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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0406**

State of Minnesota,
Respondent,

vs.

M.A.D.,
Appellant.

**Filed May 6, 2008
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-JV-05-4948

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

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

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

UNPUBLISHED OPINION

JOHNSON, Judge

When he was 17 years old, M.A.D. pleaded guilty to first-degree criminal sexual conduct, and the district court designated him an extended jurisdiction juvenile (EJJ). The district court stayed his adult sentence of 144 months of imprisonment on the condition that he successfully complete a sex-offender treatment program at a juvenile correctional facility. He failed, however, to complete the program. As a result, the district court revoked the stay and executed the 144-month adult sentence. On appeal, M.A.D. challenges the district court's findings concerning the revocation and its ultimate decision to revoke the stay. We conclude that the district court did not err and, therefore, affirm.

FACTS

On October 17, 2005, M.A.D. pleaded guilty to first-degree criminal sexual conduct for having sexual intercourse with his female cousin when she was under 13 years of age and he was more than 36 months older than she. He entered his plea pursuant to a negotiated settlement by which the prosecution agreed to dismiss three additional counts of first-degree criminal sexual conduct with another relative under the age of 13.

The district court imposed an adult sentence of 144 months of imprisonment, which was stayed on the condition that M.A.D. fully comply with the terms of EJJ probation and all court orders. The terms of EJJ probation required him to (1) attend and successfully complete the County Home School (CHS) Juvenile Sex Offender Treatment

Program (JSOP), (2) refrain from using alcohol or illegal nonprescribed drugs, and (3) attend and successfully complete the Odyssey chemical-dependency treatment program while at CHS. At sentencing, the district court stated that it would review his progress in one year if M.A.D. had not completed the program by that time.

Soon after entering JSOP, M.A.D. lied about his sexual history, manipulated staff and peers, and “deliberately malingering” in treatment. M.A.D. failed two polygraph tests that were part of the treatment program and admitted, after being confronted, that he was avoiding therapy. M.A.D. passed a third polygraph test sometime during the summer of 2006, by which time he had admitted to inappropriate sexual contact with 20 to 25 individuals between the ages of 7 and 12. At his scheduled dispositional review on August 2, 2006, approximately one week before he became 18 years old, the district court reminded M.A.D. of the conditions of his EJJ probation and warned him that if he did not complete the CHS program, the district court might send him either to Red Wing Correctional Facility, where he would remain until turning 21, or to adult prison.

The CHS monthly report for August 2006 noted that M.A.D.’s commitment to treatment had vacillated. Although there were signs of improvement, CHS staff soon determined that this was a façade. According to CHS, M.A.D. had spread an untrue and degrading rumor among residents that he had previously had sexual relations with a female CHS staff member. He exhibited physical and sexual aggression toward other residents by touching and hitting them. M.A.D. also engaged in gang activity and was accused of smoking “ditch weed.”

On October 17, 2006, CHS discharged M.A.D. from the JSOP program for his behavior. The discharge report of CHS sex offender therapist Bradley Massop stated that M.A.D. was unamenable to treatment given that his prognosis was “*extremely poor.*” The report documented a variety of sociological disorders that M.A.D. might have and quoted M.A.D. as saying that his “drug of choice is manipulation and getting over on people.” The team recommended that M.A.D. be “contained in a locked, secure facility” for the public’s safety. M.A.D. admitted the behavior alleged in the discharge report.

On October 18, 2006, at the recommendation of probation officer Troy Meyers, the district court issued an apprehension-and-detention warrant, alleging probation violations and ordering that M.A.D. be taken into custody. On five days between October 27, 2006, and January 5, 2007, the district court conducted a revocation hearing. Considerable evidence was presented concerning M.A.D.’s violations of the terms of his EJJ probation, although the witnesses had various views concerning whether juvenile probation should be revoked. Meyers’s disposition-review report stated that M.A.D. was unamenable to treatment “at [CHS] at this time” but that M.A.D. still could be treated in the juvenile system. Dennis Franckowiak, a CHS family counselor, testified that a retention-review report was intended to recommend discharge from JSOP in favor of an alternative placement. Massop admitted in testimony that it was possible that M.A.D. could benefit from treatment. The EJJ probation-screening committee, comprised of EJJ probation officers, community specialists, and supervisors, had collectively recommended that M.A.D.’s EJJ probation be restructured and that he be sent to the Red Wing facility.

Upon hearing the evidence, the district court found that M.A.D. had intentionally and inexcusably violated conditions of his EJJ probation by committing the acts that led to his discharge. The district court also found that the need for confinement outweighed the policies favoring probation because M.A.D. had a history of sexual abuse and misconduct, had indicated “a pervasive unwillingness to follow the rehabilitation program,” and was therefore not amenable to treatment. Thus, the district court revoked M.A.D.’s EJJ probation and executed his 144-month adult sentence.

DECISION

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); *see also 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 a juvenile probation revocation proceeding, a district court must “make written findings of fact on all disputed issues including a summary of the evidence relied upon and a statement of the court’s reasons for its determinations.” Minn. R. Juv. Delinq. P. 19.11, subd. 3(E). A reviewing court should reverse if it finds that the district court

revoked without making the three findings required by *Austin*. See *Modtland*, 695 N.W.2d at 607-08. District courts must “convey their substantive reasons for revocation and the evidence relied upon.” *Id.* When a district court has set forth its reasoning, rather than simply “reciting the three factors and offering general, non-specific reasons for revocation,” *id.*, a reviewing court should affirm absent a clear abuse of discretion. Thus, we will analyze each *Austin* factor in turn.

A. First *Austin* Factor

Before revoking probation, a district court must designate the specific condition of probation that has been violated. *Austin*, 295 N.W.2d at 250. “Inherent in [the court’s] consideration of the specific condition designated as having been violated is the question of whether the condition was actually imposed as a condition of probation” in the district court’s sentencing order. *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004).

The district court found that M.A.D. had committed the acts that led to his discharge from CHS-JSOP and that his failure to complete the program violated the terms of his EJJ probation. M.A.D. admitted to each of the acts that led to his termination from JSOP. He does not challenge the district court’s determination that the admissions were knowing and voluntary. M.A.D.’s admissions, together with his undisputed discharge, constitute clear and convincing evidence that he violated the original terms of his EJJ probation.

M.A.D. argues that his gang activity should not be grounds for revocation because that behavior was not specifically prohibited as a condition of EJJ probation. Although the acts that M.A.D. admitted were not themselves violations of conditions imposed by

the district court, those acts led to his discharge from CHS-JSOP, and his failure to successfully complete the program was a violation. M.A.D. argues that his case is analogous to *B.Y.*, where the court held that violation of a curfew that was apparently imposed by a probation officer, but not included in the original disposition order, could not serve as a basis for revocation. 659 N.W.2d at 766, 769. In that case, the only conditions included in the plea agreement were that “appellant testify truthfully if subpoenaed in the trials of the others involved in the crime, complete a juvenile rehabilitation program, not associate with any known gang members and have no contact with the victim.” *Id.* at 765. Thus, the district court in *B.Y.* had not incorporated the probation officer’s rules into its conditions. This case is distinguishable because the district court necessarily incorporated the CHS-JSOP rules into its conditions when it required successful completion of the program. Furthermore, M.A.D. admitted to having smoked “ditch weed,” which is a violation of the district court order requiring him to abstain from non-prescribed substances.

Because the district court designated the conditions for EJJ probation that M.A.D. violated, and because those conditions were imposed in the original sentencing order, the first *Austin* factor is satisfied.

B. Second *Austin* Factor

Before revoking probation, a district court must find that the violation was intentional or inexcusable. *Austin*, 295 N.W.2d at 250. A district court can find a violation of probationary conditions if there is clear and convincing evidence or “if the probationer admits the violation.” Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(1).

The district court found that M.A.D. was aware of the conditions of his EJJ probation and that the conduct that led to his termination was persistent, occurring throughout the course of his 11 months in JSOP. M.A.D. argues that this finding was not supported by clear and convincing evidence. The district court's findings, however, are supported by CHS incident reports prepared in the fall of 2006 and corroborating testimony from staff workers that M.A.D. was not taking responsibility for his actions or demonstrating a willingness to change.

M.A.D. argues that the district court's findings were erroneous because the district court mistakenly assumed that the conduct that led to his discharge occurred after his August 2, 2006, progress review hearing when, he contends, the conduct actually took place before that hearing but came to light afterwards. Even if true, M.A.D.'s version of events does not change the analysis. M.A.D.'s behavior violated conditions that were in force pursuant to the November 3, 2005, sentencing order.

Because there was evidence that his conduct was intentional or inexcusable, the second *Austin* factor is satisfied.

C. Third *Austin* Factor

Before revoking probation, a district court must find that the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250. The district court made such a finding in its revocation order. M.A.D. argues that these findings were not based on clear and convincing evidence.

In weighing the need for confinement against the policies favoring probation, the district court should consider whether:

- (i) confinement is necessary to protect the public from further criminal activity by the offender; or
- (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
- (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Austin, 295 N.W.2d at 251 (quoting *A.B.A. Standards for Criminal Justice, Probation* § 5.1(a) (Approved Draft 1970)). A district court should be mindful that “[t]he purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed.” *Modtland*, 695 N.W.2d at 606-07 (alteration in original) (quoting *Austin*, 295 N.W.2d at 250).

In determining that the need to confine M.A.D. outweighed policies favoring EJJ probation, the district court found that he had little or no commitment to change and remained an untreated sex offender. It also found that M.A.D.’s antisocial behavior persisted throughout his time in JSOP and that his unwillingness to engage in treatment undermined his treatment and the treatment of others. The district court was particularly troubled by M.A.D.’s history of sadistic behavior and the fact that he had as many as 20 to 25 victims. Notwithstanding the EJJ screening committee’s recommendation that M.A.D.’s EJJ probation be restructured and that he be placed at the Red Wing facility, the district court found M.A.D. unamenable to treatment at the Red Wing facility or another juvenile correction facility. The court reasoned that the Red Wing program, which uses cognitive behavioral programming, was similar in structure to the CHS program so that his chances of success at the Red Wing facility were no better than at

CHS. Indeed, M.A.D.'s appellate counsel appeared to concede at oral argument that the only difference between the Red Wing facility and CHS was the presence of the female staff worker about whom M.A.D. spread the rumor.

Regarding public safety, the district court was particularly concerned that M.A.D. might resist treatment at the Red Wing facility and remain an untreated sex offender if he were not committed to long-term placement. The district court believed that if M.A.D. were sent to the Red Wing facility, he might "just follow along . . . and never internalize any change." In light of M.A.D.'s lack of remorse and his sociopathic tendencies, the district court adopted the multi-disciplinary treatment team's written recommendation that he be incarcerated in an adult facility "to assure the safety of the public and community at-large."

M.A.D. contends that the district court's findings relative to the third factor are not supported by clear and convincing evidence because the district court revoked his EJJ probation despite the recommendation of several JSOP staff members and the EJJ screening committee. Notwithstanding those recommendations, there was ample evidence to support the judge's findings. M.A.D. has a history of sexual misbehavior and abuse, and there was evidence of various psychological disorders, which led to a poor prognosis. He was unable to complete treatment over 11 months, and there was substantial evidence that the Red Wing program was essentially the same as the CHS program. Thus, the third *Austin* factor is satisfied.

D. Mitigating Factors

Upon making the findings required under *Austin*, a district 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). Mitigating factors include amenability to treatment, successful completion of a treatment program, and whether the violations show a potential for recidivism. *B.Y.*, 659 N.W.2d at 770. The focus in this inquiry is on the circumstances surrounding the revocation and not the circumstances surrounding the offense. *Id.* at 769-70.

M.A.D. argues that his passing the third polygraph test and the progress he made during his time in JSOP should be considered mitigating factors. The district court found that there were no relevant mitigating factors that weighed in M.A.D.'s favor because he had made so little progress in treatment and his "professed willingness to make progress [was] the same claim he made in October 2005 before his placement at CHS-JSOP." The district court's decision was not an abuse of discretion. As discussed above, there is substantial evidence in the record to support the district court's finding that confinement is necessary to protect the public, and those considerations are not outweighed by the factors that M.A.D. has presented.

Finally, M.A.D. argues that his violations were merely "technical." "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.'" *B.Y.*, 659 N.W.2d at 772 (quoting *Austin*, 295 N.W.2d at 251). Here, as before, M.A.D. conflates the actions leading to his discharge

from the discharge itself. Even if the particular actions leading to his discharge would have been technical violations in isolation, the consequence of those violations was that he failed to complete the program. As discussed above in part A, successful completion of JSOP was the principal condition of M.A.D.'s EJJ probation. Therefore, his failure to complete the program was not merely technical.

In sum, clear and convincing evidence supports the district court's findings. The district court properly analyzed the three *Austin* factors. Thus, we conclude that the district court did not abuse its discretion when it revoked M.A.D.'s EJJ probation.

Affirmed.