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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2260**

State of Minnesota,
Respondent,

vs.

Tyrell Langston,
Appellant.

**Filed July 18, 2011
Remanded
Collins, Judge***

Blue Earth County District Court
File No. 07-CR-08-468

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

Ross Arneson, Blue Earth County Attorney, Michael A. Hanson, Assistant County Attorney, Mankato, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and
Collins, Judge.

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

UNPUBLISHED OPINION

COLLINS, Judge

Appellant challenges the revocation of his probation for first-degree sale of a controlled substance, arguing that the district court's findings were insufficient to support the determination that the need for confinement outweighs the policies favoring probation. We agree and therefore remand.

FACTS

Appellant Tyrell Langston pleaded guilty to first-degree sale of a controlled substance in violation of Minn. Stat. § 152.021, subd. 1(1) (2006). The district court imposed a prison sentence of 158 months, but granted Langston's motion for a downward dispositional departure and stayed the sentence for 30 years. As conditions of probation, the district court ordered Langston to spend 365 days in jail, abstain from the use of alcohol and drugs, submit to random alcohol and drug testing, and notify his probation officer of any change in address. The district court stated, "I hope I'm not just prolonging the inevitable. If I am it's your call and you're going [to] end up being back here with a violation. . . . If [you] violate [probation] . . . you will go to prison."

Approximately one-and-a-half years later, Langston's probation officer filed a violation report alleging that Langston had failed to (1) abstain from alcohol, which was confirmed by a positive test on August 12, 2010; (2) abstain from cocaine, which was confirmed by positive tests on July 28, 2010 and August 12, 2010; and (3) report an accurate address, which was confirmed by visits to the homes of Langston's girlfriend

and parents, who provided conflicting statements about where he was living. Langston admitted each of the violations.

In the report, the probation officer stated that she had repeatedly advised Langston that he was required to update her on his living situation and that the results of a number of his drug and alcohol tests were questionable. She also described Langston as evasive in answering questions about his living arrangements and substance abuse. She agreed that Langston needs treatment, but recommended that he receive it in a correctional setting because he had failed to take advantage of resources in the community while on probation.

The district court held a dispositional hearing; Langston and the probation officer testified. Langston asserted that this was “[his] first slip up in . . . almost three years.” He further testified that he believed that he was meeting all of his probation officer’s expectations, that she had never informed him of any prior problems with his behavior, and that she had praised him for his community service and caring for his children. Langston apologized for his conduct and stated that he was “going to take [his] sobriety seriously” and move in with the maternal grandfather of three of his children, who does not allow alcohol or drugs in his home.

The probation officer testified that Langston was supposed to work closely with probation for a lengthy period of time, but he had not done so. She further stated that Langston had expressed a commitment to seek treatment and care for his children “only when this Court [was] going to hold him accountable.” She recommended the execution

of Langston's sentence because he had not taken advantage of the opportunities afforded by probation and because he had committed serious violations.

Additionally, Langston, the grandfather, and a dispositional advisor for the public defender submitted letters urging Langston's reinstatement to probation. Langston explained that he relapsed due to a combination of factors, including difficulties in his relationship with his girlfriend and the admission of one of his sons to the hospital. He acknowledged making a "bad judgment call" and asked for the district court's mercy. The grandfather confirmed that Langston and the three children could reside in his home; he also requested that Langston be continued on probation because the children needed him. The dispositional advisor stated that Langston had complied with the conditions of his probation in most respects. She also assured the district court that if Langston were continued on probation, he would reside with his children's grandfather, attend church weekly, abstain from overnights at his girlfriend's home, attend Narcotics Anonymous twice per week, and complete a chemical assessment if so ordered.

The probation officer submitted a response to the dispositional-advisor's letter. She indicated that Langston had not been a reliably compliant probationer in that he completed his community service only after considerable prompting and he was required to participate in a heightened level of alcohol and drug testing due to concerns that he was tampering with his urine samples. The probation officer also asserted that the dispositional-advisor's letter was largely based on Langston's self-reporting.

The district court issued an order revoking Langston's probation and executing 134 months of his 158-month sentence. The district court explained that the "need for confinement outweighs the policies generally favoring probation" because

5. The offense of which [Langston] was [convicted] carries as a presumed sentence a commitment to the Commissioner of Corrections for a term noted in the Minnesota Sentencing Guidelines.

6. At the time of the original sentencing, the probation officer who prepared the Pre-Sentence Investigation identified no basis for either a dispositional or durational departure downward in favor of [Langston].

7. At the time of sentencing, [Langston] through his attorney provided an extensive dispositional advisor report urging the Court to consider alternatives to a prison sentence.

8. At the time of original sentence, the Court on the record made it clear to [Langston] that violations of any terms or conditions of probation would be unacceptable and not excused.

This appeal followed.

DECISION

To revoke probation, the district court must (1) identify the specific condition or conditions that were violated; (2) find that the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250-51 (Minn. 1980). We review de novo whether the district court made the findings required under *Austin*. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). But we review for an abuse of discretion whether the record contains sufficient evidence to revoke probation. *Id.* Langston concedes that he willfully

violated his probation, but he challenges the district court's determination that the need for his confinement outweighs the policies favoring the continuation of probation.

In determining whether the offender's need for confinement outweighs the policies favoring probation, the district court must consider whether

(i) confinement is necessary to protect the public from further criminal activity by the offender;

(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 607 (quotation omitted). This procedure ensures that the district court does not “reflexively revoke[]” probation when a probation violation is established. *Id.* at 608. The district court is to bear in mind that “policy considerations may require that probation not be revoked even though the facts may allow it.” *Id.* at 606 (quotation omitted).

Here, the district court concluded that the need for confinement outweighs the policies favoring probation because Langston had initially received a favorable dispositional departure and was warned that probation violations would not be tolerated. The district court's reasoning implies a reflexive reaction to Langston's failure to take advantage of the extraordinary opportunity he had been granted. *See id.* The district court did not explain why Langston's confinement is necessary to protect public safety, to ensure that he receives necessary treatment, or to avoid depreciating the seriousness of the violation. *See id.* For these reasons, we conclude that the district court's findings are

insufficient as to the third *Austin* factor, and we remand for the district court to address the relevant factors enumerated in *Modtland*.

Remanded.