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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1371**

State of Minnesota,
Respondent,

vs.

Jack Lawrence Schwab,
Appellant.

**Filed March 6, 2017
Reversed and remanded
Schellhas, Judge**

Goodhue County District Court
File No. 25-CR-14-2777

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

Stephen Betcher, Goodhue County Attorney, Red Wing, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Kirk, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his probation revocation, arguing that the district court abused
its discretion by finding that he violated conditions of his probation without his admission

or clear and convincing evidence and without satisfying the *Austin* factors. We reverse and remand.

FACTS

During Thanksgiving weekend in 2014, Schwab sexually assaulted his wife. Schwab pleaded guilty to fourth-degree criminal sexual conduct. On May 1, 2015, based on a plea agreement, the district court stayed imposition of sentence and placed Schwab on probation for ten years with a number of probation conditions that included no use or possession of alcohol or illegal drugs. The court told Schwab that he “may have contact” with his wife but “may not live at the same residence” as his wife until his therapist and probation officer agreed that it was “a safe thing to do.”

A probation violation report dated May 26, 2016, alleges that Schwab violated the following terms of his probation: (1) “no use of drugs or alcohol”; (2) “cooperate with case management through Goodhue County Health and Human Services” and “not live at the same address as the victim without approval from therapist”; and (3) register as a predatory offender. At Schwab’s May 31 probation-revocation admit-deny hearing, the district court did not read the alleged probation violations on the record, but defense counsel told the court that Schwab wanted to “admit the violation,” and Schwab said, “I did it. I’m not going to deny it. I goofed up.”

The prosecutor then explained that the state was seeking an executed sentence, and the district court announced that it would hold a separate disposition hearing and engaged in the following colloquy with Schwab:

THE COURT: . . . First of all, a question for you is, do you admit or deny that you have violated the terms of your probation?

THE DEFENDANT: Yes, I did.

THE COURT: You admit it?

THE DEFENDANT: Yes, I did.

Defense counsel then questioned Schwab about his waiver of rights and asked him, “[d]o you want to admit the violation?” Schwab said yes. Defense counsel then explained to Schwab that the state was requesting an executed prison sentence, which meant that he “would go to prison for whatever time period the crime calls for” and that “the consequence here could be very harsh or maybe we can get an alternative. I can’t guarantee it either way.” Schwab said that he understood and agreed “to go ahead and admit.”

Specifically, Schwab admitted that he violated a condition of his probation—no use of drugs or alcohol—by using methamphetamine. He added that he did so “[t]o cure [his] pain that [he had] been in” and said, “that’s what [he] was going to talk to everybody about,” acknowledging that he knew that “it’s not a valid excuse.” The prosecutor also asked Schwab whether, “as a condition of probation, [Schwab was] also not supposed to be at the house that [he] used to live at,” and Schwab said:

No. She said I could be out there; I just couldn’t sleep there. That was my understanding, and . . . I talked to . . . my PO. I said, ‘I switched my vehicles, I grabbed my lunch and stuff out there. Do I have to register out there?’ And she said, ‘no.’ She said I could be out there; I just couldn’t sleep there. So I am kind of a little lost on this part.

The district court accepted Schwab’s “admission of the probation violation and waiver of a hearing” and scheduled a disposition hearing for June 2, 2016.

At the disposition hearing, the district court found “that the violations in this case have been clearly identified, that the violations are intentional or at least without any reasonable excuse, . . . that the need for confinement does outweigh any interest that Mr. Schwab has in his personal liberty and in probation,” and that the “the need for confinement in this case does outweigh the strong public policies in favor of probation.” The court revoked the stay of imposition and sentenced Schwab to 48 months’ imprisonment. This appeal follows.¹

DECISION

Schwab argues that the district court abused its discretion by revoking his probation without clear and convincing evidence to support its finding that he violated conditions of his probation and without satisfying the *Austin* factors. Prior to revoking probation, a 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.” *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). Failure to address all three *Austin* factors requires a reversal and remand, even if the evidence was sufficient to support the revocation. *State v. Modtland*, 695 N.W.2d 602, 606–08 (Minn. 2005).

“A district 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.”

¹ The state has not filed a brief in this appeal, and we therefore determine the case on the merits. See Minn. R. Civ. App. P. 142.03.

Id. at 605 (quotation omitted). But whether a district court has made the findings required under *Austin* presents a question of law, which an appellate court reviews de novo. *Id.*

In this case, the record reflects that, at the probation-revocation admit-deny hearing, defense counsel informed Schwab of his right to a contested probation-revocation hearing, and that Schwab waived the right to a contested hearing. Schwab admitted that he had violated one condition of probation—no use of drugs or alcohol. And the district court judge accepted Schwab’s admission, saying, “I’ll accept your admission of the probation violation and waiver of a hearing.” But the record does not reflect that Schwab admitted to violating any other conditions of probation. In fact, when the prosecutor asked Schwab, “were you also not supposed to be at the house that you used to live at,” Schwab said no and explained that his probation officer told him that he could be at the house but could not sleep there, so it was his understanding that he did not have to register at that address. Apart from that comment, no one mentioned the remaining alleged probation violation—failure to register as a predatory offender—at either the probation-revocation admit-deny hearing or disposition hearing.

At the disposition hearing, without specifying any probation violations, the court stated:

I do find that the violations in this case have been clearly identified, that the violations are intentional or at least without reasonable excuse, and that the need for confinement does outweigh any interest that Mr. Schwab has in his personal liberty and in probation.

The court then revoked Schwab's probation and imposed an executed 48-month prison sentence. At Schwab's request, the court thereafter allowed Schwab to address the court but did not alter its decision to revoke Schwab's probation or make any additional findings.

"[C]ourts must seek to convey their substantive reasons for revocation and the evidence relied upon." *Modtland*, 695 N.W.2d at 608. Although a transcript may be sufficient to permit review, *id.* at 608 n.4, the transcripts in this case do not reveal the evidence upon which the district court relied or its substantive reasons for revoking Schwab's probation. We therefore conclude that the court abused its discretion by revoking Schwab's probation without satisfying the *Austin* factors. Accordingly, we reverse and remand for further proceedings.

Reversed and remanded.