STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1162

State of Minnesota,
Respondent,

vs.

Justin Michael Armendariz,
Appellant.

Filed April 5, 2011
Affirmed
Halbrooks, Judge

Blue Earth County District Court
File No. 07-CR-07-2850

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

Ross E. Arneson, Blue Earth County Attorney, Christopher J. Rovney, Assistant County Attorney, Mankato, Minnesota (for respondent)

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

Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's decision to revoke his probation and execute his sentence for aggravated robbery. Because the findings required by *State v.*

Austin, 295 N.W.2d 246 (Minn. 1980), were satisfied and because the district court did not abuse its discretion by revoking appellant's probation, we affirm.

FACTS

In January 2008, appellant Justin Michael Armendariz pleaded guilty to first-degree aggravated robbery. As part of a plea agreement, the state agreed to recommend a dispositional departure. In April 2008, the district court agreed to the dispositional departure and sentenced appellant to 69 months in prison, with a ten-year stay of execution, and a $3,500 fine. Appellant's probation was contingent on several conditions, including that he abstain from alcohol use and remain law abiding. In August 2009, appellant's probation officer, Denise Rients, recommended a $500 reduction in the fine because of appellant's promising conduct following his release from jail. Appellant was attending Alcoholics Anonymous, had received his GED, was employed full-time, and had completed several treatment opportunities.

But in February 2010, Rients received a call from a Waseca police officer, informing her that a woman had come to the police station complaining of threatening voicemail and text messages from her ex-boyfriend, appellant. The police officer told Rients that appellant sounded intoxicated in these voicemails. After receiving this call, Rients ordered appellant to submit to a urine test, which showed alcohol use. Rients issued an arrest and detention order for appellant. When appellant was apprehended, the officers found that he possessed a set of car keys, and appellant admitted that he had been driving with a revoked license.

At an initial probation-revocation hearing, appellant admitted to alcohol use and the failure to remain law abiding by driving illegally and waived his right to a hearing on those violations. At a subsequent dispositional hearing, two additional probation violations were added: failure to report the driving offenses to his probation officer and failure to pay restitution. Appellant admitted these violations as well. Rients recommended execution of appellant's sentence, arguing that he was not amenable to probation and was a danger to the public. She discussed his criminal history and reminded the district court that, when the district court agreed to the dispositional departure at sentencing, the district court warned appellant that it would be his "last chance." The prosecutor and Rients were particularly concerned that these violations came to light as a result of appellant's aggressive behavior toward an ex-girlfriend. Appellant argued that the probation violations were relatively minor, that he had not been charged with any criminal offenses as a result of the voicemails or text messages, and that other than this single relapse in alcohol use, he had made great strides while on probation and was an upstanding citizen and father.

The district court agreed with Rients's recommendation and executed appellant's 69-month sentence. The district court stated:

> I think the *Austin* factors have been satisfied. I do recall telling the defendant this is your last chance. There was a downward departure when you were sentenced, I was troubled by that. But I understand you were given a last chance, and I don't see anything here Mr. Armendariz that w[ould] lead me to conclude that you've taken advantage of that or tried to do anything to change [your] life. And that is what is very troubling to me. You seem to be able—or seem to continue to use your size and your threatening behavior to

> get what you want when you want it. And I am troubled by that. You were given every opportunity to use the resources the community provided you and to seek help; talk to Ms. Rients and do whatever and you didn't seem to use . . . those opportunities. And I, quite frankly, I've read all this information and I guess I am going to go along with Ms. Rients['s] recommendation. I think that she has taken this very seriously and I agree with the factors that she has pointed out here; I think that the need for confinement outweighs policies favoring probation because you don't want to seem to cooperate with probation; you don't seem to want to do anything they ask you to do and I just don't think that there is anything else that can be done. . . . I don't see how anything less than commitment is viable. And so that is what I am going to do and I believe that the *Austin* factors have been satisfied . . . Ms. Rients has adequately pointed that out and I believe that confinement is necessary to protect the public from further criminal activity and that is what I am going to do.

This appeal follows.[1]

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by revoking his probation without making the on-the-record findings required by *Austin*. A 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." *Austin*, 295 N.W.2d at 249-50. But before a district court may revoke probation, it 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

[1] Respondent State of Minnesota did not file a brief, but we will consider this appeal on its merits. *See* Minn. R. Civ. App. P. 142.03 ("If the respondent fails or neglects to serve and file its brief, the case shall be determined on the merits.").

policies favoring probation." *Id.* at 250. The district court is required to "create thorough, fact-specific records setting forth . . . reasons for revoking probation." *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). Whether a district court made the findings required under *Austin* presents a question of law, which this court reviews de novo. *Id.* at 605.

Appellant argues that the district court failed to make the requisite findings with respect to the first and second *Austin* factors. Appellant claims that the district court failed to find "that there was clear and convincing evidence of a probation violation, [and] that the violation was intentional or inexcusable."

With respect to the first *Austin* factor, appellant admitted the violations and waived his right to an evidentiary hearing. "When a probationer waives the first part of a revocation hearing, the state is no longer obliged to present evidence to prove the violations, and the district court may base its finding on the violation report and the probationer's waiver . . . ." *State v. Xiong*, 638 N.W.2d 499, 503 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). Because appellant admitted the probation violations and waived a hearing on that issue, the state was not required to prove the violations by clear and convincing evidence. We conclude that appellant's admissions were sufficient to "designate the specific condition or conditions that were violated" and that the first *Austin* factor is satisfied. *See Austin*, 295 N.W.2d at 250.

Appellant also argues that the district court failed to make a finding that the admitted violations were intentional or inexcusable. Although it is true that the district court did not use the words "intentional" or "inexcusable," we conclude that the district

court found appellant's violations to be intentional. The district court stated: "[Y]ou were given a last chance, and I don't see anything here, Mr. Armendariz, that w[ould] lead me to conclude that you've taken advantage of that or tried to do anything to change [your] life." The district court went on to find that appellant had been "given every opportunity to use the resources the community provided [him] and to seek help; talk to Ms. Rients and do whatever and [he] didn't seem to use . . . those opportunities." These findings are sufficient to show that the probation violations were not minor one-time relapses as appellant claims but were the result of appellant's intentional disregard for the terms of his probation. We therefore reject appellant's argument that the district court's findings fail to satisfy *Austin*.

II.

Appellant also argues that the district court abused its discretion by concluding that the need for his confinement outweighs the policies favoring probation. To satisfy the third *Austin* factor, a district court must find that the need for confinement outweighs the policies favoring probation. *Id.* The third factor is satisfied if the district court finds that

> (i) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Id. at 251 (quotation omitted). A district court must balance "the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Id.* "The decision to revoke cannot be a reflexive reaction to an accumulation of technical

violations but requires a showing that the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Id.* (quotation omitted).

Here, the district court found that the need for confinement outweighed policies favoring probation because confinement was necessary to protect the public from further criminal activity by appellant. Appellant contends that the district court's decision to revoke his probation was reflexive because the district court had warned appellant at sentencing that the dispositional departure was appellant's last chance and seemed to base its decision to revoke probation on that previous warning. Appellant also argues that the district court did not adequately weigh the information about appellant's progress while on probation. We disagree.

The district court stated that appellant continued to use his physical size to threaten people and that appellant made threatening phone calls while intoxicated. In addition, appellant's conviction for aggravated robbery was linked to his use of alcohol. The fact that appellant admitted to violating his probation by consuming alcohol—in light of the link between appellant's aggression and alcohol—supports the district court's conclusion that appellant's commitment was necessary to protect the public from future criminal activity by appellant. The district court's findings are supported by the record, and the findings support the district court's conclusion. We therefore conclude that the district court did not abuse its discretion by revoking appellant's probation.

Affirmed.