STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1515

State of Minnesota,
Respondent,

vs.

G.D.T.,
Appellant.

Filed March 31, 2014
Reversed and remanded
Stauber, Judge

Hennepin County District Court
File Nos. 27CR1319257; 27JV1011723

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Young Middlebrook, Chief Appellate Public Defender, Susan Andrews, Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

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

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

STAUBER, Judge

On appeal from revocation of his extended juvenile jurisdiction (EJJ) status and execution of his stayed sentence of 178 months, appellant argues that the district court

abused its discretion when, after a probation violation, it rejected probation's recommendation for a juvenile placement to MCF-Red Wing, as a "more measured and appropriate consequence for appellant's behavior." We reverse and remand.

FACTS

In 2011, appellant G.D.T., then 14, pled guilty to four counts of first-degree aggravated robbery and two counts of kidnapping. The charges stemmed from appellant's involvement in two robberies in which other participants committed violent sexual assaults. Under the plea deal, the district court stayed appellant's sentence of 178 months and placed him on probation as an EJJ pursuant to Minn. Stat. § 260B.130 (2010). Appellant was admitted to the Mesabi Academy in April 2011. He successfully completed the program and was discharged on June 29, 2012. He was then placed at the Auburn Lakes Group Home because his mother lacked housing.

In January 2013, appellant appeared before the district court after being discharged from Auburn Lakes for behavioral and attendance violations, including a citation for shoplifting. He then began living with his mother. In May 2013, the district court ordered appellant to return to Auburn Lakes after he failed to attend EJJ group sessions, missed school, and committed several curfew violations. In its order, the district court warned appellant that he was getting his "very last chance," and cautioned him to "gauge every one of his actions against the 178 months that are hanging over his head." At the hearing, the district court told appellant that he was "dangling by" the "thinnest of threads," and that it "expect[ed] absolute and total compliance" because any violation,

such as missing EJJ group or smoking marijuana, could result in the imposition of appellant's stayed sentence.

In a subsequent dispositional review, appellant's probation officer informed the district court in a June 2013 supplemental report of several incidents that took place in May and June. Appellant refused to show school staff something that was in his pocket, failed to attend school three times, was late to school twice, refused to participate in a group, was caught smoking twice, went outside after dark, returned to Auburn Lakes two hours late from home leave, was twice found in a room smelling of marijuana, apparently gave a fake sample on one marijuana urinalysis test, and failed two other such tests. The probation officer also noted that appellant has a hard time avoiding trouble, but "[w]hen [he] receives a consequence for an incident, he follows through," and recommended that appellant be placed on a behavior contract and remain in the group home.

When appellant failed to appear for his probation hearing scheduled for June 13, 2013, the district court issued a bench warrant for his arrest and ordered that his EJJ status be revoked. Appellant, after turning himself in on June 24, was present at a summary EJJ revocation hearing held pursuant to Minn. Stat. § 260B.130, subd. 5(c). The state sought revocation of EJJ status and imposition of the stayed sentence. Appellant's probation officer opposed revocation and instead recommended that appellant be committed to a live-in program in Red Wing. The probation officer stated that, while appellant "was blatantly disrespectful by failing to appear," imposing the sentence would not exhaust "all available resources . . . within EJJ probation," and placement at Red Wing would allow appellant "to work on much needed skills." The

probation officer's supervisor also recommended placing appellant at Red Wing. Instead, the district court revoked appellant's EJJ status and imposed the 178-month adult sentence. This appeal ensued.

D E C I S I O N

To revoke EJJ probation, a district court must identify the specific conditions of probation that were violated, find that those violations were "intentional or inexcusable," and "find that the need for confinement outweighs the policies favoring probation." *State v. B.Y.*, 659 N.W.2d 763, 768 (Minn. 2003) (quoting *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980)). "[I]n making the three *Austin* findings, [district] courts are not charged with merely conforming to procedural requirements; rather, [district] courts must seek to convey their substantive reasons for revocation and the evidence relied upon." *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). Because revocation of probation is within the broad discretion of the district court, we will not reverse absent a clear abuse of that discretion. *Austin*, 295 N.W.2d at 249-50.

The district court recited the *Austin* elements and made a finding that "the need for confinement outweighs the policies favoring probation." The district court based its finding on the fact that appellant "has not proven to be amenable to EJJ probation," citing appellant's failure to heed the court's "stern warning" and "take advantage of the many chances [the district] court has given him," and appellant's "continued difficulties with compliance and appropriate behaviors." The district court's conclusion that appellant's "best interests will be served through confinement" rests on the finding that "he has

demonstrated an inability to comply with EJJ probation, despite numerous opportunities to do so."

Appellant does not contest the district court's findings that he violated his probation and that the violations were intentional or inexcusable. Appellant's sole contention is that the district court abused its discretion by finding that the need for his confinement outweighed policies favoring probation. Because district courts must convey their "substantive reasons for revocation and the evidence relied upon," *Modtland*, 695 N.W.2d at 608, the district court's findings must indicate that the need for incarceration actually trumps the policies favoring probation.

I. Need for confinement

Appellant's probation officer testified that appellant was making progress but required more structure. Both the probation officer and his supervisor recommended that appellant be sent to the Red Wing program, which could impose such structure. The district court nonetheless found a need to confine appellant, citing his "inability to comply with EJJ probation, despite numerous opportunities to do so." But the district court's findings do not credibly link appellant's noncompliant behavior—truancy, delinquency, and marijuana use—to a need for confinement, especially when the two people best able to judge appellant's chance for success, his probation officer and the officer's supervisor, both recommended placement in the Red Wing program, where appellant would "be able to work on his academics, receive chemical dependency education, participate in . . . treatment groups, and . . . learn independent living skills."

The reports from the probation officer support these recommendations. The district court's findings did not substantively demonstrate a need for confinement.

II. Policies favoring probation

Even when offenders violate specific terms of their probations, "policy considerations may require that probation not be revoked." *Austin*, 295 N.W.2d at 250. Because the purpose of probation is to rehabilitate the offender, "revocation should be used only as a last resort when treatment has failed." *Id.* at 250. The failure of treatment occurs when "the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Id.* at 251 (quotations omitted). District courts must "take care that the decision to revoke is based on sound judgment and not just their will," and must avoid "reflexive reaction[s]" to accumulations of technical violations that do not amount to a failure of treatment. *Id.* (citation and quotation omitted).

The policies favoring continued probation are even stronger in the EJJ context. In EJJ cases, "the determination, absent mitigating factors, that a defendant has violated probation" often, as here, has the "harsh and inflexible result" of requiring "the execution of a lengthy prison sentence." *B.Y.*, 659 N.W.2d at 772. Furthermore, "[t]he public is not particularly well served by automatic incarceration [of an EJJ probationer] on a technical violation" because such violations often amount to "youthful obstinance [that] may not always foreclose a determination that an EJJ defendant is amenable to probation." *Id.* Thus, "to revoke probation and execute a previously stayed adult sentence for technical violations of EJJ probation, the violations must demonstrate that the offender cannot be counted on to avoid antisocial activity." *Id.* (quotation omitted).

The district court was obligated to avoid reflexive reactions to minor violations. *Austin*, 295 N.W.2d at 251. The supreme court has further cautioned that, because EJJ probation revocation often has a harsh and inflexible result, district courts must see through youthful obstinance and revoke only if appellant is truly incorrigible. *B.Y.*, 659 N.W.2d at 772. Here, the district court even acknowledged the strong public policy reasons favoring appellant's continued probation, both before revoking EJJ status and at the revocation hearing, by stating that sending appellant to prison would not "make a better person out of you" and would create "somebody I'd [probably not] like to live next door to."

But the district court nonetheless imposed a nearly 15-year sentence because of truancy, delinquency, and marijuana use. Although appellant's violations of the terms of his EJJ probation were troublingly recurring, he did not harm others or egregiously reoffend. With an underlying sentence of 178 months and an as-yet-unexplored option of sending appellant to Red Wing on the table, we conclude that the district court abused its discretion by failing to make credible findings that the need to confine appellant outweighed the policies favoring probation.

III. "Total compliance" standard

Although the district court made *Austin* findings, it appears that the court actually imposed a "total compliance" or "last chance" standard on appellant. Before revoking appellant's EJJ status, the district court warned him that it "expect[ed] absolute and total compliance," and cautioned appellant that any violation—even minor ones such as missing EJJ group or smoking marijuana—could result in the imposition of the stayed

sentence. And at the EJJ revocation hearing, the district court acknowledged that it was imposing the sentence because appellant had his "last chance."

But the underlying rehabilitative purpose of probation, and the supreme court's emphasis on measured, non-reflexive reaction to minor violations in the EJJ context, render this standard legally troubling. Minnesota law does not allow a district court to require "total compliance" of an EJJ parolee. Instead, the law requires that the district court make the substantive finding that appellant's violations render the need to incarcerate him greater than the strong public policies that favor continued probation. *B.Y.*, 659 N.W.2d at 772; *Austin*, 295 N.W.2d at 251. But the record demonstrates that, while the district court may have "conform[ed] to procedural requirements" when making its *Austin* findings, it failed to "convey [its] substantive reasons for revocation and the evidence relied upon" in a credible manner. *See Modtland*, 695 N.W.2d at 608. Because the district court's findings did not demonstrate that the need to confine appellant outweighed the policies favoring probation, we reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.