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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A06-2312

State of Minnesota,
Respondent,

vs.

James Blackorbay,
Appellant.

**Filed February 26, 2008
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 00107073

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Alan D. Margoles, Margoles & Margoles, 790 Cleveland Avenue, Suite 223, St. Paul, MN 55116 (for appellant)

Considered and decided by Ross, Presiding Judge; Lansing, Judge; and Crippen, Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

James Blackorbay appeals from an order revoking his probation and executing his 21-month prison sentence for second-degree criminal sexual conduct. He argues that he did not violate his probation by failing to complete required treatment and that even if he did violate his probation, the violation is excused. Because the record supports the district court's finding that Blackorbay intentionally and inexcusably violated his probation, we affirm.

FACTS

James Blackorbay pleaded guilty to second-degree criminal sexual conduct on September 12, 2001. The district court imposed a stayed sentence of 21 months' imprisonment, subject to a five-year conditional release term. As part of his probation, Blackorbay was required to complete chemical dependency treatment, abstain from alcohol and nonprescription drugs, and complete sex-offender treatment. At a probation revocation hearing in October 2002, Blackorbay admitted to using cocaine and violating his probation. Most relevant to this appeal, Blackorbay had not completed the required sex-offender treatment program at the time of the 2002 hearing, and the district court warned him, "[I]f you leave the program or get kicked out of the program, you know, anything at all, then . . . I'll have no choice but to send you to prison." It is not clear whether the court was focusing only on the required chemical dependency program or also on the sex-offender program, but it is without dispute that Blackorbay was required to complete both.

Blackorbay violated his probation again on July 5, 2006, by failing to re-enter the sex-offender treatment program and the chemical dependency treatment program. At the probation revocation hearing in July 2006, the district court granted Blackorbay another opportunity to complete sex-offender treatment, extending his probation to March 2007. In August 2006, however, Dennis Johnston & Associates discharged Blackorbay from its sex-offender treatment program because Blackorbay had failed to regularly participate in it.

The district court therefore conducted another probation revocation hearing in September 2006. Blackorbay's probation officer recommended that the court execute his sentence because of Blackorbay's multiple failures to attend sex-offender treatment and the officer doubted that Blackorbay would complete the treatment. Therapist Dennis Johnston confirmed that Blackorbay failed to regularly attend the treatment program. He testified that none of Blackorbay's absences were excused. He explained that the sex-offender treatment program covers the topics of the offense cycle, relapse prevention plan, letters of apology, self-forgiveness, and the creation of a personal support network. Blackorbay had not participated continuously in Johnston's sex-offender treatment program, and, at the time of the September 2006 hearing, he had completed only the offense-cycle segment. A report written by Johnston in September 2006 indicated that Blackorbay had not begun the segments that address relapse prevention, victim empathy, or self-forgiveness.

Blackorbay testified that he wanted to complete the sex-offender treatment program and that, given the chance, he would do so. It was not contested that Blackorbay

had various health-related difficulties in the five years he was on probation, and he testified that his girlfriend of fifteen years also had significant health problems. She was a diabetic with a seizure disorder, was legally blind, and was addicted to heroin. Blackorbay testified that his girlfriend committed acts of prostitution to obtain heroin and that individuals who sold her heroin often sexually and physically abused her. He claimed that he missed his sex-offender treatment meetings in August because he did not want to leave her alone. She died in late August 2006. Blackorbay testified that because he no longer had her to care for, he could complete treatment.

The district court was not persuaded by Blackorbay's explanation. It found that clear and convincing evidence supported the charge that Blackorbay violated the terms of his probation and that the violation was intentional and inexcusable. The court noted that it had, with the consent of the probation office, gone to great lengths to extend Blackorbay's probation because of his personal difficulties, but it determined that he continued to make unsupportable excuses for his failure to complete treatment. The district court did not find that Blackorbay's desire to care for his girlfriend, supposedly of fifteen years, justified his failure to complete treatment, noting that in 2001 Blackorbay told his probation officer that he had no significant relationship. The court found that the need for confinement outweighs the policies favoring probation because of the seriousness of the violation. It stated that the required sex-offender treatment program that Blackorbay failed to complete was a major component of his probation. Because he had not completed the essential treatment and did not provide a sufficient excuse for his continued failure, the district court determined that Blackorbay is a danger to the

community. It therefore revoked Blackorbay's probation and sentenced him to 21 months' imprisonment. Blackorbay appeals.

D E C I S I O N

Blackorbay challenges the district court's decision to revoke his probation. A district court has broad discretion in determining if there is sufficient evidence to revoke probation, and the district court should be reversed only if there is a clear abuse of that discretion. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). Blackorbay challenges the revocation for failing to complete sex-offender treatment, contending that revocation was premature because his probation term had not yet expired. He asserts, therefore, that at the September 27, 2006, hearing, he still had until March 2007 to complete the required sex-offender treatment. The district court may revoke probation when it appears that a defendant has violated any of the conditions of probation. Minn. Stat. § 609.14, subd. 1 (2006). The revoking court must first find that: (1) a specific condition or conditions of probation was violated; (2) the violation was intentional or inexcusable; and (3) the need for confinement outweighs the policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). The district court's findings must create a thorough, fact-specific record setting forth the court's reasons for revoking probation and must be supported by clear and convincing evidence. *Modtland*, 695 N.W.2d at 608; *State v. Ehmke*, 400 N.W.2d 839, 840 (Minn. App. 1987). The district court addressed each of the *Austin* factors.

Specific Condition or Conditions Violated

The first *Austin* factor is whether Blackorbay violated a specific probationary condition. *Austin*, 295 N.W.2d at 250. We agree with the state that the district court had sufficient basis to conclude that he did. The September 2006 probation revocation hearing specifically addressed whether Blackorbay had failed to complete required sex-offender treatment. The only testimony taken at the hearing related to this treatment. Johnston testified that Blackorbay had not finished his treatment and had numerous unexcused absences. The testimony revealed that in the four years since 2002, Blackorbay failed to complete or make progress toward completing several central aspects of the treatment program.

The district court reasonably found that Blackorbay had not completed treatment as required by a probation term. Blackorbay's contention that he did not violate this condition because he had until March 2007 to complete the program is unpersuasive on its face. A district court may revoke probation for a violation occurring at any point. Minn. Stat. § 609.14, subd. 1. Blackorbay essentially would have us hold that a district court must wait until a probationary period has expired before assessing whether a probationer's failure to comply with required treatment forms a basis to revoke probation. We decline to adopt this approach. *See State v. Moot*, 398 N.W.2d 21, 22 (Minn. App. 1986) (affirming revocation of the defendant's five-year probation after one year because the defendant failed to complete chemical dependency treatment), *review denied* (Minn. Feb. 13, 1987). The goal of sex-offender treatment—to reduce the risk of recidivism—is thwarted if a probationer may postpone full, ongoing participation simply on the fact that

his period of probation is longer than the usual time it might take to complete the treatment. The district court reasonably interpreted the treatment requirement as imposing a progressive duty of prompt compliance until completion of the program. The court did not abuse its discretion by finding that Blackorabay's failure to diligently participate in treatment violated the terms of his probation.

The Violation was Intentional and Inexcusable

The second *Austin* factor is whether the probation violation was intentional and inexcusable. *Austin*, 295 N.W.2d at 250. The district court found that it was. It noted that Blackorabay received significant leeway to complete his probation in order to accommodate his health problems. Our review of the record leads us to conclude that the district court was very patient with Blackorabay's failures, giving him six additional months of probation to progress toward completing the treatment. But the court appropriately reasoned that "[a]t some point the excuses have to stop." Testimony at the September 2006 hearing established that Blackorabay was no closer to completing sex-offender treatment in 2006 than he was in 2002, when he first violated probation. The district court heard from Blackorabay's probation officer that Blackorabay constantly gave excuses and that he was doubtful that Blackorabay would ever complete the program. The court reasonably dismissed the contention that Blackorabay's girlfriend's ill health was a mitigating factor that would excuse his failure to complete sex-offender treatment; it found it implausible and factually unsupported that Blackorabay missed treatment because he had to protect her from danger. The facts support the court's finding that Blackorabay

intentionally and inexcusably violated the condition of his probation that he complete sex-offender treatment.

Need for Confinement Outweighs Policies Favoring Probation

The third *Austin* factor is whether the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250. The *Austin* court noted that the purpose of probation is rehabilitation and that “revocation should be used only as a last resort when treatment has failed.” *Id.* Because in five years Blackorbay made little progress toward completing the sex-offender treatment program, it cannot be denied that he is an untreated sex offender. It was not an abuse of discretion for the district court to conclude that treatment had failed since Blackorbay, without valid excuse, refused to complete it. *See id.* at 251. Given that the requirement to complete the treatment arises from the danger posed by an untreated offender, the district court reasonably found that Blackorbay poses a serious danger to the community.

Because the district court made the required *Austin* findings when determining whether there was sufficient evidence to revoke Blackorbay’s probation, and because its findings are supported by a fact-specific analysis that sets forth the reasons for revoking probation, we affirm the district court’s order revoking probation and executing Blackorbay’s 21-month prison sentence.

Affirmed.