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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1372

State of Minnesota,
Respondent,

vs.

Andrew Tyler Sibley,
Appellant.

Filed March 1, 2011
Affirmed
Toussaint, Judge

Olmsted County District Court
File No. 55-CR-09-8466

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

Mark A. Ostrem, Olmsted County Attorney, Julie L. Germann, Assistant County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Y. Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Toussaint, Judge; and Hudson, Judge.

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

TOUSSAINT, Judge

Appellant Andrew Tyler Sibley pleaded guilty to second-degree burglary and two counts of felony violation of a restraining order. The district court stayed appellant's 33-

month prison sentence and placed him on probation. Appellant violated his probation on the day of his release from custody, and the court revoked his probation and executed the sentence. Appellant challenges the revocation of his probation, arguing that the evidence was insufficient to show that his probation violation was intentional or inexcusable and that the need for confinement outweighs the policies favoring probation. We affirm.

D E C I S I O N

The district court enjoys broad discretion in determining whether sufficient evidence exists 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). Whether the district court has made the required findings under *Austin* presents a question of law, which appellate courts review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

The district court must engage in a three-step analysis before revoking probation: "(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." *Austin*, 295 N.W.2d at 250. The finding of a probation violation must be supported by clear and convincing evidence. Minn. R. Crim. P. 27.04, subd. 3(3).

Appellant was placed on probation after he was convicted of several offenses relating to unlawful encounters with two former girlfriends, T.G. and N.K. In early February 2009, T.G. obtained a restraining order against appellant; he violated the order two weeks later by approaching T.G. in the cafeteria on their college campus and asking

to speak to her. Appellant was charged with violation of a restraining order, which was a felony due to his two prior convictions for violating restraining orders in 2001. *See* Minn. Stat. § 609.748, subd. 6(d)(1) (2008) (punishing as a felony a violation of a restraining order within ten years of two or more previous domestic-violence-related offenses). In March, he violated T.G.'s restraining order a second time and was again charged with felony violation of a restraining order.

In late August, appellant entered the residence of former girlfriend N.K. in the middle of the night without her permission. Appellant pushed N.K. into a wall, threw her cell phone at her, and took her wallet. Appellant was arrested and charged with first-degree burglary, first-degree assault, interference with a 911 call, fifth-degree assault, theft, and fourth-degree intentional damage to property. A few days later, N.K. obtained a no-contact order against appellant.

Appellant violated T.G.'s restraining order again in early November. He drove up to T.G. as she was walking in a park and spoke to her; and then he followed her in her vehicle until she managed to lose him. He was charged with felony violation of a restraining order.

In January 2010, appellant entered a plea of guilty to second-degree burglary relating to the August intrusion of N.K.'s residence, and two counts of felony violation of a restraining order relating to the February and November offenses involving T.G. The state dismissed the remaining charges. The district court granted appellant supervised release until his sentencing in March and ordered him not to have contact with T.G. or N.K. Appellant violated this order and other presentencing conditions on numerous

occasions and was returned to custody at least twice.

In March, the district court sentenced appellant to 15 months and 21 months in prison for the February and November violations of T.G.'s restraining order respectively and stayed execution of both sentences for five years. Regarding the second-degree burglary conviction, the court granted a downward dispositional departure from the presumptive 33-month executed prison sentence by staying all 33 months for five years. The court imposed numerous conditions on appellant, including five years of probation for the harassment convictions and ten years for the burglary conviction; 245 days in jail, with credit for good time and time served; compliance with all no-contact orders; and no contact with T.G. or N.K. "in person, by mail, by telephone, by facsimile, by email or by third-parties."

On the day he was released from custody, April 23, 2010, appellant violated the probation condition that he refrain from contact with N.K. by calling N.K.'s place of employment to ask whether she still worked there. Appellant was arrested four days later. When asked about the incident by his probation officer and law enforcement, appellant denied contacting N.K.'s employer. He later explained that he called to find out if the employer, a nutritional-food store, carried a certain nutritional supplement. He testified that he planned to ask his father to purchase the supplement for him but wanted to find out if N.K. was still employed there so as to avoid a "run-in" between his father and N.K. On May 12, the court revoked appellant's probation and executed his prison sentence.

Appellant challenges the district court's findings on the second and third *Austin* factors. First, appellant argues that clear and convincing evidence does not support the district court's finding that appellant's probation violation was intentional or inexcusable. *See Austin*, 295 N.W.2d at 250. The court found that appellant violated this condition "within hours of his release from jail." The court reasoned that although the violation "in isolation" may not warrant revocation, appellant's action of calling N.K.'s employer was "exactly the type of predatory, stalking behavior which [he] has regularly engaged in."

Since February 2009, appellant has failed repeatedly to abide by judicially imposed prohibitions on contact with T.G. and N.K. He was charged with three violations of a restraining order against T.G. within a nine-month period in 2009. He also committed multiple violations of his presentence conditions prohibiting contact with N.K. and T.G. Finally, appellant committed a probation violation on the same day that he was released from jail, and he initially lied about it to his probation officer and to law enforcement.

Appellant argues that his violation was not intentional or inexcusable because his explanation for contacting N.K.'s place of employment was "plausible." He testified that he inquired about N.K.'s continued employment at the store to ensure that his father would not interact with her when he purchased a nutritional supplement for appellant. Appellant's explanation raises a credibility issue for the district court, to which we give substantial deference. *See State v. Spanyard*, 358 N.W.2d 125, 127 (Minn. App. 1984) (deferring credibility determination to trial court), *review denied* (Minn. Feb. 27, 1985). The district court found that appellant "presents well and says the 'right' things to put

himself in the best available light." The court further found that appellant "minimizes his behavior" and is prone to "contorted thinking." These findings reflect the district court's distrust of appellant's explanations for his conduct. The district court acted within its discretion by discrediting appellant's explanation.

Appellant also challenges the district court's findings on the third *Austin* factor, arguing that the need for confinement does not outweigh the policies favoring probation. *Austin*, 295 N.W.2d at 250. In considering this *Austin* factor, a district court should not revoke probation unless it finds that either: (1) the confinement is necessary to protect the public from further criminal activity; (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. *Id.* at 251.

Appellant argues that the court acted reflexively by revoking his probation upon his first violation. 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" and "cannot be a reflexive reaction to an accumulation of technical violations." *Id.* at 250-51 (quotation omitted). In other words, the evidence must show that the offender "cannot be counted on to avoid antisocial activity." *Id.* at 251 (quotation omitted). The district court found that appellant was "a public safety risk because of his *continuing* course of conduct." (Emphasis added.) As demonstrated above, appellant's conduct displays a pattern of disregard for restraining orders and no-contact orders. Such orders exist to protect not only specific individuals but the public at large from criminal activity.

Moreover, the district court conducted a thorough examination of psychiatric treatment options for appellant, who suffers from severe depression and bipolar disorder. One of appellant's probation conditions was to complete a dialectical behavior therapy program at a local mental-health facility; he never entered the program because he was incarcerated for his probation violation on the day of his release from custody. The district court learned that a facility within the department of corrections has dialectical behavior therapy programming. The court also learned that appellant's suggested treatment program is "a sober house" with a "Bible study group" and that the program offers no treatment "in any way, shape, or form." The district court properly evaluated the treatment options available to appellant and balanced appellant's need for treatment with the concern for public safety.

The district court did not abuse its discretion by revoking appellant's probation and executing his 33-month prison sentence.

Affirmed.