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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-778
A10-779

State of Minnesota,
Respondent,

vs.

N. V. G.,
Appellant.

Filed January 11, 2011
Affirmed
Stauber, Judge

Hennepin County District Court
File Nos. 27JV08687; 27CR1012402

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

In these consolidated appeals from the revocation of his EJJ probation and execution of his consecutive 41-month sentences on two aggravated robbery convictions,

appellant argues that the district court abused its discretion in finding that appellant violated the terms of his probation and that the need for confinement outweighs the policies favoring probation. We affirm.

FACTS

On September 21, 2007, appellant N.V.G. was charged with four counts of first-degree aggravated robbery and one count of fifth-degree drug possession. The district court granted the state's motion to designate the proceeding an extended jurisdiction juvenile (EJJ) prosecution pursuant to Minn. Stat. § 260B.130, subd. 1(3) (2006). In January 2008, appellant pleaded guilty to two counts of first-degree aggravated robbery in exchange for the dismissal of the remaining charges. Appellant received two consecutive 41-month sentences. The district court stayed execution of the sentences and placed appellant on EJJ probation until he turned 21 years old. Along with other conditions of probation, appellant was committed to the County Home School long-term adolescent-treatment program.

Appellant completed the program at the County Home School, though his probation officer reported that he "struggled throughout the program" and his progress was "pretty shaky." After his discharge from the County Home School, appellant was placed at the Vintage Place Group Home in January 2009. Appellant ran away from the group home twice. Appellant left Vintage Place on April 6, 2009, and his whereabouts were unknown until April 9, 2009. Appellant left the group home again on April 26, 2009, and his whereabouts were unknown until he was arrested on July 11, 2009. Appellant tested positive for marijuana at the time of his arrest. Appellant appeared

before the district court and admitted violating the terms and conditions of his probation by absconding from Vintage Place and by using marijuana. The state recommended that appellant's probation be revoked and that he be sent to prison as an adult. The district court instead elected to "give [appellant] one final try at attempting to comply with EJJ probation." The court ordered that appellant be placed in the long-term treatment program at the Minnesota Correctional Facility at Red Wing (MCF-Red Wing).

When ordering the placement at MCF-Red Wing, the district court judge informed appellant that, "I'm giving you a bit of a break, but this is the final break. There are no more breaks." The judge advised appellant to

> keep your nose clean. You need to stay away from gang bangers. You need to follow what the staff tells you. You need to stay out of fights. And you need to get along. Okay? You know, this is your deal here now. This is your one final opportunity to get it right.

Appellant signed his EJJ probation contract, which required him "to enter and successfully complete the residential program at: MCF-Red Wing." The contract also required appellant to "follow all reasonable rules established by staff until you are successfully discharged from this requirement or removed by the court." Another provision in the contract required that appellant "[f]ollow all rules and regulations of the Minnesota Correction Facility-Red Wing Program."

On January 13, 2010, appellant's probation officer filed a notice of violation, alleging that appellant violated the terms of his probation by failing to successfully complete the MCF-Red Wing program and failing to follow the rules and regulations of the program. The court held a contested revocation hearing on March 10, 2010.

Probation officer Kimberly Bell testified that appellant did not follow the program at MCF-Red Wing, refused to participate in treatment, did not follow directions, engaged in threatening behavior, and engaged in alleged gang behavior. Bell testified that she informed appellant that his actions at MCF-Red Wing were in violation of his EJJ contract. Appellant responded by blaming the MCF-Red Wing staff and saying he did not like the program. In their last conversation, appellant told Bell that "he would do anything to get himself revoked." Bell testified that a screening committee made up of other EJJ probation officers unanimously agreed to recommend revocation. Bell acknowledged that appellant had not been discharged from the MCF-Red Wing program, and also that appellant had only been in the program for six months whereas the program normally takes 10 to 14 months to complete. However, she also testified that the MCF-Red Wing program has never discharged anyone, and that ordinarily a resident's probation is revoked by the court before it can reach that point.

The court also heard testimony from William Stemper, appellant's caseworker at MCF-Red Wing. Stemper testified that he believed appellant had the ability to complete the program, but had been unsuccessful for various reasons. The main reason was that appellant spent very little time in the regular treatment unit. Of the 181 days he was at MCF-Red Wing, appellant was placed in the secure lock-up unit for 105 days. Appellant spent most of his time in the secure unit due to disciplinary infractions, including charges for threatening and assaulting others, verbal abuse, disorderly conduct, harassment, disobeying direct orders, lying, misrepresentation, destruction of property, and gang activity. Stemper also testified that appellant's behavior had a negative impact on others,

including causing some residents to be nervous around him because of his verbal and physical abuse.

Appellant's November 9, 2009, progress report from MCF-Red Wing facility indicates that appellant was not making adequate progress towards his goals. The report shows that appellant's progress was inadequate in nearly all areas, including: motivation for change, cognition, skills, family, substance abuse, peer relationships, mental health, and relapse-prevention planning. The only area where appellant's progress was deemed adequate was problem solving and trauma/loss. In appellant's February progress report, he received inadequate progress marks in all categories, indicating that he had actually regressed after the November report. Stemper testified that after five months in the program, appellant had not moved beyond Level 1, a level which normally takes residents only "a couple months" to complete. Appellant was not even able to complete an orientation class for new residents because he was in lock up so often for disciplinary reasons.

The district court issued an order on March 17, 2010, revoking appellant's probation and executing the consecutive 41-month sentences. The court concluded that appellant violated the terms of his probation by not following the rules at MCF-Red Wing and by not successfully completing the program. The court further concluded that the violations were intentional and inexcusable, and that the need for confinement outweighs the policies favoring probation. This appeal followed.

D E C I S I O N

"The [district] court has broad discretion in determining 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). Before a person's probation is revoked, "the [district] court must (1) designate the specific condition or conditions that were violated; (2) find that the violation was intentional or inexcusable; and (3) find that need for confinement outweighs the policies favoring probation." *Id.* at 250. The finding of a violation must be supported by clear and convincing evidence. Minn. R. Crim. P. 27.04, subd. 3(3) (2009). Whether the district court has made the required findings is a question of law and subject to de novo review. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Appellant challenges the district court's findings on the first and third *Austin* factors. Specifically, appellant argues that clear and convincing evidence does not support the district court's finding that appellant violated the terms of his probation by failing to complete the MCF-Red Wing program. Additionally, appellant argues that the need for confinement in an adult correctional facility does not outweigh the policies favoring continued probation.

As to the first *Austin* factor, appellant contends that he could not have violated his probation by failing to the complete the MCF-Red Wing program because he had only been in the program for six months and the program ordinarily takes more than a year to complete. Because his probation contract required him to "successfully complete" the

program, appellant argues that he did not violate this term simply by making poor progress in the first six months he was in the program.

We find this argument unpersuasive. The record shows that the district court was presented with overwhelming evidence of appellant's failure to make any progress towards completing the program. Appellant's caseworkers at Red Wing deemed his progress inadequate in nearly every measurable category. After six months, appellant had not completed the first level of a six level program—a level that ordinarily takes residents two months to complete. While at the facility, appellant spent the majority of his time locked up in a secure unit, preventing him from making any progress towards successfully completing the program. Appellant even indicated to his probation officer that he was trying to get his probation revoked.

While it is true that appellant was still 17 years old at the time of the revocation hearing and his probation was to last until his 21st birthday, to accept appellant's argument would force the district court to allow appellant to wallow at the Red Wing program until the day his probation ends before it can be determined that he has failed to "successfully complete" the program. The record shows that the Red Wing program has never discharged anyone and instead leaves it up to the courts to revoke a resident's probation. In determining that appellant violated the terms of his probation contract by not successfully completing the Red Wing program, the district court stated:

> While it is true the [appellant] will be eighteen years of age on March 19, 2010, and could still technically be returned to Red Wing, the Court concludes that [appellant] has not only made no progress while he has been at Red Wing for over seven months, but has regressed over time. Further,

> [appellant's] aggression and abusive conduct has negatively impacted the staff's ability to work with the other residents.

The record fully supports this finding by the district court. Furthermore, the district court also found that appellant violated another term of his probation contract by not following the rules at MCF-Red Wing. Appellant's EJJ probation contract required him to "follow all reasonable rules established by [MCF-Red Wing] staff." The district court found that appellant violated this term:

> [Appellant] knew that following the rules of the MCF-Red Wing staff and program was ordered by [the district court] at the Revocation Hearing on July 17, 2009 and was memorialized as a term of his most recent probation contract. While at MCF-Red Wing, [appellant] committed the following infractions: assault, disorderly conduct, fail[ing] to follow direct orders, lying, property damage, and alleged gang activity. Consequently, [appellant] spent more time in the secure unit than his regular unit for infractions of the rules at MCF-Red Wing.

The record contains ample evidence to support the district court's finding. Both Bell and Stemper testified that appellant committed numerous infractions while at MCF-Red Wing. Appellant concedes that he violated this term of his probation contract, but argues that this alone was not enough to revoke probation. However, appellant cites no case law or authority to support the proposition that violation of a single condition of probation is insufficient to support a revocation. Indeed, such a rule would be contrary to the *Austin* decision, which states that before probation may be revoked, the court must "designate the specific *condition* or conditions that were violated." *Austin*, 295 N.W.2d at 250 (emphasis added). Clear and convincing evidence supports the district court's

findings that appellant violated the terms of his probation by failing to follow the rules at the MCF-Red Wing facility and by failing to complete the program.

Appellant also challenges the third *Austin* factor, arguing that the need for confinement does not outweigh the policies favoring probation. In *Austin*, the supreme court stated that "[t]he purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Id*. The decision to revoke probation must be based on "a balancing of the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Id*. 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 was not revoked. *Id*. at 251.

The district court concluded that it would unduly depreciate the seriousness of the violation if appellant's probation was not revoked. Appellant argues that continued probation would not depreciate the seriousness of his probation violation because he was already adequately punished by having to spend time in lock-up at Red Wing. This argument is unavailing. Appellant did not change his course of behavior as a result of his time in lock-up, but rather continued to violate rules and make no progress towards successfully completing the program.

The record shows that the district court carefully considered the evidence and made thorough findings to support its conclusion that the need for confinement outweighs

the policies favoring probation. The court recounted appellant's serious crimes, his prior court-ordered placements, and his conduct while on probation. The court made detailed findings of fact regarding appellant's history on probation and his behavior while at the MCF-Red Wing facility. The court determined that appellant "has consistently demonstrated by his behaviors and attitude that he is unamenable to probation," and concluded that the seriousness of his violations would be unduly depreciated if probation were not revoked. This conclusion is fully supported by the record and is not an abuse of discretion.

Affirmed.