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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0293**

State of Minnesota,
Respondent,

vs.

Timothy Keith Berg,
Appellant.

**Filed January 29, 2008
Affirmed
Crippen, Judge***

Wright County District Court
File No. K1-02-2718

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Thomas N. Kelly, Wright County Attorney, 10 Northwest Second Street, Buffalo, MN 55313 (for respondent)

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Considered and decided by Toussaint, Chief Judge; Crippen, Judge; and Muehlberg, Judge.**

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

** Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellant challenges the district court's decision to revoke the stay and execute his sentence for first-degree DWI, arguing that the evidence failed to establish that he intentionally violated stay conditions or that the need for confinement outweighed the policies favoring probation. We affirm.

FACTS

In 2002, appellant Timothy Berg pleaded guilty to first-degree felony DWI.¹ The court stayed his 42-month sentence, for seven years, on conditions that he remain law abiding, complete chemical dependency treatment, attend Alcoholics Anonymous meetings, not use or possess alcoholic beverages or controlled substances, submit to random testing to verify the same, and provide a biological specimen for future DNA analysis. Appellant was warned that failure to comply with these conditions would result in revocation of his probation.

At appellant's fifth probation violation hearing on October 12, 2006, the district court revoked the stay of his sentence. The court found that (1) appellant violated a specific condition of his probation by consuming alcohol on September 26, 2006; (2) appellant's probation violation was intentional and inexcusable; and (3) the need for incarceration outweighed the policies favoring probation because appellant had "attributed all of his criminal acts to an inability to abstain from alcohol."

¹ Appellant has prior DWI convictions from 1987, 1991, 1993, 1998, and 2000. He also has prior convictions for three misdemeanor or gross misdemeanor assaults and violating an order for protection.

Four times prior to the revocation at issue, appellant violated his probation by (1) failing in 2003 to report to jail (prompting a 12-day enlargement of his probationary jail condition); (2) consuming alcohol and not entering a treatment program (resulting in a 30-day jailing enlargement); (3) not completing treatment and not maintaining contact with his probation officer (30-day enlargement); and (4) not completing treatment, not maintaining contact with his probation officer, and not providing a DNA sample (up to 240 additional jail days).

D E C I S I O N

The 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).

When the district court finds that violation of the conditions of probation provide grounds for revocation, it may order execution of the previously stayed sentence. Minn. Stat. § 609.14, subd. 3(2) (2002); *see also* Minn. R. Crim. P. 27.04, subd. 3(3)(b) (stating court may order execution of sentence if it finds conditions of probation have been violated). In revocation proceedings, the state must present clear and convincing evidence that the probationer has violated conditions of probation and that probation should therefore be revoked. *See* Minn. R. Crim. P. 27.04, subd. 3(3).

The district court must engage in a three-step analysis before probation can be revoked: (1) designate the specific probation condition(s) violated; (2) find that the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250. The decision to

revoke cannot be a reflexive reaction to an accumulation of technical violations, but requires a showing that the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity. *Id.* at 251.

Appellant does not contest that his drinking on September 26, 2006, violated the probation condition that he abstain from alcohol. The first *Austin* factor is met because the district court found that appellant "violated a specific term and condition of probation pursuant to his admission that he used alcohol in violation of a no-use provision in the original sentence."

As to the second *Austin* factor, the district court found that appellant (1) "made a choice to consume alcohol," (2) was not "forced to use alcohol," and (3) "had six prior treatment interventions before that time and should by this time have the tools to avoid using alcohol." Appellant argues that, when he drank alcohol, he did not intend to violate his probation. But the record establishes that appellant willingly consumed alcohol despite knowing that he was required to abstain from alcohol as a condition of probation. The second *Austin* factor is met.

In considering the third *Austin* factor, the district court "must balance the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005) (quotation omitted). The district court must consider three policies: (1) whether confinement is necessary to protect the public; (2) whether the offender needs correctional treatment that can best be provided in prison; and (3) whether not revoking probation would depreciate the seriousness of the violation. *Id.*

The record establishes that the district court, examining the need for imprisonment, considered appellant's criminal history, his four prior violations of probation conditions, and concluded that appellant is not amenable to treatment because he is unable to control his consumption of alcohol. The court also concluded that imprisonment was needed to avoid depreciating the seriousness of the violation. The third *Austin* factor is met. The record sufficiently indicates that appellant's confinement is warranted.

Appellant argues that the district court failed to properly treat revocation as a "last resort." *See Austin*, 295 N.W.2d at 250 (stating that the "purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed"). He asserts that his probation violations were merely technical in nature and did not include the commission of new crimes that would warrant revocation. But the record shows that appellant's violations were material and sufficiently indicates that there remained no alternative court response. Appellant's five probation violations, especially when considered in light of his criminal history of driving while impaired, showed public safety dangers. As the district court observed, appellant's alcohol abuse was tied to his pattern of violations, and the record demonstrates his inability to avoid either the abuse or the violations. *See State v. Hamilton*, 646 N.W.2d 915, 918 (Minn. App. 2002) (stating continued violation of conditions of probation justified revoking probation), *review denied* (Minn. Sept. 25, 2002); *State v. Theel*, 532 N.W.2d 265, 267 (Minn. App. 1995) (stating a defendant's failure to follow court's order despite repeated warnings indicated that probation was not succeeding and confinement was justified), *review denied* (Minn.

July 20, 1995), *abrogated in part on other grounds*, *Modtland*, 695 N.W.2d at 606; *see also* Minn. Sent. Guidelines III.B.(2) (revocation of stayed sentence justified if offender persists in violating conditions of the stay). The district court did not abuse its discretion in revoking appellant's probation.

Affirmed.