STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0590

Raymond Leon Semler, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 24, 2009
Affirmed
Shumaker, Judge

Crow Wing County District Court
File Nos. 18-K1-96-001530, 18-K1-00-001601

Raymond Leon Semler, Moose Lake Annex, 1111 Highway 73, #206261, Moose Lake, MN 55767-9452 (pro se appellant)

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

Donald F. Ryan, Crow Wing County Attorney, 322 Laurel Street, Brainerd, MN 56401 (for respondent)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

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

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

On this appeal from a remand to the district court to consider the factors set forth in *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980), appellant challenges the district court's (1) decision to issue findings without holding a hearing, (2) consideration of his original criminal conduct, and (3) weighing of the third *Austin* factor. Because the district court properly considered relevant evidence and the *Austin* factors, and the decision to hold a hearing was within the court's discretion, we affirm.

FACTS

In March 1997, appellant Raymond Leon Semler was found guilty of fourth-degree criminal sexual conduct and kidnapping. The district court sentenced Semler to 42 months in prison, but stayed execution of that sentence and placed him on supervised probation for 50 years. The conditions of his probation included completion of an outpatient sex-offender treatment program and abstention from alcohol. In July 2000, Semler was charged with two counts of gross-misdemeanor driving while impaired (DWI); and in August his probation officer sought to revoke his probation, alleging that Semler had used alcohol and failed to complete sex-offender treatment as ordered.

At the probation-violation hearing in January 2001, Semler admitted both allegations. The court gave Semler an opportunity to explain. Semler stated that he had not consumed alcohol since July, and was attempting to enter a new sex-offender program but was having difficulty. The court revoked his probation and executed his

sentence on the 1997 convictions. Then, Semler pleaded guilty to one of the DWI charges.

Semler moved to withdraw his plea, which the district court denied. He appealed in 2006, challenging his plea to the DWI charge and the district court's failure to make the required findings at his probation revocation hearing. *See State v. Semler*, A06-2093, 2008 WL 73235, at *1 (Minn. App. Jan. 8, 2008). We held that the court had properly denied Semler's motion to withdraw his plea of guilty, but remanded to the district court "for the purpose of satisfying the requirements of *Austin*." *Id.* at *3.

In response, the district court issued an order, dated March 6, 2008, containing findings of fact and conclusions of law. Semler appeals from this order, arguing that the district court erred on remand by issuing findings without holding a hearing, considering the nature of his original crime, and failing to properly consider the third *Austin* factor.[1]

D E C I S I O N

Hearing on Remand

Semler first argues that the district court erred by making findings without a hearing on remand. Generally, a district court's "duty on remand is to execute the mandate of the remanding court strictly according to its terms." *Duffey v. Duffey*, 432

[1] Semler's assertions in sections II and IV of his brief address his claim that a hearing should have been held on the record; they are treated as a single argument for purposes of this opinion. His argument in section V of his brief, that the court's order was not "in the interests of justice," is unsupported by any relevant case law, and so we do not address it. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (declining to address issues unsupported by legal analysis or citation). Finally, his arguments in sections VI and VII, regarding the court's alleged failure to address the *Austin* factors and weigh the policies favoring probation, are treated as one argument, as they allege the same deficiencies.

N.W.2d 473, 476 (Minn. App. 1988). When a case returns to the district court on remand without specific directions as to how the district court should proceed, the district court has discretion "to proceed in any manner not inconsistent with the remand order." *Id.* We review the district court's compliance with the mandate of the remanding court to determine whether it abused its discretion. *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005).

In reversing the district court's order revoking Semler's probation, we stated that remand was necessary "for the purpose of satisfying the requirements of *Austin*." *Semler*, 2008 WL 73235, at *3. We gave no other direction to the district court.

Austin requires the district court to (1) designate the specific condition or conditions that the defendant violated; (2) find that the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. 295 N.W.2d at 250. Minn. R. Crim. P. 27.04, subd. 3(4), states that "[a] verbatim record shall be made of the proceedings at the revocation hearing and in any contested hearing the court shall make written findings of fact." The "written findings" portion of this requirement can be satisfied by the district court stating its findings and reasons on the record. *State v. Modtland*, 695 N.W.2d 602, 608, n.4 (Minn. 2005).

A verbatim record was made of Semler's original probation-revocation hearing held on January 2, 2001, but no hearing was held on remand. Although the language of rule 27.04 states that a recorded hearing must be held, this mandate does not necessarily apply when a probation revocation is remanded solely to comply with *Austin*. We did not remand Semler's case for any substantive or procedural problem concerning the hearing

itself. Rather, the remand was based on the court's failure to explicitly consider the requisite *Austin* factors before deciding to revoke Semler's probation. The court could properly do this without holding a new hearing. Furthermore, it is not apparent that Semler even requested a hearing before the district court issued its order. Because neither our remand nor any other law or rule of procedure mandates that a hearing be held in this situation, we conclude that the district court did not abuse its discretion in deciding not to hold one.

Consideration of Original Criminal Conduct

Semler also claims that the court based its order for revocation on irrelevant information, namely, the facts constituting the basis for his original convictions. The district court attached a memorandum to its order, which explained that its "evaluation of the *Austin* factors . . . was conducted in a context which included the following observations:" Semler's "crimes were not crimes of opportunity but crimes of predation"; Semler "displayed no remorse for his acts"; and Semler's "acts had devastating emotional and psychological impact on his victim."

In determining whether the need for confinement outweighs the policies favoring probation, the district court must base its decision on "the original offense and the intervening conduct." *Modtland*, 695 N.W.2d at 607 (quotation omitted). Thus, it was necessary for the court to consider Semler's predation and subsequent lack of remorse in deciding whether to revoke his probation, and it was not error for the court to consider these factors.

Consideration of Austin Factors

Finally, Semler contends that the district court did not properly discuss the third *Austin* factor in its order. This court reviews de novo the adequacy of the district court's *Austin* findings. *Id.* at 605.

After determining that an individual has intentionally or inexcusably violated the terms of probation, the court must consider the third *Austin* factor, "bear[ing] in mind that policy considerations may require that probation not be revoked even though the facts may allow it." *Id.* at 606 (quotation omitted). The court should consider (1) whether "confinement is necessary to protect the public from further criminal activity"; (2) whether "the offender is in need of treatment which can most effectively be provided if he is confined"; or (3) whether "it would unduly depreciate the seriousness of the violation if probation were not revoked." *Id.* at 607 (quotation omitted). "When determining if revocation is appropriate, courts must balance the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Id.* at 606-07. "[I]n making the three *Austin* findings, courts are not charged with merely conforming to procedural requirements; rather, courts must seek to convey their substantive reasons for revocation and the evidence relied upon." *Id.* at 608.

On remand, the court complied with the procedural requirements of *Austin* by making findings on all three factors, but Semler maintains that it failed to properly address the substantive requirements of *Austin*, especially on the third factor.

The district court's analysis of the third *Austin* factor consists of the following:

> Given the very serious nature of the crimes [Semler] has committed and the absence of good faith on [Semler's] part to abstain from the use of alcohol and to complete outpatient sex offender treatment, the need for confinement in this case outweighs any policies favoring a continued probationary disposition.

While the court did not use *Modtland*'s language in its analysis, its substantive reasons were clearly conveyed from its findings of fact, conclusions of law, and accompanying memorandum.

The court found that Semler had two alcohol-related violations, both involving driving while intoxicated, and had been terminated from sex-offender treatment on two different occasions. The court also noted that staff from the sex-offender treatment center indicated that they would not readmit Semler because of his lack of commitment to the program. In its accompanying memorandum, the court made clear that it was also relying on the fact that Semler's crimes were ones of predation, rather than opportunity, and that he had displayed no remorse for his behavior.

The court's conclusion that the policies favoring probation were outweighed by the need for confinement was clearly based on the need to protect the public. It considered "the very serious nature of his crimes" and Semler's inability to complete treatment on his own because of his "absence of good faith." The court's order sufficiently conveys the reasons and basis for its conclusion that the need for incarceration outweighs the policies favoring probation, and was not a "reflexive

reaction" to technical violations, which *Austin* sought to avoid. *Austin*, 295 N.W.2d at 251 (quotation omitted).

Affirmed.