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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2185**

State of Minnesota,
Respondent,

vs.

Brian J. Vincent,
Appellant.

**Filed January 8, 2008
Affirmed
Halbrooks, Judge**

Anoka County District Court
File No. K0-01-10795

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

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John M. Stuart, State Public Defender, Philip Marron, Assistant Public Defender, 2221 University Avenue Southeast, Suite 425, Minneapolis, MN 55414 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Minge, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's decision to revoke his probation and execute his sentence on the ground that the district court's findings are insufficient. Because we conclude that the district court's findings are sufficient, we affirm.

FACTS

In February 2002, appellant Brian Vincent pleaded guilty to the felony offense of fifth-degree possession of a controlled substance after 52 grams of marijuana were found in his vehicle. At sentencing, the district court stayed adjudication of the offense, provided that appellant successfully complete five years of probation. As conditions of his probation, appellant was ordered to complete primary care and aftercare at the Counseling Clinic in Brooklyn Park; refrain from using mood-altering chemicals, including alcohol; submit to random urinalysis and breathalyzer testing; complete cognitive programming as directed by the Department of Corrections; remain law abiding; and obey the rules and regulations of probation.

At appellant's first probation-violation hearing in January 2003, he admitted that he violated his probation by failing to complete the aftercare program, failing to complete cognitive programming, and failing to maintain contact with his probation officer. The district court revoked appellant's stay of adjudication and ordered that imposition of a sentence for his offense be stayed. The district court also ordered appellant to serve 30 days in jail and reinstated all other conditions of probation.

Appellant's second probation-violation hearing was held in August 2004. At that hearing, he admitted violating his probation by failing to inform corrections within 48 hours of moving to a new address, failing to complete the aftercare program within the required time limit, failing to report as directed by his probation officer, and failing to submit to urinalysis testing. The district court ordered appellant to serve an additional 30 days in jail but reinstated the stay of imposition and all previous probation conditions.

Appellant's third probation-violation hearing occurred on April 26, 2006. At that hearing, appellant admitted violating his probation by failing to submit to urinalysis testing, the second such violation. Based on the recommendation of the probation officer, the district court again reinstated the stay of imposition and ordered appellant to serve 60 days in jail. Assuming no new probation violations occurred, the district court planned to discharge appellant from probation. The district court gave appellant one month to report to jail and required him to undergo weekly urinalysis testing until he reported.

Appellant's fourth probation-violation hearing occurred on August 19, 2006. Appellant admitted violating his probation before reporting to serve his 60 days in custody by failing to abstain from the use of mood-altering chemicals and failing to report contact with the police. The district court revoked appellant's probation and executed a year-and-a-day sentence with credit for time served. This appeal follows.

D E C I S I O N

Appellant contends that the district court erred in finding that he was not amenable to probation and in executing his sentence. The seminal case on probation revocation in Minnesota is *State v. Austin*, 295 N.W.2d 246 (Minn. 1980). There, the supreme court

stated that the “purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed. There must be a balancing of the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *Austin*, 295 N.W.2d at 250. Revocation cannot be an impulsive response to an accumulation of technical violations; it requires a showing that the defendant cannot be expected to avoid antisocial behavior. *Id.*

To ensure that these principles are satisfied, a district court must make three findings before revoking a defendant’s probation. A district court must (1) designate the specific condition or conditions of probation the probationer violated; (2) find that the violation was intentional or unexcusable; and (3) find that the need for confinement outweighs the policies favoring continued probation. *Id.* More recent case law clarified that a district court must specifically and expressly address each of these three *Austin* findings on the record. *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). A district court’s failure to do so requires reversal for proper findings. *Id.*

Even if a district court finds that the first two *Austin* factors are met, the district court must carefully evaluate whether confinement is required and not reflexively revoke probation merely because a violation has been established. *Id.* Factors that district courts should consider in assessing whether confinement is appropriate are whether (1) confinement is necessary to protect the public from further criminal activity, (2) correctional treatment of the defendant can best be administered if he or she is confined, and (3) it would unduly depreciate the seriousness of the violation if probation were not revoked. *Austin*, 295 N.W.2d at 251.

Here, appellant admitted every one of his probation violations and does not contest the sufficiency of the first *Austin* finding. See *State v. Xiong*, 638 N.W.2d 499, 503 (Minn. App. 2002) (admitting violation relieves the state of presenting evidence proving that the first *Austin* factor is satisfied), *review denied* (Minn. Apr. 16, 2002). The district court expressly found that appellant's probation violations were unexcused at his fourth probation-violation hearing. Appellant does not challenge this second *Austin* finding and did not address it in his brief. See *Scruggs v. State*, 484 N.W.2d 21, 24 n.1 (Minn. 1992) (issues on appeal not addressed in a party's brief are deemed waived). Therefore, the only matter before this court is the sufficiency of the district court's finding regarding the third *Austin* factor.

"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." *Modtland*, 695 N.W.2d at 605 (quotation omitted). In concluding that appellant is not amenable to further probation, the district court expressly noted appellant's numerous prior probation violations and that he was given every opportunity to prevent a felony conviction on his record. The district court stated that it had no choice but to find that appellant's repeated probation violations and continued substance abuse indicate that he is "not amenable to probation." Based on the repeated violations, the district court expressly found that the need for appellant's incarceration now outweighs any benefits of probation.

A district court's finding that a defendant has repeatedly and continually violated the conditions of probation justifies revoking the defendant's probation and executing a

stayed sentence. *See State v. Hamilton*, 646 N.W.2d 915, 918 (Minn. App. 2002), *abrogated in part on other grounds by Modtland*, 695 N.W.2d at 606 (continued violations of the law, and henceforth a condition of probation, justified revoking defendant's probation); *State v. Theel*, 532 N.W.2d 265, 267 (Minn. App. 1995), *abrogated in part on other grounds by Modtland*, 695 N.W.2d at 606 (stating that a defendant's "failure to follow the court's order despite repeated warnings indicates that the probation was not succeeding" on probation and that confinement was justified); *see also* Minn. Sent. Guidelines III.B. (revocation of a stayed sentence is generally justified if "the offender persists in violating conditions of the stay").

The policy considerations discussed in *Austin* also support revocation. Under the circumstances here, a decision to not revoke appellant's probation at his fourth probation-violation hearing for the tenth admitted probation violation would unduly depreciate the seriousness of failing to comply with the conditions of probation. *See Austin*, 295 N.W.2d at 251. Furthermore, appellant's continuing substance abuse indicates that outpatient treatment is failing to address this issue. Given the failure of outpatient treatment, more intensive inpatient treatment, which would presumably be provided to appellant while he is in custody, appears to be a more appropriate way to treat the problem. *See id.* Accordingly, the district court's decision to revoke appellant's probation was not an abuse of discretion.

Affirmed.