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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-335**

State of Minnesota,
Respondent,

vs.

Jose Luis Delgado,
Appellant.

**Filed November 23, 2010
Affirmed
Crippen, Judge***

Ramsey County District Court
File No. 62-K0-99-2288

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sean McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellant Jose Delgado challenges the district court order that revokes probation and executes his stayed 1999 sentence. Appellant argues that the court erred in its finding that the need for confinement outweighs the policies favoring probation by referring to the sentencing guidelines that called for a presumptive prison sentence for the 1999 offense. Appellant also argues that the court erred by failing to consider appellant's federal prison time, among other factors, in deciding to revoke probation. Because the district court made the requisite findings on the record to support its revocation decision, we affirm.

FACTS

In August 1999, appellant pleaded guilty to a first-degree controlled-substance crime (possession with intent to deliver cocaine) in violation of Minn. Stat. § 152.021, subds. 1(1), 3(a) (1998). The sentencing guidelines indicated a presumptive prison sentence for the offense. *See* Minn. Sent. Guidelines IV (1999). The state agreed to appellant's motion for a downward dispositional departure, and the district court sentenced appellant to an imprisonment of 115 months, which was at "the high end of the sentencing guidelines box," but stayed execution, subject to conditions, for 30 years. The conditions included the requirement that appellant "be law-abiding in all respects." Appellant then moved to New York to serve his probationary sentence.

On March 4, 2005, appellant pleaded guilty to a federal charge of a felon in possession of a firearm, and was sentenced to 70 months in federal prison. While in

prison, appellant was cited for at least four rule violations, including assault with injury and possession of drugs. In May 2009, appellant was released to a halfway house, where he was employed for about three months as a delivery person. Upon his release from federal custody in October 2009, appellant was arrested on a detainer and brought to Minnesota for violating the term of his 1999 probation requiring that he remain law-abiding.

At a November 2009 revocation hearing, appellant admitted that he was in violation of the terms of his probation, and the district court continued the disposition to allow appellant to present information regarding his criminal history. At a December 2009 hearing, the court found that revocation factors were met. The court noted that the current sentencing guidelines assigned a maximum sentence of 110 months for a first-degree controlled-substance crime, as opposed to the 115 months ordered by the district court in August 1999. Accordingly, the district court revoked appellant's probation and executed a sentence of 110 months' incarceration.

DECISION

1.

The district court has broad discretion to determine 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). But whether the district court made sufficient findings under *Austin* is a question of law that this court reviews de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

In *Austin*, the Minnesota Supreme Court established a three-factor revocation standard. 295 N.W.2d at 250. Before a district court revokes probation, it must: (1) designate the specific condition of probation that the defendant violated; (2) find that the violation was inexcusable or intentional; and (3) find that the need for confinement outweighs the policies favoring probation. *Id.* In making the *Austin* findings, district courts should articulate the substantive reasons for revocation and the evidence relied upon, rather than simply reciting the three factors and offering general reasons for revocation. *Modtland*, 695 N.W.2d at 608.

Appellant does not dispute the district court findings or the factual bases for the court's determination that a specific violation occurred and was inexcusable or intentional. He confines his argument to the third *Austin* factor on need for confinement. "The purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *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 balancing of the defendant's interest in freedom and the state's interest in rehabilitation and public safety. *Id.* at 250-51 (quotation omitted). Thus, in considering this *Austin* factor, a district court should not revoke probation unless it finds either that: (1) the confinement is necessary to protect the public from further criminal activity; or (2) the defendant is in need of treatment that can be most effectively provided if he is confined; or (3) "it would unduly depreciate the seriousness of the violation if probation were not revoked." *Modtland*, 695 N.W.2d at 607.

At the December 1, 2009 hearing, the district court asked the state's attorney if he knew whether the *Austin* factors apply in a different manner when there is a departure from the guidelines. The state's attorney replied, "some judges when they see a departure, they proceed on the assumption that the policies that were in favor of incarceration had already outweighed the need for probation and so at least that one factor, they presume had already been met." The court stated, "That's my understanding. I have done that before because it is a guidelines commit sentence."

This approach is not supported by caselaw and contravenes the *Modtland* court's instruction that district courts undertake a careful balancing of interests and avoid a "reflexive reaction" to a defendant's violation of a probation condition. *See id.* at 608. But it is not evident in the record that the court followed the presumption that it discussed, and it was appropriate for the court to consider the seriousness of the underlying offense and the imposition of a stayed sentence in deciding to revoke appellant's probation. *See* Minn. Sent. Guidelines III.B. (2009) ("Less judicial forbearance is urged for persons violating conditions of a stayed sentence who were convicted of a more severe offense or who had a longer criminal history."). In the sense that forbearance is lessened, each of the *Modtland* considerations is enlarged by the seriousness of the original offense.

The record shows that the district court made sufficient findings to support its ultimate conclusion that the need for confinement outweighs the policies favoring probation. Specifically, the court found that confinement is necessary to protect the public from further criminal activity. *See Modtland*, 695 N.W.2d at 607 (listing

considerations in third-*Austin*-factor balancing test). The court also found that the most effective treatment or remedy is confinement. *See id.* Additionally, the court stated: “[A]nd most importantly, I think I am not going to depreciate the seriousness of this violation by not revoking the probation.” *See id.* The court noted again that the underlying offense was serious, and this properly suggests that the seriousness of the violation is enlarged by the seriousness of the original offense. The court again observed that justice requires attention to the guidelines when addressing a violation of a federal firearms offense while on probation.

Furthermore, the district court stated on the record that it considered appellant’s criminal history as set forth in the presentence investigation report; the “significant” and “very serious” felon-in-possession offense; and the fact that in 1999 the court “took a chance” by staying the sentence and appellant “didn’t need to be in [federal] prison.” *See id.* at 608 (instructing district courts to articulate the facts and evidence relied upon in revoking probation). The court also openly considered two letters written on behalf of appellant, one from the employment specialist at appellant’s halfway house program that described his success there. And at the December 2009 hearing, the probation officer recommended revocation, citing appellant’s current unemployment and the four rule violations while in prison, among other factors. The court disclosed adequate bases for its ultimate finding that the need for confinement outweighs the policies favoring probation, despite its discussion on whether the guidelines called for imprisonment in 1999.

2.

Appellant also argues that the district court erred in making the third *Austin* finding by failing to consider appellant's 70-month federal prison sentence. Specifically, appellant contends that the time served in federal prison was relevant to "whether failure to revoke probation would unduly depreciate the seriousness of the violation." But although the time served in federal prison may be relevant to the need for confinement, it does not diminish the extent to which the violation undercuts the stay that was permitted for the original serious offense; appellant failed to remain law-abiding pursuant to the terms of his 1999 probation. Moreover, the prison sentence does nothing to diminish the first two *Austin* factors, the occurrence of a specified violation that was inexcusable or intentional.

Also, the record indicates that the district court weighed appellant's time served in federal prison and considered whether this time affected appellant's probationary disposition. At the November 2009 revocation hearing, the court noted that appellant was not entitled to custody credit for the 70 months served in federal prison pursuant to caselaw, but stated that it did "have some discretion" to weigh the occurrence of the imprisonment. At the December 2009 dispositional hearing, appellant conceded that he was not entitled to custody credit for 70 months, but asked the district court to "fashion a disposition in this matter that is fair" in light of the time served in federal prison. The court determined that the imprisonment did not outweigh the factors for revocation or the cause for execution of the full stayed sentence, and it was within the court's broad discretion to order this execution.

Appellant further contends that the record is inadequate to support revocation under *Austin* because the district court failed to consider certain other factors, such as appellant's success while on federal probation. As discussed above, the court made sufficient findings to support its conclusion that the need for confinement outweighs the policies favoring probation; the court did not abuse its discretion by revoking appellant's probation.

Affirmed.