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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0491**

In the Matter of the Welfare of E. A. P.

**Filed February 17, 2009
Affirmed
Kalitowski, Judge**

Hennepin County District Court
File No. 27-JV-05-180

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant E.A.P. challenges the district court's decision to revoke his extended jurisdiction juvenile (EJJ) probation, arguing that the district court abused its discretion

by concluding that the need for confinement outweighed policies favoring probation. We affirm.

DECISION

In 2005, appellant E.A.P. was adjudicated delinquent, designated EJJ, and placed on probation with a stayed 60-month adult sentence. In October 2007, appellant was accused of violating the terms of his probation. Following a contested revocation hearing, the district court revoked appellant's probation and ordered execution of the 60-month sentence.

The district court has broad discretion in determining whether the evidence justifies the revocation of probation. *State v. Austin*, 295 N.W.2d 246, 249 (Minn. 1980). And when choosing the appropriate disposition in a juvenile-delinquency case, the district court is afforded broad discretion. *In re Welfare of R.V.*, 702 N.W.2d 294, 298 (Minn. App. 2005). Therefore, absent an abuse of discretion, we will affirm a revocation order and a disposition. *Id.*

The Minnesota Supreme Court has established a three-step analysis that must be completed by a district court before revoking probation. *Austin*, 295 N.W.2d at 250; *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (quoting *Austin*, 295 N.W.2d at 250). 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 proved by clear and convincing evidence. Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(1). After making the required *Austin* findings, a district court must execute a sentence unless it finds mitigating factors that justify a continuation of the stay. Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(3); Minn. Stat. § 260B.130, subd. 5 (2008). Such mitigating factors may include successful completion of a treatment program, amenability to treatment, and whether the violation demonstrates possible recidivism. *B.Y.*, 659 N.W.2d at 770. The appropriate focus is on the mitigating factors surrounding the violation, not on those surrounding the original offense. *Id.* at 769-70.

Appellant challenges the district court's application of the third *Austin* factor. Appellant argues that there are mitigating factors surrounding his probation violation that justify continuing the stay. To support his argument, appellant cites his successful completion of the Glen Mills Academy and Step Group Home programs and his employment as an auto mechanic where he is in a management-training program.

Under the third *Austin* factor the court must find by clear and convincing evidence that the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250; *see also* Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(1) (stating "clear and convincing" standard). "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. A district court should always remain cognizant of the fact 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 (quoting *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. *Austin*, 295 N.W.2d at 251 (quotation omitted).

Here, the district court concluded that the third *Austin* factor was met, finding appellant has been on probation since the age of 12 for felony auto theft and that appellant violated probation for that offense on numerous occasions. The district court also relied on appellant’s behavior in May 2007 when, one month after completing the Step Group Home program, appellant was charged with fifth-degree assault, fleeing a police officer, damage to property, disorderly conduct, and consumption by a minor. The court noted that the state opposed the revocation of appellant’s EJJ probation at the revocation hearing for the probation violations arising from the May 2007 incident because appellant’s probation officer recommended continued probation. The district court also based its decision to revoke on the fact that appellant’s October 2007 probation violation was for violating curfew and associating with two known gang members, one of whom was carrying a loaded pistol. Finally, the district court noted that appellant’s EJJ probation officer recommended that probation be revoked.

A thorough examination of the record reveals that the district court considered appellant's past treatment-program success as well as the alternatives to revocation and found the alternatives insufficient to protect public safety. On this record, despite the presence of some mitigating factors, we conclude that it was not an abuse of discretion for the district court to revoke appellant's EJJ probation and execute appellant's 60-month adult sentence.

Affirmed.