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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1496**

State of Minnesota,
Respondent,

vs.

Kimberly Michelle Cunningham,
Appellant.

**Filed April 27, 2010
Affirmed
Wright, Judge**

Morrison County District Court
File No. 49-CR-07-2966

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brian J. Middendorf, Morrison County Attorney, Todd L. Kosovich, Assistant County Attorney, Little Falls, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Wright, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant challenges the district court's decision to revoke her probation and impose an executed sentence of 60 months' imprisonment for identity theft, arguing that the district court abused its discretion by doing so. We affirm.

FACTS

Appellant Kimberly Cunningham pleaded guilty to two counts of identity theft, a violation of Minn. Stat. § 609.527, subd. 2 (2006). Cunningham admitted using a credit card number that she received from an acquaintance, who had stolen it from a customer at work. After Cunningham also obtained the victim's bank account information, she used it to receive a cash advance from the account and to apply for a credit card in the victim's name. Cunningham was arrested before she received the credit card.

The presumptive guidelines sentence for Cunningham's offenses was 21 months' imprisonment. The parties negotiated a sentence of 60 months' imprisonment with a stay of execution and a five-year probation term. The duration of the sentence is the career-offender maximum, which the state sought based on Cunningham's criminal history, which includes 24 felony convictions. The district court imposed a sentence consistent with the terms of the plea agreement and imposed conditions of probation, which included satisfactory completion of a 90-day treatment program and compliance with all of the program's requirements. As such, the sentence imposed represents an upward durational departure and a downward dispositional departure.

Two months after the sentence was imposed, Cunningham was discharged from the treatment facility for violating program rules. At the probation-revocation hearing that followed, Cunningham admitted violating the terms and conditions of probation by consuming alcohol and methamphetamine, failing to abide by curfew rules, and being discharged from the treatment program.

The district court revoked the stay and executed the sentence, finding that Cunningham violated the terms of her probation by failing to complete the treatment program. The district court reasoned that, because Cunningham understood that she was not permitted to use drugs or alcohol while in the treatment program, her violation was knowing and intentional, and public policy requires execution of Cunningham's sentence. This appeal followed.

DECISION

Cunningham argues that the district court abused its discretion by revoking her probation because the evidence does not establish that the violation was inexcusable or that the need for confinement outweighs the policies favoring probation. If a probationer violates a condition of probation, the state must prove the violation of a condition of probation by clear and convincing evidence. Minn. R. Crim. P. 27.04, subd. 3(2); *State v. Johnson*, 679 N.W.2d 169, 177 (Minn. App. 2004). If the violation is proved, the district court may revoke probation and execute a previously stayed sentence. Minn. Stat. § 609.14, subd. 1(a) (2008). The decision to do so rests within the district court's broad discretion and will not be disturbed absent a clear abuse of that discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980).

When revoking a defendant's probation, the district court must (1) designate a specific condition that was violated; (2) find that the violation was intentional and inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *Id.* at 250 (the *Austin* factors).

As to the first *Austin* factor, the district court found, and Cunningham does not dispute, that Cunningham violated her probation by consuming drugs and alcohol and by failing to complete the treatment program successfully. Thus, by designating a specific probation condition that was violated, the district court satisfied the first *Austin* factor.

Regarding the second *Austin* factor, the district court found that Cunningham's violations "were knowing and intentional and not with excuse or justification." This finding is supported by Cunningham's testimony that, while understanding that she was required to follow the program rules and complete the treatment program, she drank alcohol and used methamphetamine in violation of the rules, which resulted in her discharge. Cunningham also admitted that she had neither an excuse nor justification for the conduct that led to her discharge from the program. Although Cunningham testified that she "didn't realize how hard [maintaining sobriety] was going to be," the evidence does not reflect that her probation violation was unintentional. There is ample record support for the district court's finding that the requirements for the second *Austin* factor have been met.

The district court analyzed the third *Austin* factor, whether the need for confinement outweighs the policies favoring probation, in particularized findings. *See State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005) (iterating the *Austin* factors and

the need for express findings regarding them). To ensure that the balance is properly struck between the probationer's interest in freedom and the state's interest in insuring rehabilitation and public safety, a district court should not revoke probation unless it finds that

- (i) confinement is necessary to protect the public from further criminal activity by the offender; or
- (ii) the offender is in need of correctional treatment which can most effectively be provided if [the offender] is confined; or
- (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Id. (quotation omitted). Here, the district court found that the need for confinement outweighs the policies favoring probation for three reasons. First, confinement is necessary to prevent Cunningham from engaging in criminal activity. Second, because Cunningham's "only enforced period of sobriety" has occurred when she is incarcerated, the programs available to her while incarcerated will allow her to achieve sobriety again. Finally, the district court considered Cunningham's extensive criminal history and Cunningham's failure to grasp the opportunity to avoid prison, which was provided through the plea agreement, and determined that failing to revoke probation would unduly depreciate the seriousness of the probation violation.

The record before us establishes that the district court carefully considered each of the *Austin* factors. Accordingly, the district court's decision to revoke Cunningham's probation was a sound exercise of its discretion.

Affirmed.