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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0936

State of Minnesota,
Respondent,

vs.

Jared Schultz, Jr.,
Appellant.

Filed June 9, 2009
Reversed and remanded
Randall, Judge[*]

Martin County District Court
File No. 46-CR-05-1631

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

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Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and Randall, Judge.

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[*] Retired judge of the Minnesota Court of Appeals, serving 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

RANDALL, Judge

On appeal from the revocation of his probation and execution of his sentence for first-degree criminal sexual conduct, appellant argues that the district court (1) failed to make the necessary findings on the *Austin* factors, and (2) abused its discretion when it revoked his probation. Because the district court is compelled to provide specific findings on the *Austin* factors, and, importantly, the third *Austin* factor, we reverse and remand.

FACTS

In 2005, appellant Jared Schultz, Jr., was charged with first-degree criminal sexual conduct after officers received a report that appellant, then 18 years old, had been engaging in sexual relations with an 11-year-old female. In 2007, appellant pleaded guilty as charged. At his sentencing, appellant moved for a dispositional departure from the 144-month presumptive prison sentence. The district court sentenced appellant to 144 months in prison, but stayed execution of the sentence with several conditions. Appellant was required to serve one year in the county jail, have a sexual-offender evaluation, follow recommendations for counseling, have a chemical-dependency assessment and follow related recommendations, and continue mental-health counseling. The district court stated that it would review appellant's progress before the expiration of one year and determine whether appellant merits the continued stay of execution; and if appellant failed to meet the court's expectations his sentence would be executed.

In February 2008, the district court granted appellant a furlough "solely for the purpose of attending outpatient sex-offender treatment." Appellant was ordered to report directly to treatment, return to jail immediately upon conclusion of the treatment session, and not make any stops in transit. Approximately one week later, the jail intercepted a letter to appellant from his girlfriend. The letter indicated that appellant had contact with his girlfriend on a furlough day. In the letter, appellant's girlfriend stated: "I got to see you yesterday, it made me all happy []. And I got the good kisses. I love how you kiss." The state notified the district court. According to the state, the department of corrections instructed appellant that he was prohibited from having "contact" with anyone other than his immediate family, and that appellant violated the jail rules.

In March 2008, appellant's probation officer (PO) sent the court a summary of appellant's adjustment since sentencing. Appellant had completed a chemical-dependency assessment; had not attended enough sex-offender-treatment sessions to provide the court with an update; failed to initiate contact for mental-health counseling; lied to jail staff in order to have visitation with a friend; and attempted to mail a letter to a minor female. Because appellant was not abiding by jail rules and court orders, his PO believed that he would likely have a great deal of difficulty abiding by conditions upon release to the community, and recommended execution of appellant's sentence.

The district court held a review hearing and addressed appellant:

> do you recall when you were here before the Court and we talked about your year in the county jail and the Court talked to you specifically about reviewing this case and trying to decide whether you have met the requirements and whether or not you were going to be considered a risk for re-offending,

> and that you were going to have to show this Court and society that you should be spared from execution of the prison term? Do you remember that court hearing[?]

Appellant replied that he recalled that hearing. The court stated: "So in less than a month after you get out to go to sexual offender treatment, you're having inappropriate physical contact with a young lady when you're on furlough from jail, is that correct?" Appellant agreed that the court was correct. The following exchange then occurred:

> [The court]: What does that tell me?
>
> [Appellant]: That I probably won't listen.
>
> [The court]: I guess that's exactly what it tells me.

In the probation-violation order, the court states that:

> [i]t was specifically delineated on the Court's record that a review of [appellant's] progress in sexual offender treatment would be made before the expiration of one year, and a determination at that time would decide whether or not the stay of execution would be extended or whether [appellant] had failed to meet expectations of the Court, and therefore should be committed directly to the Commissioner of Corrections for the presumptive sentence.

The court found that while on furlough to attend sex-offender treatment, appellant had "unauthorized and inappropriate physical contact with a 19-year old female." The court found that it is "uncontroverted that such contact, during a furlough for sexual offender treatment, was inappropriate and beyond all the boundaries that would be expected of a person attempting to successfully address issues of being a sexual predator and/or offender." The court concluded that appellant no longer qualified for the stay of

execution and committed him to the commissioner of corrections for the presumptive 144-month sentence.

D E C I S I O N

Appellant argues that the district court abused its discretion by revoking his probation. 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." *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980).

Appellant asserts that the district court failed to make the necessary findings on the *Austin* factors when it revoked his stay of execution. The state argues that the district court was not required to make findings on the *Austin* factors because the district court did not revoke appellant's probation, but rather, concluded after a review hearing that appellant no longer merited the continued stay of execution. This "argument" we reject! Appellant was: (1) on probation; (2) had it revoked. We address the merits on that basis.

Under Minn. Stat. § 609.135, subds. 1(a)(1)-(2) (2006), a district court may stay imposition or execution of a sentence and may order intermediate sanctions without placing the defendant on probation, or place the defendant on probation and order intermediate sanctions. A district court may revoke a stay of imposition or execution of a sentence when "it appears that the defendant has violated any of the conditions of probation or intermediate sanctions[.]" Minn. Stat. § 609.14, subd. 1(a) (2006). But before a district court may revoke probation, it must "1) designate the specific condition or conditions that were violated; 2) find that the violation was intentional or inexcusable;

and 3) find that need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d at 250.

Here, the district court imposed a sentence, but stayed execution of the sentence, and placed appellant on probation with specific conditions. One of the conditions was that appellant serve one year in jail, and during that time he could not "pose any public risk of reoffending" and was given "the opportunity to [] demonstrably show to [the] court and society that he should be spared execution of the entire prison term." Additionally, appellant was required to participate in sex-offender treatment, obtain a chemical-dependency assessment, and engage in mental-health counseling. Appellant was on probation, and the district court was required, upon revocation of appellant's probation, to make the necessary findings on the *Austin* factors.

Before revoking appellant's probation, the district court was required to designate the specific violation, find the violation intentional or inexcusable, and *find that the need for confinement outweighed the policies favoring probation*. *Austin*, 295 N.W.2d at 250 (emphasis added). The district court is required to "create thorough, fact-specific records setting forth [] reasons for revoking probation." *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). Whether a district court made the findings required under *Austin* presents a question of law, which this court reviews de novo. *Id.* at 605.

Here, the district court did not refer to the *Austin* factors. Our review of the record leads to the conclusion that the district court failed to make all of the requisite specific findings. The district court designated the specific violation, which was appellant's "unauthorized and inappropriate physical contact with a 19-year old female." Then the

district court essentially found that the violation was "inexcusable." The district court stated:

> [T]he explanation . . . was that the young female was waiting to meet with [appellant] upon his return to [jail] and that the contact was minimal in nature. A writing intercepted by the [jail] . . . by the female in question detailed her reaction to the physical contact. It is uncontroverted that such contact, during a furlough for sexual offender treatment, was inappropriate and beyond all the boundaries that would be expected of a person attempting to successfully address issues of being a sexual predator and/or offender.

This record truly lacks a reasonable analysis of the final *Austin* factor—whether the need for confinement outweighs the policies favoring probation. The district court stated:

> [Appellant] expressed to the Court that he was going to show this Court and society that he should be spared from execution of the prison term.
>
> . . . .
>
> When the Court inquired as to how long [sexual offender] treatment had been in progress, [appellant] stated . . . 'About four weeks.'
>
> The Court then summarized 'So in less than a month after you get out to go to sexual offender treatment, you're having inappropriate physical contact with a young lady when you're on furlough from the jail, is that correct?' [Appellant's] response, 'Yes, your Honor.' The Court next inquired, 'What does that tell me?' [Appellant,] 'That I probably won't listen.'

The district court found that appellant was going to demonstrate that he should not have his prison sentence executed, and then within four months committed an "inexcusable violation." The district court held that appellant was not "the listening type."

The record shows that the letter was written by an adult, a 19-year old woman, and states, "I got to see you yesterday, it made me all happy []. And I got the good kisses []. I love how you kiss." Appellant does not appear to be "Public Enemy Number One." When questioned about it by the court, appellant's response, "[t]hat I probably won't listen[,]" is arguably honest and refreshingly naive. It lacks the best behavior "spin" that district courts continually hear from probation offenders explaining away "The Great Train Robbery" that took place in England in 1963.

The district court did not make it clear that it considered appellant's constitutional interest in freedom and the state's interest in balancing his rehabilitation versus the public safety. The Minnesota Supreme Court made it crystal clear in *Austin* that there is a sound public policy favoring probation, and the need for prison confinement must be shown by the state to outweigh that policy. At this point, an explanation of that factor is lacking.

Reversed and remanded.