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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-1371**

State of Minnesota,  
Respondent,

vs.

Q. G.,  
Appellant.

**Filed June 2, 2009  
Affirmed  
Crippen, Judge\***

Scott County District Court  
File No. JV-04-23465

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

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

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

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

## **UNPUBLISHED OPINION**

**CRIPPEN**, Judge

On appeal following revocation of his extended-jurisdiction-juvenile (EJJ) status and execution of his stayed adult sentence, appellant Q.G. argues that the district court clearly erred by finding that the need for confinement outweighed the policies favoring probation. Appellant also argues that the court abused its discretion by failing to give due consideration to mitigating factors. We affirm.

### **FACTS**

Appellant, then 16, sexually assaulted his 14-year-old group-home roommate in November 2004. On a plea agreement, he later pleaded guilty to one of two counts of first-degree criminal sexual conduct, and other charges were dismissed. He received a stayed 144 month sentence as an EJJ offender, and he was ordered to complete sex-offender treatment at MCF-Red Wing (Red Wing).

In September 2007, Scott County correction authorities filed a notice of probation revocation, stating that appellant was not amenable to sex-offender treatment. An amended notice explained that appellant had been removed from the Red Wing treatment program due to persistent behavioral issues. At a revocation hearing in March 2008, appellant admitted to intentional and inexcusable probation violations, but he disputed whether the need for confinement outweighed the policies favoring probation. The district court decided to revoke appellant's EJJ probationary status and to execute his adult sentence.

In its April 2008 revocation order, the district court summarized the testimony of six witnesses, including two experts, in a series of detailed factual findings. The court found by clear and convincing evidence that the need for appellant's confinement outweighed the policies favoring probation. The court also found that there were insufficient mitigating factors to justify a continued stay of appellant's adult sentence. Appellant challenges the court's credibility determinations as to the expert witnesses and its conclusion that no mitigating factors justify a further stay of his adult sentence, but he does not dispute the district court's summary of the testimony presented at the hearing.

## **DECISION**

### **1.**

We accord "great weight" to a district court's findings of fact and will not overturn them unless they are clearly erroneous. Minn. R. Civ. P. 52.01. The Minnesota Supreme Court has established a three-step analysis that must be completed by a trial court before probation is revoked. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980) ("[T]he court must 1) designate the specific condition or conditions that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that the need for confinement outweighs the policies favoring probation."). This analysis applies to EJJ revocation proceedings. *State v. B.Y.*, 659 N.W.2d 763, 768-69 (Minn. 2003).

Appellant's assertions regard only the third *Austin* factor. To satisfy this factor, a district 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). The court must balance "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 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.” *Id.* at 251 (quotation omitted).

Appellant broadly asserts that he “is a product of Minnesota's failed child protection and delinquency systems.” Detailing this assertion, he adds:

The [district] court's order sending [appellant] to prison completes a long history of placements, beginning in 1997 when [he] became a ward of the state. At age 16, [appellant] was placed at Red Wing as an extended jurisdiction juvenile for criminal sexual conduct. At age 19, he was discharged from Red Wing. And at age 20, he was sent to prison for 144 months.

Following this indictment, he assigns error to the district court's determination that one expert witness's opinion was more reliable than another on balancing appellant's amenability to treatment against the need for public safety.

Explaining its decision on the need to confine appellant, the district court found the testimony and opinions of the state's expert, Kelly Wilson, Psy.D, to be more reliable than those of appellant's expert, James Gilbertson, Ph.D. The record amply supports the court's position that the third *Austin* factor is satisfied.

There is narrow disagreement of the two experts as to appellant's amenability to treatment, and this is partly explained by the contradictory information that appellant has provided throughout his treatment and to various expert evaluators. For example, Drs. Wilson and Gilbertson disagreed on whether appellant is sexually deviant. Dr. Gilbertson

characterized appellant's sexual offense as a function of anti-social characteristics, not sexual deviance. But he stated during cross-examination that sexual deviance is consistent with details from appellant's treatment records presented by Dr. Wilson: namely; appellant's arousal to forced sex, to wearing women's underwear, and to sex with boys. Dr. Wilson also testified that appellant denied that he had committed a sexual offense and told her that he was at no risk to reoffend because he is not a sexual offender. Dr. Gilbertson, in turn, testified that he would change his conclusions about appellant's amenability to treatment if appellant had indicated that he was at no risk to reoffend. Disagreement of the experts is easily tied to the contradictory information in appellants' treatment records and the contradictory statements he has made to the experts.

Professional judgment also appears to have been a factor in the experts' disagreement regarding appellant's diagnosis. Dr. Gilbertson did not agree with Dr. Wilson's diagnosis of anti-social personality disorder because appellant, though over 18, had not "been out in the community." Dr. Gilbertson opined that conduct disorder was therefore the better diagnosis. But both diagnoses appear to be supported by the record. Dr. Wilson testified that a diagnosis of anti-social personality disorder "does not require that an individual be in a non-institutional setting." And Dr. Gilbertson testified that although a diagnosis of conduct disorder is usually restricted to people under the age of 18, an examiner is allowed to use his or her professional judgment to continue to use the diagnosis beyond a person's 18th year.

Finally, Dr. Gilbertson's opinion regarding appellant's risk of recidivism—that appellant poses a moderate risk of re-offending sexually and a high risk of re-offending

criminally if not confined—matches the conclusion of the district court. Appellant does not assign error to this or any finding supported by Dr. Gilbertson’s expert testimony.

Given the record of explanations for the expert disagreements, there is no clear error in the district court’s determination that the need for appellant’s confinement outweighs the policies favoring probation.<sup>1</sup>

## 2.

Appellant also argues that the district court failed to give due consideration to mitigating factors that would justify a continuation of the stay. A district court has broad discretion in determining whether the evidence justifies the revocation of probation. *Austin*, 295 N.W.2d at 249. Absent a clear abuse of that discretion, we will affirm a revocation order and disposition. *State v. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007).

Appellant contends that he is particularly amenable to treatment in a probationary setting, that he has accepted responsibility and showed remorse for violating his probation, and that his behavior at Red Wing is attributable to his childhood experiences. The district court acknowledged appellant’s background, which it described as “tragic.” But the court also noted that appellant is manipulative and aggressive, has minimal insight into his behavior, has little motivation to change his behavior, has few coping strategies, and has demonstrated a “pervasive pattern of using intimidating and violent

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<sup>1</sup> Appellant appears to argue that the district court committed procedural error by holding separate revocation and sentencing hearings. He cites *State v. Modtland*, which involved a district court’s decision to revoke probation before making the required *Austin* findings. 695 N.W.2d 602, 607–08 (Minn. 2005). But here, all of the *Austin* findings were admitted to by appellant or made by the district court before appellant’s sentence was executed. Nor does appellant explain how he was prejudiced by separate hearings.

behavior to obtain his objectives.” The court considered appellant’s behavior at Red Wing, which included threatening his peers with rape, torture, beatings, and kidnapping, and the court weighed the tension between appellant’s interest in treatment and his denial that he is a sex offender.

The district court acted within the boundaries of its discretion by declining to find sufficient or compelling mitigating factors to justify a continued stay of appellant’s sentence.

**Affirmed.**