires it. *See* Minn. R. Civ. App. P. 103.04 (“The appellate courts may reverse, affirm or modify the judgment or order appealed from or take any other action as the interest of justice may require.”).

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). Under *Austin*, a district court must make three findings *before* it may revoke probation: “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.” *Id.* at 250. The court must evaluate all three factors, even if it finds a violation occurred that was intentional or inexcusable. *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). When a court balances the state's interest in public safety against

the probationer's interest in freedom, as is required by the third *Austin* factor, the court's attention is to be focused on the policy considerations supporting probation. *Id.* at 607. This inquiry ensures that a court bases its decision on sound judgment, and protects the defendant from reflexive decision-making. *Id.* at 608. We may not uphold a probation revocation if the district court fails to provide specific reasons according to all three *Austin* factors, because "it is not the role of appellate courts to scour the record to determine if sufficient evidence exists to support the district court's revocation." *Id.*

At the January 2001 hearing, appellant admitted that he violated his probation by using alcohol and by failing to complete an outpatient sex-offender treatment program. The district court confirmed with counsel that a factual basis existed to support appellant's admission. But the court did not inquire into the nature of the violations, did not find whether the violations were inexcusable or intentional, and did not weigh the need for confinement against appellant's interest in freedom. Instead, the court simply found that appellant violated his probation and then imposed sentence.

"[C]ourts must seek to convey their substantive reasons for revocation and the evidence relied upon." *Id.* Because the district court did not address the required *Austin* findings or engage in any similar analysis regarding its decision to revoke probation, we conclude that the court abused its discretion. We acknowledge that appellant has completed his sentence. Nevertheless, the supreme court has made it clear that the *Austin* findings must be made expressly by the district court, and that if one or more findings is omitted, remand is the remedy consistent with the law. *Id.* Thus, we reverse the district

court's order revoking appellant's probation and remand for the purpose of satisfying the requirements of *Austin*.

**Affirmed in part, reversed in part, and remanded.**