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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-379**

State of Minnesota,
Respondent,

vs.

Richard Thomas Whaley,
Appellant.

**Filed October 31, 2011
Affirmed
Crippen, Judge***

Scott County District Court
File No. 70-CR-09-14159

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

Todd P. Zettler, Assistant Scott County Attorney, Shakopee, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Andrea G. M. Barts, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and
Crippen, Judge.

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

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellant Richard Whaley challenges the district court order that revokes the stay of his 2010 sentence for 81 months' imprisonment and executes the sentence. Appellant argues that the court abused its discretion because it failed to make necessary findings of fact and the evidence did not establish that the need for confinement outweighs the policies favoring probationary supervision. Finding no merit in these contentions, we affirm.

FACTS

In May 2010, appellant pleaded guilty to a second-degree controlled substance crime (possession of methamphetamine) in violation of Minn. Stat. § 152.022, subd. 2(1) (2008). The sentencing guidelines indicated a presumptive sentence of imprisonment. At the September 2010 sentencing hearing, the state requested that the court execute appellant's prison sentence, noting that appellant had three previous felony-level drug convictions, had committed six probation violations on those convictions, and failed in eleven prior substance-abuse treatment plans. Appellant requested a stayed sentence, pointing to his recent graduation from the Minnesota Teen Challenge program, his recent academic achievements, and the support of his family and friends.

The district court sentenced appellant to 81 months' imprisonment, but granted him a downward dispositional departure from the sentencing guidelines and placed him on 40 years of probation. The conditions of probation required appellant to refrain from law violations and from the use of alcohol or non-prescribed drugs. The court cautioned:

“I want you to know that if you fail, even the first time . . . I would not hesitate then to make you serve that sentence.” The court added: “The keys to the jailhouse are in your pocket, and you control whether you’re going back or not.”

Less than two months after this sentencing, appellant was apprehended for driving while intoxicated, and he subsequently tested positive for methamphetamine and THC. He subsequently admitted the accusation of violating conditions of the earlier stay.

At the disposition hearing in November 2010, the state asked the district court to execute the 81-month sentence. Appellant explained that he suffered from addiction, and requested that the stay of execution remain in place and that the court allow him to return to Minnesota Teen Challenge for an intensive 12- to 13-month program.

The district court began its remarks with the explanation that he must make findings on an intentional, inexcusable violation, and the court noted: “[T]he more important question here is whether or not the need for confinement outweighs the policies favoring probation.” The court subsequently found that appellant had committed intentional and inexcusable violations by using drugs and operating a motor vehicle while impaired.

The district court reminded appellant of the unusual nature of the earlier downward dispositional departure, especially in the face of appellant’s history of prior convictions, probation violations, and failed attempts at treatment. The court noted with approval appellant’s completion of Minnesota Teen Challenge, but also lamented that the experience was appellant’s twelfth or thirteenth attempt at treatment. The court also

observed that appellant had violated probation on each of his prior drug offense convictions.

Concluding its remarks, before revoking probation and sentencing appellant, the district court stated:

My obligation is not just to you. My obligation is to all the people that live in this state and could be subject to dire consequences. It would be tragic if you were sitting here and you had killed somebody because you were operating a motor vehicle . . . while under the influence of a substance.

D E C I S I O N

“The trial 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). But the sufficiency of the court’s findings under *Austin* is a question of law, subject to de novo review. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Austin demands district court findings that designate violated conditions, determine that they are intentional or inexcusable, and “find that need for confinement outweighs the policies favoring probation.” 295 N.W.2d at 250. The court must describe the reasons for revoking and the evidence it relies on, not assuming that the *Austin* demands are satisfied by “reciting the three factors and offering general, non-specific reasons for revocation.” *Modtland*, 695 N.W.2d at 608.

Specific to the need-for-confinement factor, the *Austin* court called attention to three sub-factors stated in the American Bar Association Standards for Criminal Justice. These factors require examining whether confinement is needed to “protect the public

from further criminal activity by the offender,” for correctional treatment that is best provided during confinement, or because a further stay “would unduly depreciate the seriousness of the violation if probation were not revoked.” *Austin*, 295 N.W.2d at 251 (quoting A.B.A. Standards for Criminal Justice, Probation § 5.1(a) (Approved Draft 1970)). The court need only find one of the three sub-factors. *See id.*

In addition to reciting the three *Austin* factors, the district court applied the factors to appellant’s specific circumstance and past history; the court made findings on appellant’s illegal drug use, finding that the violation was both intentional and inexcusable. On the crucial third factor of the *Austin* standards, the court also made sufficient findings on the record to support its conclusion that the need for confinement outweighs the policies favoring probation. The court found the need to protect the public from further criminal activity, particularly in operating a motor vehicle while impaired. The court also observed its doubts on the effectiveness of non-correctional substance abuse treatment for appellant, given appellant’s multiple probation violations and failed treatment attempts.

The district court’s decision to revoke appellant’s probation reflected legitimate deliberation, with appropriate findings, as opposed to a “reflexive reaction to an accumulation of technical violations.” *Austin*, 295 N.W.2d at 251 (quoting *United States v. Reed*, 573 F.2d 1020, 1024 (8th Cir. 1978)). In addition to reasons for ordering confinement, the court weighed factors in support of appellant’s request for continued probation, observing his family support and the offer of Minnesota Teen Challenge to attempt further treatment.

The district court made sufficient findings on the record to support its conclusion that the need for confinement outweighs the policies favoring probation, and the record supports these findings. The court did not abuse its discretion by revoking appellant's probation and executing his sentence.

Affirmed.