STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0540

State of Minnesota,
Respondent,

vs.

Stephen Joseph Melius,
Appellant.

Filed September 22, 2009
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CR-02-094313

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

Michael O. Freeman, Hennepin County Attorney, Michael K. Walz, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Marie L. Wolf, Interim 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 Kalitowski, 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

KALITOWSKI, Judge

Appellant Stephen Joseph Melius challenges the district court's revocation of his probation, arguing that the evidence in the record fails to establish that (1) appellant's violation was intentional or inexcusable, and (2) the need for confinement outweighed the policies favoring probation. We affirm.

D E C I S I O N

Probation may be revoked if the district court finds upon clear and convincing evidence that probation has been violated. Minn. R. Crim. P. 27.04, subd. 3(3). Absent a clear abuse of discretion, we will not reverse a district court's determination that there is sufficient evidence to revoke probation. *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004). Part of the district court's role as fact-finder in a probation-revocation hearing is to judge the credibility of witnesses, and this court defers to the district court's credibility evaluations. *State v. Losh*, 694 N.W.2d 98, 102 (Minn. App. 2005), *aff'd*, 721 N.W.2d 886 (Minn. 2006). But whether the district court has made the findings required to revoke probation is a question of law that we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

In *State v. Austin*, the Minnesota Supreme Court adopted a three-step analysis that a district court must follow before revoking probation. 295 N.W.2d 246, 250 (Minn. 1980). *Austin* requires district courts to 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. *Id*. 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." *Modtland*, 695 N.W.2d at 608 n.4. *Modtland* requires district courts to make specific findings on the *Austin* factors to assure the creation of "thorough, fact-specific records" setting forth the substantive reasons for revoking probation. *Id*. at 608.

Because appellant does not dispute the district court's designation of the specific conditions of probation that he violated, appellant's challenge is limited to whether the district court abused its discretion in finding (1) that appellant's probation violations were intentional or inexcusable, and (2) that the need for confinement outweighs the policies favoring probation.

I.

Appellant argues that the district court abused its discretion in finding that his probation violations were intentional or inexcusable because the finding was not supported by clear and convincing evidence in the record. We disagree.

The district court designated appellant's three probation violations: (1) failing to submit to four random urinalysis (UA) tests; (2) providing a diluted UA sample; and (3) failing to attend a meeting with his probation officer. The district court found that these violations were intentional or inexcusable.

An appellant may present evidence of extenuating circumstances to bolster a claim that a probation violation was excusable. *See State v. Johnson*, 679 N.W.2d 169, 177 (Minn. App. 2004). Appellant claims that his failure to submit to four random UA tests

is excusable because he had to skip the UA tests in order to comply with his probation condition of full-time employment. We disagree.

When an appellant (1) knows what is required to comply with a condition of his probation, and (2) chooses to take a job that will likely interfere with his compliance with that requirement, attendance at work is not a legal excuse for noncompliance. *See State v. Moot*, 398 N.W.2d 21, 24 (Minn. App. 1986) (finding that an appellant's probation violation of failing to complete a chemical-treatment program could not be excused based on appellant's work requirements, when he chose to take a job that he knew would interfere with his treatment schedule), *review denied* (Minn. Feb. 13, 1987).

Here, appellant claims that his choice of employment made him unable to comply with all of the conditions of his probation. But when appellant began probation he was informed of the conditions, which among others included: (1) submitting to random UA testing as ordered; (2) abstaining from mood-altering chemicals including alcohol; and (3) maintaining full-time employment. Appellant also knew that the UA testing facility was located in downtown Minneapolis and that he would likely need to take public transportation to the facility. Nevertheless, the record indicates that appellant chose to obtain full-time employment in the western suburbs with a company that had strict project deadlines and that appellant claims would terminate his employment for taking time off work to comply with random UA tests. Because appellant knew of his probation conditions, yet chose to work a job that might not allow him to comply with these conditions, he cannot use attendance at work as an excuse for his probation violations.

We conclude that the district court did not abuse its discretion in finding that appellant's failure to submit to random UA tests was intentional or inexcusable.

There is evidence on the record that appellant intentionally violated the conditions of his probation and, in light of this court's deference to the district court's credibility determinations, appellant has failed to show that his violations were unintentional or excusable. Thus, we conclude that the district court did not abuse its discretion in determining that the second *Austin* factor was satisfied.

II.

Appellant argues that the record cannot support a finding that the need for confinement outweighs the policies favoring probation because he has not been charged with or convicted of any new offenses and correctional treatment is not necessary for appellant's or the public benefit. We disagree.

With regard to the third *Austin* factor, the district 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 probation 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 (quotations omitted). The third factor is satisfied if: (1) confinement is necessary to protect the public from further criminal activity by the offender; or (2) the offender is in need of correctional treatment that can most effectively be provided if he is confined; or (3) it would unduly depreciate the seriousness of the violation if probation were not revoked. *Id.* Revocation may be justified if only one of

these elements is met. *Id.* The district court may consider an individual's prior record when determining whether the individual is amenable to probation. *State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994), *review denied* (Minn. Apr. 21, 1994). Similarly, *Modtland* permits district courts to consider the original offense and any intervening conduct when weighing the third *Austin* factor. *Modtland*, 695 N.W.2d at 607.

Although appellant has not been charged with or convicted of a new offense since he began probation in 2003, a district court need not find a new charge or conviction to find that a defendant poses a danger to the public. *See Sejnoha*, 512 N.W.2d at 600 (holding that the district court may consider an individual's prior record when determining whether the individual is amenable to probation). Here, the district court properly found that appellant's underlying "offense of felony drunk driving is a crime with a high potential to create a serious threat to public safety." *See State v. Losh*, 755 N.W.2d 736, 744 (Minn. 2008) (a person who commits the offense of driving while impaired poses a threat to public safety); *State v. Hanson*, 532 N.W.2d 598, 601-02 (Minn. App. 1995) (stating that removing drunken drivers from the highways serves public safety), *aff'd*, 543 N.W.2d 84 (Minn. 1996). The record indicates that appellant (1) has been convicted of driving while impaired five times; (2) has previously violated his probation five times, all of which involved a failure to abstain from alcohol or drugs; and (3) has failed to provide an accurate urinalysis result. Thus, the district court concluded, based on appellant's underlying offense and intervening conduct, that the need for confinement outweighed the policies favoring probation.

We conclude that the district court did not abuse its discretion in finding the third *Austin* factor satisfied based on evidence in the record that appellant has a history of alcohol and drug use and driving while impaired, and thus poses a threat to public safety.

Affirmed.