STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2057

State of Minnesota,
Respondent,

vs.

Keith Ward Hohlen,
Appellant.

Filed June 30, 2014
Reversed and remanded
Klaphake, Judge[*]

Mille Lacs County District Court
File No. 48-CR-11-175

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

Janice S. Jude, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Kirk, Judge; and Klaphake, Judge.

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

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

KLAPHAKE, Judge

Appellant Keith Ward Hohlen challenges the revocation of his probation, arguing that the district court did not make the required findings under *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). While the record before this court shows that the district court made the required *Austin* findings, the state concedes that key documents are missing from the district court file, making the record inadequate for appellate review. For this reason, we reverse and remand.

D E C I S I O N

Whether to revoke probation is within the district court's discretion, and we will reverse a probation revocation only if there is an abuse of that discretion. *Austin*, 295 N.W.2d at 249-50. Whether the district court made the required findings is a question of law, which we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). When the defendant violates a condition of his probation, the district court may revoke his probation and execute the previously stayed sentence. Minn. Stat. § 609.14, subd. 3 (2010). Before revoking a defendant's probation and executing the stayed sentence, 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. The district court is required to make thorough, fact-specific findings on the record before revoking probation. *Modtland*, 695 N.W.2d. at 608.

Appellant was convicted of making terroristic threats in 2011, and the district court sentenced him to 15 months in prison, stayed for five years, and 30 days in jail, on condition that appellant complete an anger management assessment and follow all conditions of his probation. The district court stayed appellant's 30-day jail sentence pending his direct appeal to this court. We affirmed appellant's conviction but amended his sentence to one year and a day, and the Minnesota Supreme Court denied review. *State v. Hohlen*, No. A11-1880, 2012 WL 3892128 (Minn. App. Sept. 10, 2012), *review denied* (Minn. Nov. 20, 2012). Appellant initiated a federal habeas corpus petition, again appealing his conviction and sentence.

The district court held probation revocation hearings on February 8, 2013 and August 2, 2013. Following the first hearing, the district court ordered appellant to complete an updated assessment and follow its recommendations, and sentenced him to 60 days in jail beginning on February 15. Appellant failed to report to jail on that date. Following the second hearing, the district court found that appellant did not comply with the February 8 order, rejecting appellant's explanation that he thought his federal habeas corpus appeal stayed his jail sentence. The district court judge noted that the language of the February 8 order and the judge's directive to appellant on the record at the hearing were explicit regarding appellant's duty to report to jail. The district court revoked appellant's probation and executed his one-year-and-a-day sentence.

We are inclined to conclude that the district court did not abuse its discretion in revoking appellant's probation. The district court record suggests that the district court's finding on the first *Austin* factor is correct, that appellant was informed at his 2011

sentencing hearing that he must complete an updated anger management assessment, and follow all conditions of probation. It also appears that the district court properly found the second factor, that appellant intentionally violated his probation when he failed to verify with the court or his probation agent his completion of the assessment, and did not report to jail. Finally, the third *Austin* factor appears satisfied, as well; the district court noted that it had no choice but to send appellant to prison because he steadfastly refused to comply with the conditions of his probation, and revocation was the only way to show him the severity of his probation violations.

The state, however, did not file an appellate brief in this matter and concedes that the record supports a reversal and remand for the district court to hold another probation violation hearing because key information is missing from the appellate record, including a transcript of the February 8 hearing and a copy of appellant's completed January 2012 anger management assessment report. The state agrees that these documents reveal that the district court revoked appellant's probation based, at least in part, on its mistaken recollection of events from the February 8 hearing.

Typically, an appellant who fails to provide this court with a complete district court record does not meet the burden of proof supporting reversal. *See State v. Vang*, 357 N.W.2d 128 (Minn. App. 1984) (affirming because the limited record available to the appellate court made review impossible). However, since the state agrees that the district court judge's recollections of the February 8 hearing are incorrect and must be verified by the hearing transcript or other documents, we decline to foreclose appellate review. We therefore reverse and remand for the district court to hold another probation hearing to

assess whether appellant violated the conditions of his probation. *See, e.g.*, *State v. Rhodes*, 627 N.W.2d 74, 89 (Minn. 2001) (remanding because of incomplete record); *State v. Perkins*, 582 N.W.2d 876, 879 (Minn. 1998) (remanding to reopen omnibus hearing because record incomplete); Minn. R. Crim. P. 27.04, subd. 3.[1]

Finally, appellant's pro se supplementary brief does not raise any new arguments necessitating review.

Reversed and remanded.

[1] We also note that at the August 2 probation violation hearing the prosecutor mischaracterized appellant's underlying criminal acts supporting his conviction for terroristic threats. The prosecutor incorrectly told the district court that appellant was convicted of telling a Mille Lacs County employee that he was going to "slit her throat." It is unclear whether the prosecutor's misstatement may have influenced the district court's findings on the *Austin* factors.