STATE OF MINNESOTA
IN COURT OF APPEALS
A11-523

State of Minnesota,
Respondent,

vs.

N. R. S.,
Appellant.

Filed December 20, 2011
Reversed
Minge, Judge

Blue Earth County District Court
File No. 08-JV-07-243

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

Robert D. Hinnenthal, Brown County Attorney, Mary Kay Mages, Assistant County Attorney, New Ulm, Minnesota; and

Ross E. Arneson, Blue Earth County Attorney, Casey M. Hardy, Assistant County Attorney, Mankato, Minnesota (for respondent)

Mark E. Betters, Betters Weinandt Attorneys at Law, Mankato, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Minge, Judge; and Hudson, Judge.

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

MINGE, Judge

Appellant challenges the district court's decision to revoke his extended-jurisdiction-juvenile (EJJ) probation. Because the findings of the district court and the record do not support its conclusion that the need for confinement outweighs the policies favoring probation, we reverse the decision to revoke his EJJ probation.

FACTS

In April 2007, appellant N.R.S., at 16 years of age, stole two handguns from a residence. Appellant was certified for prosecution as an adult. Under the terms of a plea agreement, he was given EJJ status and a delinquency petition was filed, charging him with first-degree burglary involving a dangerous weapon. In October 2007, the district court accepted appellant's guilty plea, placed him on EJJ probation, and stayed the 48-month presumptive adult sentence. Appellant's probation set forth 13 conditions, including not using alcohol or other mood-altering chemicals and participating in random chemical testing.

After admitting a second probation violation involving illicit chemical use, appellant was placed on electronic home monitoring for 45 days and ordered to undergo a chemical-dependency evaluation. The evaluation recommended outpatient treatment. Appellant attended but did not successfully complete a treatment program.

In July 2009, appellant admitted his third probation violation for illicit chemical use. His probation officer recommended revoking appellant's EJJ status. The district court deferred making a decision on revoking probation to allow appellant to enter an

inpatient chemical-dependency treatment program and to investigate drug court as an alternative to revocation. The district court made the following statement at the conclusion of the July 2009 hearing:

> [I]t is very clear your big problem is drugs, you're the one that is gonna have to determine what you need to stay away from drugs; stay away from people that are messing around with it; don't put yourself in the presence where you are going to be tempted – um – and hopefully once you get into this in-patient treatment program – I know that you've been into it before – um – lot of people have drug/alcohol problems you've got some advantages that some people don't. You have parents that care for you; you've got a good head on your shoulders, so make the most of it this time make up your mind that you are going to make it work. Good luck because you are the big loser if you can't do this.

Appellant entered and successfully completed inpatient chemical-dependency treatment at Hazelden. Hazelden reported that "[i]t is not our belief that [appellant] would benefit from any further punitive measures in regards to his legal issues. [Appellant] appears to be progressing in his attempts at recovery and any discussion or consideration of incarceration would certainly impede any progress [appellant] has made to date."

On September 25, 2009, the district court conducted an evidentiary hearing to determine whether to revoke appellant's EJJ probation. At the conclusion of the hearing, the district court revoked appellant's probation and EJJ status and ordered him to appear for sentencing. The district court found that revocation was in appellant's "best interest" and was the "least restrictive alternative."

On appeal, this court reversed the district court's decision revoking EJJ and remanded the matter to the district court. *State v. N.R.S.*, No. A09-2044, 2010 WL

3119446, at *2 (Minn. App. Aug. 10, 2010). We noted that the Minnesota Supreme Court had held that the so-called *Austin* factors apply to revocation of EJJ probation, and we held that the district court erred in not making an *Austin* analysis with specific findings. *Id.* (citing *State v. B.Y.*, 659 N.W.2d 763, 768−69 (Minn. 2003) (applying *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980) to EJJ revocation); *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005) (requiring that the district court make specific findings)). In remanding, we stated that "the parties should be given an opportunity to present additional evidence, including evidence on appellant's updated and current circumstances, in such proceedings as the district court deems appropriate." *Id.*

On December 13, 2010, on remand, the district court conducted an evidentiary hearing. The record before the district court included transcripts of the July and September 2009 court hearings and the evidence of the three earlier violations. Additional testimony and documentary evidence was received. Appellant testified that, during the previous 17 months, he had maintained contact with probation, abstained from alcohol, abstained from other controlled substances such as marijuana, received his high school diploma, began attending Minnesota State University at Mankato, began receiving therapeutic counseling and psychiatric care for his anxiety disorder, and began taking prescribed medication.

The record contains evidence regarding testing. It discloses that, during the 15 months following the September 25, 2009 dispositional hearing, appellant had 20 negative tests for alcohol and other chemical substances, five positive tests for opiates, and three inconclusive tests. Appellant and the testing/probation officer agreed that

appellant had provided advance notice of a prescription medication that he was taking which could cause the five positive test results and that he had consumed large quantities of fluids while suffering from colds and the flu which could cause the three inconclusive test results. Explanations were also provided for a missed test and an incomplete test.

The Blue Earth County District Court found three admitted probation violations between July 2008 and May 2009. The district court discounted the positive developments, addressed the *Austin* factors, ordered revocation of appellant's EJJ probation, and transferred the matter to Brown County District Court for a hearing on execution of the adult sentence. This appeal follows.

D E C I S I O N

The issue on appeal is whether the district court abused its discretion in revoking appellant's EJJ probation. The district court must conduct the three-step *Austin* analysis before revoking EJJ probation. *B.Y.*, 659 N.W.2d at 768–69. 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." *Austin*, 295 N.W.2d at 250. This third *Austin* factor is met when 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.'" *Modtland*, 695 N.W.2d at 607 (quoting *Austin*, 295 N.W.2d at 251).

Under the third *Austin* factor, "[t]here must be a balancing of the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Austin*, 295 N.W.2d at 250. "[D]istrict courts must bear in mind that 'policy considerations may require that probation not be revoked even though the facts may allow it' and that '[t]he purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed.'" *Modtland*, 695 N.W.2d at 606 (quoting *Austin*, 295 N.W.2d at 250). "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." *Austin*, 295 N.W.2d at 251 (quotations omitted). Before revoking EJJ probation, the district court "must be certain to take all of the circumstances of probation into consideration." *B.Y.*, 659 N.W.2d at 772.

All findings must be supported by clear and convincing evidence. Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(1). Evidence is clear and convincing if it is "unequivocal and uncontradicted, and intrinsically probable and credible." *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 52 (Minn. App. 1994), *review denied* (Minn. Mar. 23, 1994); *see also Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978) (stating that "clear and convincing" means that the truth of the alleged facts must be "highly probable"). "The district court has broad discretion in determining whether the evidence justifies the revocation of probation," and this court will only reverse such a decision when the district court abuses that discretion. *In re Welfare of R.V.*, 702 N.W.2d 294, 298 (Minn. App. 2005) (citing *Austin*, 295 N.W.2d at 249). However, it is inadequate to simply recite the three *Austin*

factors and offer "general, non-specific reasons for revocation"; instead, district courts must "convey their substantive reasons for revocation and the evidence relied upon." *Modtland*, 695 N.W.2d at 608. This requirement is satisfied when the district court creates "thorough, fact-specific records setting forth their reasons for revoking probation." *Id.*

Here, the district court made findings on each *Austin* factor, concluding that the need for confinement outweighed the policies favoring probation and that not revoking appellant's EJJ probation "would unduly depreciate the seriousness of the underlying offense and the seriousness of a third violation of the EJJ conditions." The district court determined that appellant's compliance with probation had been "significantly and continuously substandard" and that previous measures to ensure compliance had failed. The issue is whether the district court's findings of fact support its conclusion that the need for confinement outweighed the policies favoring probation.

As set forth previously in this opinion, appellant had three admitted probation violations between July 2008 and May 2009. After appellant admitted the third violation, the district court deferred disposition until after appellant attempted inpatient chemical-dependency treatment. Due to the unique procedural circumstances of this case, 17 months passed between that disposition-deferring decision by the district court in July 2009 and the December 2010 district court hearing resulting in the revocation of appellant's EJJ probation, the decision now on appeal.

The district court's findings establish that, during those 17 months, appellant made significant strides in his personal life and education and experienced success with the

rehabilitative measures taken while on probation. These included completing inpatient chemical-dependency treatment at Hazelden, continued testing of urine samples for drug use, beginning mental-health counseling and psychiatric care, continuing his education, and continued monitoring by his probation officer. There is no finding that, during the 17 months prior to the December 2010 evidentiary hearing, appellant failed any chemical tests, failed to appear for any tests without good reason confirmed by parents, intentionally withheld from providing urine samples, or intentionally diluted any of the samples provided. On this record and given the *Austin* and *Modtland* decisions, we decline to infer adverse credibility determinations in reviewing revocation of EJJ probation. We note that the probation reports and court records also indicate that, except for the pre-July 2009 probation violations, appellant complied with or was discharged from all other conditions of his probation, including: performing community service; making restitution payments; submitting a letter of apology; participating in Victim Offender Mediation; participating in a psychological evaluation and following all recommendations; and having no contact with the victims.

We recognize the difficulty that the district court faced with changing circumstances across a lengthy time span. When the district court considered appellant's admitted probation violations at the hearing in July 2009, appellant's record was grim. Without the positive developments since then, the record would clearly support the district court's revocation of probation. However, in July 2009, when the probation violations were relatively recent, the district court withheld disposition and essentially gave appellant a chance for treatment and drug court. After appellant enrolled in and

successfully completed an inpatient chemical-dependency treatment program, the district court revoked EJJ probation but did not include the *Austin* analysis in making its decision. This led to our reversal and remand with instructions that the parties be allowed to present evidence relevant to the *Austin* factors, "including evidence of appellant's updated and current circumstances." *N.R.S.*, 2010 WL 3119446, at *2.

In December 2010, when the evidentiary hearing on remand occurred, the district court's task was to reopen the record and make any appropriate additional findings regarding appellant's post-violation behavior. The record of the hearing contains positive reports. The district court's findings accept, or do not reject, those reports. These conflict with the district court's other finding that, as of December 2010, appellant was not responsive to interventions and was significantly and continuously noncompliant with the terms of his probation. In fact, the findings indicate that the substance-abuse probation violations have been addressed and conflict with the December 2010 conclusion that failure to revoke probation would unduly depreciate the seriousness of the 2008 and 2009 probation violations. As a result, we conclude that the district court abused its discretion in determining that the need for appellant's confinement outweighs the policies favoring his probation and in ordering revocation of appellant's EJJ probation. Therefore, we reverse the district court's decision.

Reversed.

Dated: