

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-152**

State of Minnesota,
Respondent,

vs.

Gary Maurice Ahrens,
Appellant.

**Filed December 7, 2010
Affirmed
Bjorkman, Judge**

Traverse County District Court
File No. 78-CR-08-59

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

Matthew P. Franzese, Traverse County Attorney's Office, Alexandria, Minnesota (for
respondent)

Cynthia Vermeulen, Vermeulen Law Office, P.A., St. Cloud, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Johnson, Chief Judge;
and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the district court's decision to revoke his stay of adjudication and impose an intermediate sanction, arguing that the district court clearly erred in finding that he violated the restitution terms of his probation and erred in its legal analysis. We affirm.

FACTS

Appellant Gary Maurice Ahrens sells and installs used grain bins. On March 20, 2008, he was charged with two felony-level counts of theft by false representation based on his failure to deliver and install grain bins after receiving payment from several farmers.

On January 26, 2009, Ahrens pleaded guilty to one count of misdemeanor-level theft by false representation pursuant to a plea agreement. During the plea hearing, the parties had some difficulty finalizing the restitution terms. The parties ultimately stated on the record that Ahrens would, "with the agreement of the victims," deliver grain bin materials to farmer Gary Anderson by June 1, complete construction of the bin by July 1, and make various financial adjustments based on labor costs. The district court stayed adjudication for one year "on the condition[] that there be a performance and/or restitution as set forth by counsel on the record."

When the June 1 and July 1 deadlines passed without Ahrens making any effort to comply with his restitution obligation, the state filed notice of a probation violation.

Ahrens later delivered the grain bin materials and retained another contractor to construct a grain bin on Anderson's property.

An evidentiary hearing on the probation violation was held on December 17. Because there was no written restitution order,¹ the transcript of the January 26 plea hearing was referenced to establish the restitution terms, including the June 1 and July 1 deadlines for delivery and completion of the grain bin. Anderson testified that the bin was only partially completed and that the materials used were "inferior," requiring additional work before the bin could be used. Anderson acknowledged on cross-examination that the completion date was "[n]ot a major issue" and that he acquiesced to the delays because he "didn't need the bin until [September]." Ahrens testified that he had been in communication with Anderson about the bin and that they had agreed that some delay was acceptable because the "crop was late."

The district court found that there was clear and convincing evidence that Ahrens violated his probation terms by failing to deliver and construct the bin within the required time frame, that this violation was intentional and inexcusable, and that the need for revocation outweighs the policies favoring probation. The district court emphasized that Ahrens's obligations were governed by a probation agreement, not a civil contract, making the fact that Anderson "waived the timing requirements . . . of little consequence." The district court revoked the stay of adjudication, adjudicated Ahrens guilty of misdemeanor theft by false representation, and sentenced Ahrens to 90 days in

¹ The district court asked the parties to submit a proposed order memorializing the restitution terms, but the parties did not do so.

jail with a \$1,000 fine and ordered him to pay restitution as certified by the county attorney. The court continued Ahrens on probation for one year, staying portions of the jail time and fine. This appeal follows.

D E C I S I O N

When a defendant violates a condition of probation, the district court has broad discretion in determining whether to impose intermediate sanctions or revoke probation. *State v. Cottew*, 746 N.W.2d 632, 636-37 (Minn. 2008) (citing *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980)). Whether the district court made the findings required to impose sanctions or revoke probation is a question of law this court reviews de novo. *See id.* at 638; *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

I. The district court did not abuse its discretion in determining that Ahrens violated the restitution terms of his probation.

Ahrens asserts that the state did not produce clear and convincing evidence that he violated his probation terms because (1) no written restitution order was issued and (2) the probation terms were subject to modification by agreement between Ahrens and the farmers. We address each argument in turn.

Written order

Ahrens concedes that he was aware of the restitution terms imposed by the district court during the plea hearing, but argues that because the district court did not provide him with a written restitution order any failure to comply cannot provide the basis for a probation violation. The state argues that written notice was unnecessary because the offense is a misdemeanor. We agree. The requirement of a written sentencing order only

applies where the offense level is a felony or a gross misdemeanor. See Minn. R. Crim. P. 27.03, subd. 7. Ahrens cites no authority for his legal argument, and it is clear from the record, that Ahrens was aware of and agreed to his probation terms, including the deadlines that applied to his restitution obligations.

Modification of probation terms

Ahrens next argues that the district court clearly erred in finding that he violated his probation terms because Anderson agreed to delay the June 1 and July 1 deadlines. Ahrens emphasizes that the district court incorporated the restitution terms that were created “with the agreement of the victims,” asserting that this language left the time frame for specific performance open for modification between Ahrens and Anderson. We disagree. The fact that Anderson did not view timing as a “major issue” and “didn’t need the bin” by the court-imposed deadlines is not determinative. Ahrens’s modification argument ignores the fact that restitution was governed by a court order. What was previously a civil, contractual relationship between Ahrens and Anderson became a criminal matter involving the state and district court when Ahrens was charged with, and pleaded guilty to, theft by false representation. The district court’s order is not a negotiable agreement.

Ahrens also argues that the district court improperly “focus[ed] solely on the timing” and did not make adequate findings related to the quality of the work and Anderson’s “satisfaction” with the grain bin. But timing was an integral part of the restitution terms the court imposed in connection with the stay of adjudication. It is undisputed that Ahrens failed to comply with the court-imposed deadlines to complete his

work. This uncontested evidence amply supports the district court's determination that Ahrens violated his probation terms.

We note that the circumstances and restitution terms in this case may be, as Ahrens contends, "unconventional." But ultimately, Ahrens's obligation to perform restitution arose out of criminal proceedings. On this record, we conclude that the district court did not abuse its discretion in finding clear and convincing evidence that Ahrens violated his probation.

II. The district court followed the necessary procedural safeguards in making its findings.

Ahrens challenges the adequacy of the district court's findings, arguing that the court failed to follow the *Austin* analysis.² The state argues that the district court was not required to make *Austin* findings because the court imposed an intermediate sanction rather than the full sentence. We agree. The supreme court has held that "the *Austin/Modtland* analysis only applies to the revocation of probation and execution of the underlying sentence—not to the imposition of intermediate sanctions—for probation violations." *Cottew*, 746 N.W.2d at 634.

While the court need not analyze the *Austin* factors when it imposes intermediate sanctions for probation violations, it must follow other procedural safeguards set forth in Minn. R. Crim. P. 27.04. *Id.* at 637-38. A probationer is entitled to proper notice of the reported violation and a hearing at which the district court must find clear and convincing

² *Austin* requires district courts revoking probation to make written findings that (1) designate the specific condition that was violated, (2) determine the violation was intentional or inexcusable, and (3) conclude the need for confinement outweighs the policies favoring probation. 295 N.W.2d at 250.

evidence that the probation condition was violated. Minn. R. Crim. P. 27.04, subds. 1(2)(b), 3; *Cottew*, 746 N.W.2d at 638. Upon this finding, the district court has discretion to revoke probation or impose intermediate sanctions. Minn. R. Crim. P. 27.04, subd. 3(2)(b); *Cottew*, 746 N.W.2d at 638.

Ahrens does not dispute that he received proper notice that he violated the terms of his probation. The record reflects that the state provided Ahrens with written notice of the violation that described the circumstances of the alleged violation, including the deadlines that he did not meet. The district court conducted an evidentiary hearing to address the alleged probation violation. Ahrens was represented by counsel and had the opportunity to present evidence and challenge the state's evidence of a violation. On this record, we conclude that Ahrens received the notice and opportunity to be heard that rule 27.04 requires.

Ahrens also asserts, in the context of his *Austin* arguments, that the district court abused its discretion in imposing intermediate sanctions because his actions were unintentional and excusable. While the district court is not required to find inexcusable conduct when it imposes an intermediate sanction rather than revoking probation and executing an underlying sentence, imposition of jail time and revocation of a stay of adjudication with respect to an entirely blameless defendant could be arbitrary so as to constitute an abuse of discretion. See *Cottew*, 746 N.W.2d at 638 (stating that the exercise of discretion in determining intermediate sanctions “requires conscientious judgment, not arbitrary action” (quotation omitted)).

In imposing the intermediate sanctions in this case, the district court considered Ahrens's "nonchalance" with respect to his customers, including holding their money for an extended period of time and refusing to return their phone calls. The district court noted Ahrens's same lack of regard for the district court and the terms of his probation. Even with a court order and stayed sentence, Ahrens refused to deliver the required materials and begin construction on Anderson's bin until even further steps were taken to enforce the restitution terms. In short, the evidence demonstrates Ahrens was not entirely blameless. Accordingly, we conclude that the district court acted well within its discretion in revoking the stay of adjudication and imposing intermediate sanctions.

Affirmed.