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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-617**

State of Minnesota,
Respondent,

vs.

Q.L.S.,
Appellant.

**Filed March 25, 2008
Affirmed
Johnson, Judge**

Beltrami County District Court
File No. J9-02-50708

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

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Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

When he was 16 years old, Q.L.S. pleaded guilty to burglary and arson, and the district court designated him an extended jurisdiction juvenile (“EJJ”). The district court stayed his adult concurrent sentences of 18 months and 58 months on the condition that he successfully complete a rehabilitation program at a juvenile correctional facility. He failed, however, to complete the program. Among other reasons for the failure, he used alcohol during two furloughs and, during the second furlough, was charged with eight criminal offenses, including two counts of assault of an officer. When he turned 21, the district court revoked the stay and executed the adult concurrent sentences. Because Q.L.S. received credit for 44 months served in the juvenile facility, he was placed on adult supervised release for the remainder of the adult sentences. On appeal, Q.L.S. argues that the district court should have discharged his sentences entirely rather than executing his adult sentences. We conclude that the district court did not abuse its discretion in executing his adult sentences and, therefore, affirm.

FACTS

In August 2002, Q.L.S. and two other juveniles broke into an unoccupied cabin near the Red Lake Indian Reservation and stole two four-wheeler vehicles. The group returned to the residence a few days later and burned it down. *See In re Welfare of Q.L.S.*, No. A03-1049, 2004 WL 614987, at *1 (Minn. App. Mar. 30, 2004).

Q.L.S. was charged in Beltrami County Juvenile Court with two counts of first-degree arson, two counts of second-degree burglary, one count of third-degree burglary,

and one count of theft of a motor vehicle. The state moved for presumptive adult certification, but the parties agreed at the plea hearing in February 2003 that Q.L.S. would be designated an EJJ. Q.L.S. entered an *Alford* plea to one count of first-degree arson and a plea of guilty to one count of second-degree burglary. The district court dismissed the remaining counts under the plea agreement.

At the disposition hearing, the district court imposed, but stayed, concurrent adult sentences of 18 months for second-degree burglary and 58 months for first-degree arson. The district court committed Q.L.S. to the Commissioner of Corrections for placement at the Minnesota Correctional Facility at Red Wing and ordered that he successfully complete the program. The district court retained jurisdiction over him until he turned 21, unless earlier discharged or revoked.

While at Red Wing, Q.L.S. went on two furloughs and violated the terms of his juvenile disposition both times. During both his March and May 2006 furloughs, he went to Red Lake and drank alcohol, thereby failing to remain chemically free. On his May furlough, he was charged with eight new criminal offenses, including criminal damage to property and two counts of assault on an officer, thereby failing to remain law-abiding. Based on his conduct while on furlough and his failure to complete the program at Red Wing, the state sought to revoke the stay of Q.L.S.'s adult sentences on August 31, 2006. On November 7, 2006, Q.L.S. turned 21 years old and was discharged from the Red Wing facility.

At the EJJ revocation hearing on November 15, 2006, the state presented evidence that Q.L.S. failed to successfully complete the program at Red Wing. Red Wing Senior

Corrections Agent Nicole Kern testified that Q.L.S. had gone through periods of “doing pretty well and then he would spiral.” Kern testified that each time he had regressed, she had reminded him of the program’s requirements, but he “wasn’t successful in the program because he chose not to cooperate with it.” Kern also testified that 14 months is the average length of time it takes a resident to complete the Red Wing program, but Q.L.S. had been at Red Wing for more than 44 months.

The district court made findings on the record that Q.L.S. violated the terms and conditions of his juvenile disposition by not successfully completing the Red Wing program. In an amended order, the district court revoked the stayed adult sentences for arson and burglary and executed concurrent prison sentences of 58 months for first-degree arson and 18 months for second-degree burglary. The district court also awarded him credit for 1,330 days. As a result, Q.L.S. was placed on adult supervised release. He appeals.

D E C I S I O N

The Minnesota Supreme Court has established a three-step analysis that must be completed by a district court before revoking probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980); *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). The district court must: (1) designate the specific condition of probation that has been 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 three *Austin* factors apply to EJJ revocation proceedings. *State v. B.Y.*, 659 N.W.2d 763, 768-69 (Minn. 2003). A violation of the terms and conditions of probation

must be proven by clear and convincing evidence. Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(1).

In revoking Q.L.S.'s EJJ designation and executing his adult sentences, the district court found that the three *Austin* factors required for revocation had been satisfied. Q.L.S. contends that the district court erred because the state did not prove all required factors and because there were mitigating factors. 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." *Austin*, 295 N.W.2d at 249-50.

A. First *Austin* Factor

The district court found that completion of the Red Wing program was a specific condition of Q.L.S.'s juvenile disposition and that the state proved by clear and convincing evidence that he violated that condition. At the EJJ disposition, the district court had ordered that he "shall successfully complete the program at the facility in Red Wing, Minnesota." Q.L.S. concedes that he did not complete the program and, therefore, that the state proved the first *Austin* factor.

B. Second *Austin* Factor

The district court found that Q.L.S.'s failure to complete the Red Wing program was intentional and inexcusable. First, the district court found that he intentionally used alcohol, which violated the rules of the treatment program and resulted in his return to the facility. Second, the district court found that his failure to complete the program was not the result of intellectual deficiencies or mental health issues. Third, the district court

found that he had enough time to complete the program because he was in the program for more than 44 months, far more than the 14-month average.

Q.L.S. argues that the court's finding on this factor was not supported by clear and convincing evidence. He maintains that the only reason his EJJ status was revoked was that he turned 21 and "aged out" before he could successfully complete the program. But the probation officer and program staff stated that Q.L.S. had failed to comply with the requirements of the Red Wing program before turning 21. While at Red Wing, he had reverted to past negative behaviors, including withdrawing and becoming defiant, and had generally chosen not to cooperate with the program. The two furloughs occurred eight months and six months, respectively, before his 21st birthday. The state filed its petition to revoke his EJJ status two months before his 21st birthday based on the above-described evidence. The record reveals that Q.L.S. had time to complete the program before turning 21 but failed to do so. The evidence supports the district court's finding that Q.L.S.'s violations of his juvenile disposition were intentional and inexcusable. *See In re the Welfare of J.K.*, 641 N.W.2d 617, 621 (Minn. App. 2002) (affirming finding of intentional and inexcusable violations because appellant deliberately and repeatedly refused to comply with probation requirements or take advantage of treatment opportunities).

C. Third *Austin* Factor

Q.L.S. contends that the district court erred in finding that the need for confinement, in the form of supervised release, outweighed the policies favoring outright release. According to the Minnesota Supreme Court, "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. 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 (quoting *United States v. Reed*, 573 F.2d 1020, 1024 (8th Cir. 1978) (other quotation omitted)).

In concluding that the third *Austin* factor had been satisfied, the district court explained its reasoning:

The need for confinement, in this case being supervised probation, clearly is in the best interest of society and outweighs any interest or policies which would favor outright release from a secure facility with no supervision since [Q.L.S.] failed both previous times he was furloughed from the maximum supervision he was under at Red Wing.

The court also expressed concern about his risk of relapse and re-offending:

I have very little doubt in my own mind that [Q.L.S.] would be well served, as society would be, to have some continued supervision for him. He has been under the maximum supervision you can have. He has been in a secure facility basically for the last 44 months and the two times that he was not, he failed rather quickly. So I would say the prognosis that he would not fail again is very slim unfortunately.

The court found that Q.L.S. risked failure whether on supervised release or on release with no restrictions but that continued supervision would be the better option: "When he is getting supervision he has some access to some support and some resources that he might otherwise not have as well, which would be good for him, and something that I hope he would take advantage of."

Q.L.S. argues that the need for supervised release did not outweigh the policies favoring release without supervision because the violation itself was “technical,” based on an alcohol relapse. Under the district court’s order, he was to “successfully complete” the Red Wing program. Because he drank alcohol the two times he was on furlough and was arrested on the second of those occasions for multiple new offenses, including assaulting an officer, he clearly violated the court’s order that he successfully complete the Red Wing program. In *Austin*, the probation violation was not “technical” because the infraction was failing to obey a probation officer’s instruction to attend a specific residential treatment program. 295 N.W.2d at 250. Similarly in this case, Q.L.S.’s violation was not “technical” but substantive because he failed to complete a program he was required to complete.

The district court properly considered Q.L.S.’s rehabilitative needs and concluded that he would benefit from further supervision. Despite Q.L.S.’s contention that the environment at his sister’s home in Indiana (where he stated he would go if he were released without supervision) would be better for him than the environment on the Red Lake reservation (where he stated he would go if his adult sentences were reinstated), the court reasoned that both Q.L.S. and society would be best served if he remained under supervision. Accordingly, the district court did not abuse its discretion in finding that the need for confinement, in the form of supervised release, outweighed the policies favoring probation, in the form of release without supervision.

D. Mitigating Factors

Q.L.S. argues that the court should have considered mitigating factors under Minn. Stat. § 260B.130, subd. 5 (2006), and that those mitigating factors weigh against revoking his EJJ designation and executing his stayed adult concurrent sentences. Upon making the findings required under *Austin*, a court is required to execute a sentence unless the court finds mitigating factors that justify continuing the stay. Minn. Stat. § 260B.130, subd. 5; Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(3).

The mitigating factors claimed by Q.L.S. do not justify discharging the stayed adult concurrent sentences. At the EJJ revocation hearing, Q.L.S. asserted that the court should consider that his mother and brother committed suicide when he was young, that he self-reported his alcohol relapse on his first furlough, that his second furlough got off to a bad start when he discovered the suicide of his cousin, and that he had been incarcerated for longer than if he had originally been given adult sentences.

The state conceded at the hearing that mitigating factors exist but argues that they were not significant enough to justify continuing the stay. The evidence concerning mitigating factors supports the district court's conclusion. This case differs from *B.Y.*, where the Minnesota Supreme Court concluded that the district court had erred in ruling that no mitigating factors were present. There, successfully completing a rigorous rehabilitation program should have been considered a mitigating factor when the only probation violation was a single missed curfew. 659 N.W.2d at 770. Although a district court may find a probation violation to be "an anomaly in what has otherwise been a path to rehabilitation," *id.* at 770, in this case, where Q.L.S. consumed alcohol both times on

furlough and was charged with eight new offenses on his second furlough, the violations were no such anomaly. The evidence that he failed to complete a rehabilitation program over a period three times as long as the average time period supported the finding that he was not following a “path to rehabilitation.”

Because the district court properly considered the three *Austin* factors and because sufficient mitigating factors did not exist, the district court did not abuse its discretion in revoking Q.L.S.’s EJJ designation and executing his stayed adult concurrent sentences.

Affirmed.