STATE OF MINNESOTA
IN COURT OF APPEALS
A10-0251
A10-260

State of Minnesota,
Respondent,

vs.

Paul Eric Hillsdale,
Appellant.

Filed August 31, 2010
Reversed and remanded
Harten, Judge[*]

Hennepin County District Court
File Nos. 27-CR-07-115984; 27-CR-08-25649

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard A. Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Harten, Judge.

[*] 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

HARTEN, Judge

In these consolidated appeals, appellant challenges the district court revocations of his probation on two separate convictions for felony assault, arguing that the revocations should be reversed and appellant's probation reinstated. Respondent State of Minnesota concedes that the district court failed to make required findings of fact to support revocation, but argues that the appropriate remedy is a remand for findings, not a reversal of the revocations.

FACTS

In 2003, appellant Paul Eric Hillsdale was adjudicated guilty of assaulting his mother. Imposition of sentence was stayed and he was placed on probation until 2006; because of interim probation violations, this probationary term was later extended to September 2008. In 2007, appellant was again adjudicated guilty of assaulting his mother; he was sentenced to 27 months, execution stayed, and placed on probation for three years. In 2008, while still on probation for the 2003 and 2007 felony assaults, appellant was convicted for assaulting his girlfriend and was sentenced to 24 months consecutive to the previously imposed 27 months; execution of the 24 month sentence was stayed and appellant was placed on probation for three years. At the 2008 sentencing for the 2007 offense the district court had the following exchange with appellant:

> COURT: So if you are revoked on any of this . . . you will do whatever is remaining of the old 27 months sentence and then with no credit on this new sentence, you'll do the 24 months on this sentence consecutive to whatever might be left on the 27-month sentence.

> And I think I told you the last time you were here, and I want to reiterate it, I want zero tolerance on probation. So you have any kind of violation, and you are going to prison. Understood?
>
> APPELLANT: Yes, Your Honor.
>
> COURT: This is it. No more chances. No more coming back wanting a break.
>
> APPELLANT: Yes, Your Honor.
>
> COURT: It's either do what you are supposed to do or go to prison for whatever time is left.
>
> APPELLANT: Yes, Your Honor.

Two of the conditions of appellant's probation were that he abstain from using alcohol and that he inform his probation officer if he at any time violated the law.

Six months later, police responding to a burglary call at the house next to appellant's found appellant on the ground bleeding and with a broken ankle. He had a bag of tools and showed indicia of intoxication. Three months after that, police responded to a call from a campground about an intoxicated person and again found appellant passed out on a picnic bench, and showing indicia of intoxication. Appellant did not report either incident to his probation officer. When appellant thereafter appeared in district court for probation violations, the court revoked his probation and executed his sentences, but made no written findings pursuant to *State v. Austin*, 295 N.W.2d 246 (Minn. 1980), which are required for probation revocation. This appeal followed.

D E C I S I O N

Appellant asserts that (1) because the district court revoked appellant's probation without first making findings as required by *State v. Austin*, the revocation order must be reversed and appellant must be reinstated on probation; and (2) the district court abused its discretion in revoking appellant's probation because the evidence did not establish that the need for confinement outweighed the policies favoring probation.

The decision of whether to revoke probation is within the district court's discretion and will be reversed only for an abuse of that discretion. *Id.* at 249-250. The revocation proceeding requires the district court to make a threefold analysis: (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. *Id.* at 250 (the *Austin* factors). "If a contested [probation] revocation hearing is held, the court must make written findings of fact, including a summary of the evidence relied on in reaching a revocation decision and the basis for the court's decision." Minn. R. Crim. P. 27.04, subd. 3(3). The requisite written findings may be produced by transcribing the district court's statements on the record. *State v. Modtland*, 695 N.W.2d 602, 608 n.4 (Minn. 2005) (citing *Pearson v. State*, 308 Minn. 287, 292, 241 N.W.2d 490, 493 (1976)).

After hearing testimony on the two violations, the district court revoked appellant's probation by saying, "[w]ell, I feel there has been sufficient proof of a probation violation and it will be my intent to revoke." The state "concedes that the district court failed to make written findings of fact identifying the evidence relied upon

in making its revocation decision on the *Austin* factors" and that "the court's statements on the record in this case fail to meet Rule 27.04, subd. 3(3)'s requirements."

When a district court fails to make the three *Austin* findings (that must be "written" under rule 27.04), a reviewing court must reverse and remand for those findings. *See Modtland*, 695 N.W.2d at 603, 608 (reversing this court's determination that the district court had not abused its discretion in revoking probation without making all three *Austin* findings because record contained sufficient evidence to demonstrate that the *Austin* factors were satisfied, and holding that the district court erred by revoking after making only one finding, and remanding for further findings).[1]

This case must be reversed and remanded to the district court for written findings pursuant to *Austin* and Minn. R. Crim. P. 27.04.

Reversed and remanded.

[1]Appellant relies on *In re Welfare of R.V.*, 702 N.W.2d 294, 308 (Minn. App. 2005) (concluding that findings were insufficient, affirming revocation of probation, reversing disposition, and remanding for additional findings in a juvenile-delinquency case). But *R. V.* is distinguishable: there the deficient findings concerned the juvenile's future placement, not the basis for probation revocation.