STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0990

State of Minnesota,
Respondent,

vs.

Nicholas Charles Farrow,
Appellant.

Filed April 14, 2009
Affirmed
Bjorkman, Judge

Ramsey County District Court
File No. 62-K1-03-001950

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges the district court's revocation of his probation, arguing that the district court abused its discretion by not making written or adequate oral findings to support its decision and that the evidence does not show that the violation was intentional or inexcusable or that the need for confinement outweighs the policies favoring probation. Appellant also contends that, in the event we decline to reinstate his probation, his case must be remanded for imposition of the presumptive 21-month sentence because the district court departed from the guidelines sentence without stating reasons for doing so on the record. We affirm.

FACTS

In October 2003, appellant Nicholas Farrow pleaded guilty to second-degree assault, an amended charge following a sexual assault against his former girlfriend. The district court sentenced appellant to 42 months' imprisonment but dispositionally departed by staying execution of the sentence and placing appellant on probation for seven years. The sentence represented a durational departure from the 21-month presumptive sentence, based on "the fact that a seven-year-old child was present within the apartment . . . [and] also the fact that there was a current Order for Protection in place at the time of the offense."

One of the conditions of appellant's probation was that he complete sex-offender treatment. In February 2006, appellant admitted that he was in violation of this probation term. Appellant's probation officer testified at that hearing that appellant was having

problems working in the treatment groups due to anger-management issues. The district court ordered appellant to serve 90 days in jail and continued appellant's probation with the added condition that he complete anger-management counseling before returning to the treatment program. Appellant completed this counseling and returned to sex-offender treatment in September 2007.

In March 2008, appellant again admitted that he was in violation of the sex-offender treatment condition of his probation. Specifically, he acknowledged that the treatment program terminated him for failing to comply with the program. Appellant requested that he be given jail time as a consequence and continued on probation. The district court found appellant in violation of his probation and executed appellant's 42-month prison sentence. This appeal follows.

D E C I S I O N

A district court has broad discretion in determining whether there is sufficient evidence to revoke probation and we will not reverse the district court's decision absent an abuse of discretion. *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004). But whether the district court has made the required findings to revoke probation is a question of law we review de novo. *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005).

The supreme court has adopted a three-step analysis that a district court must follow before revoking probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). Under *Austin*, the district court must make written findings that (1) designate the specific condition of probation that has been violated; (2) determine the violation was intentional or inexcusable; and (3) conclude the need for confinement outweighs the policies

favoring probation. *Modtland*, 695 N.W.2d at 606 (citing *Austin*, 295 N.W.2d at 250). The writing requirement is satisfied when the district court states "its findings and reasons on the record, which, when reduced to a transcript, is sufficient to permit review." *Id.* at 608 n.4.

I. The district court did not abuse its discretion when it revoked appellant's probation.

Appellant first argues that the district court abused its discretion because it failed to make written findings of fact or adequate oral findings on the record with respect to the second and third *Austin* factors. Appellant also contends that these findings are unsupported by clear and convincing evidence in the record.

As to the second *Austin* factor, the district court found that in the five years since appellant was placed on probation, he had not even neared completion of sex-offender treatment. The district court noted that appellant had "ample opportunity" to complete the treatment program and specifically found that appellant was "not any further along than you were the date that I sentenced you." The district court found that appellant's violation was both inexcusable and intentional.

Appellant argues that the district court's findings are inadequate and lack evidentiary support. We disagree. The findings convey the substantive reasons for the court's conclusion that appellant's violation was intentional and without legal excuse. *See Modtland*, 695 N.W.2d at 603 (stating that *Austin* does not merely establish a procedural requirement but directs courts to "seek to convey their substantive reasons for revocation and the evidence relied upon"). And the findings are supported by the

information provided to the district court. Appellant's probation officer testified that appellant understood the importance of completing sex-offender treatment, yet once again failed to follow program rules after returning to the treatment program in September 2007. The officer further testified that the program terminated appellant in January 2008 and refused to take him back. The probation officer's testimony provides a sufficient basis for the district court's findings that appellant's failure to comply with the treatment requirement of his probation terms was intentional and without legal justification or excuse.

Regarding the third *Austin* factor, the district court found that "the public is entitled to be safe from sex offenders, especially those who are untreated, so I think I could reasonably conclude that public safety is paramount in this particular case." The court further found that because appellant had not completed sex-offender treatment, for whatever reason, he "present[s] a risk to society." Appellant argues that these findings do not address the third *Austin* factor at all and that they are merely insufficient commentary related to general concerns for public safety.

In making the third *Austin* finding, "[t]here 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 district court must consider three policies: (1) whether confinement is necessary to protect the public; (2) whether the offender needs correctional treatment that can best be provided in prison; and (3) whether or not revoking probation would depreciate the seriousness of the violation. *Modtland*, 695 N.W.2d at 607. A district court should always remain cognizant of the fact that "the

purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Id.* at 606 (quotation omitted).

Here, the district court found that because appellant remains untreated, he presents a risk to society. The district court also found that the department of corrections offers a treatment program appellant could complete while in confinement. And the district court concluded that appellant had been given "ample opportunity" to complete the program but had not made sufficient progress toward doing so. We conclude that the court's statements on the record adequately convey the court's reasoning. These findings are fully supported by the evidence, including the probation officer's testimony that

> [appellant] has gone nowhere in his therapy at Project Pathfinders. . . . Pathfinders is refusing to take him back into their program. At this time Probation feels that [appellant] is not amenable to probation. And Probation would be recommending that his probation be revoked . . . . Probation feels at this time the need for [appellant's] incarceration outweighs any need for him to be allowed to remain in the community because right now, at this time, he is untreated and there doesn't seem to be any motivation for him to complete treatment . . . .

Appellant's reliance on this court's unpublished decision in *State v. Bruce*, No. A07-600, 2008 WL 2102893 (Minn. App. May 13, 2008), is misplaced. Not only are unpublished decisions of this court not precedential, Minn. Stat. § 480A.08, subd. 3(c) (2008), the facts in *Bruce* are distinctly different. In *Bruce*, the probationer had more than three years left to complete sex-offender treatment, had been making progress, and remained willing to complete the treatment program. 2008 WL 2102893, at *2. That is not the case here. And the absence of a probation term that specified a deadline for

completing sex-offender treatment is not dispositive of the third *Austin* factor. *See State v. Rock*, 380 N.W.2d 211, 212-13 (Minn. App. 1986) (affirming a probation revocation when the evidence showed that a probationer was "not interested in trying to change" and was unwilling to participate in sex-offender treatment), *review denied* (Minn. Mar. 27, 1986); *State v. Hemmings*, 371 N.W.2d 44, 47 (Minn. App. 1985) (affirming a probation revocation when the evidence supported a district court's finding that a probationer was "unamenable to treatment"). Here, the evidence supports the district court's determination that the need to confine appellant outweighs the policy favoring probation.

II. Appellant waived his right to challenge his sentence.

Appellant argues that if we affirm the revocation of his probation, his sentence must be corrected to the presumptive 21-month term because the district court improperly departed from the sentencing guidelines by not stating reasons for departure on the record at sentencing.

Appellant did not raise this issue at sentencing or at the time his sentence was executed at the probation-revocation hearing. We therefore decline to consider it on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (establishing that appellate courts will not review issues that were not first argued, considered, and decided in court below).

Affirmed.