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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1849**

State of Minnesota,
Respondent,

vs.

Eric Steven Morgan,
Appellant.

**Filed May 22, 2017
Affirmed
Kirk, Judge**

Cass County District Court
File No. 11-CR-13-1170

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

Christopher J. Strandlie, Cass County Attorney, Walker, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges the district court's revocation of his probation, arguing that
the court erred in finding that he violated the conditions of his probation when he refused

to allow law enforcement to search his residence and that he had prohibited contact with the minor children of his girlfriend. We affirm.

FACTS

On February 18, 2014, appellant Eric Steven Morgan pleaded guilty to third-degree criminal sexual conduct. The district court sentenced appellant to 36 months in prison, stayed, with a ten-year conditional release term. The district court placed appellant on supervised probation and imposed a number of conditions, including remaining law abiding, abstaining from alcohol or the use of controlled substances, attending a sex-offender program, having no unsupervised contact with females under the age of 18, and submitting to searches of person, place, or residence.

Appellant repeatedly violated the conditions of his probation. On July 7, 2014, the district court held a probation-violation hearing, and appellant admitted to pleading guilty to disorderly conduct and using alcohol. The district court reinstated his probation, and all previously imposed conditions, and ordered that appellant complete and follow the recommendations of a chemical-dependency assessment.

On July 23, 2015, the district court held a second probation-violation hearing where appellant admitted to having unsupervised contact with the four minor daughters of B.B., his girlfriend. The district court found that appellant violated his probation. It reinstated appellant's probation, and all previously imposed conditions, and ordered that appellant serve 180 days in jail and re-enter sex-offender treatment. The district court specifically ordered appellant to have no contact with B.B.'s children, or any other children under the age of 18 years old, unless specifically approved by Leech Lake Child Welfare or

appellant's probation agent. The district court warned appellant that "[a]ccidental, incidental contact is not an excuse. I don't want there to be any question in your mind."

On April 4, 2016, the district court held a third probation-violation hearing, which appellant contested. Appellant admitted to seeing B.B. and her children "a few times," but he claimed that he did not have any direct contact with B.B.'s children because they were seated inside the car when he spoke with B.B. The district court found that appellant had violated his probation by having contact with B.B.'s children and by failing to abstain from alcohol and controlled substances. The district court again reinstated appellant's probation, and all previously ordered conditions, and ordered that appellant serve 180 days in jail.

Prior to imposing appellant's sentence, the district court judge asked appellant to tell the court in his own words "what it means when I say no contact with children under the age of eighteen." Appellant replied, "Staying away, staying away and no contact. I mean staying away from my girlfriend's kids, going back to treatment, going back to work, no contact." The district court noted,

You can't walk out to a car [that the children are sitting in]. There's no exception because you're not talking directly to the children that you get to have that kind of indirect contact. It means no contact. You need to stay away from kids Anything that comes up in your mind as a question, you have to stay away from kids. . . . I have to say that if you're back and we're in some squishy area where you're having contact but you didn't mean anything by it, I can't read it as anything other than being manipulative at that point . . . at that point the surrounding circumstances are such that it's going to be hard to find you credible at all.

Little more than a month later, the district court held a fourth probation-violation hearing. Appellant's probation agent filed a report with the district court alleging that

appellant continued to have contact with B.B.'s minor children and that appellant had recently refused law enforcement's request to search his residence. Appellant denied the allegations.

At the probation-violation hearing, Cass County Sheriff's Deputy Randall Iverson testified that the ex-girlfriend of E.M., appellant's father, had recently called the police department to report that B.B. and her minor children were residing on E.M.'s property where appellant also resided. Deputy Iverson testified that on June 23, he and Aaron Schueller, appellant's probation agent, went to appellant's residence to speak with appellant and to verify whether B.B. and her children were in fact on the property. There are three separate residences on the property, which included E.M.'s residence and two trailer houses. Deputy Iverson testified that when he arrived at the property, appellant came out of E.M.'s residence and spoke with him. Appellant admitted that he had been staying at E.M.'s residence and that B.B. and the children were living in the "middle trailer," which was the trailer house closest to E.M.'s residence. The distance between the middle trailer where B.B. and her children were living and E.M.'s residence is 112 feet. Deputy Iverson observed some children's bicycles out in the yard.

Deputy Iverson and Agent Schueller knocked on the door to the middle trailer where B.B. and the children were residing, but no one answered. The vehicle that B.B. and appellant co-owned was parked next to the middle trailer. Agent Schueller testified that appellant told him that "he didn't have permission to go in there because his grandmother owned the residence." Deputy Iverson testified that after they asked appellant for a key to gain entry into the middle trailer, E.M. emerged from his residence and aggressively

approached Deputy Iverson and Agent Schueller “swearing and saying racist comments And I felt like for our safety that we needed to leave the property as soon as we could, I guess, before things escalated.” Agent Schueller asked appellant to get into Schueller’s car and the three men left the property.

Agent Schueller testified that, as appellant’s probation officer, he met with appellant generally once a week and that appellant had resided on his father’s property throughout his supervised probation. Appellant had reported to Agent Schueller that he resided in all three residences on the property at different points in time, but that he was currently residing in his father’s residence. Appellant was in the midst of updating the middle trailer, and he would oftentimes show Agent Schueller his work. Agent Schueller testified that he had previously been in the middle trailer between 25 to 50 times during home visits and that he had always been able to gain entry to the trailer.

Agent Schueller testified that he informed appellant that he needed to verify whether or not B.B. and her children were residing at the property, and appellant “immediately got really nervous, and he eventually admitted that B.B. and the children were living in the trailer home closest to his dad’s residence.” Appellant also admitted to viewing the children outside of the window of his father’s residence. Agent Schueller testified that he observed children’s bicycles out in the yard.

E.M. testified that appellant has always had access to the middle trailer and that appellant could have entered the trailer if he wanted to on June 23. E.M. admitted that B.B. and the children moved in to the middle trailer in June 2016. Appellant testified that B.B. and her children were residing on his father’s property on June 23 and had been there for

the past few months. Appellant explained that he no longer had access to the middle trailer because he “pretty much considered whoever was staying there is somebody else’s property so, you know, it wasn’t my right to go in there.” Appellant admitted that he did not disclose to Agent Schueller that B.B. and her children were residing on the property, but he denied having any personal contact with the children. Appellant also admitted that the bicycles were used by B.B.’s children. Appellant testified that B.B. was not paying rent in exchange for residing in the middle trailer.

At the August 22, 2016 hearing, the district court revoked appellant’s probation, finding clear and convincing evidence that appellant had violated two probation conditions: refusing law enforcement’s request to search his residence and having unauthorized contact with B.B.’s children. The district court told appellant that “[y]ou had four kids out living approximately a hundred feet from you, ten miles out of town where the people that are supervising you had no ability to pay attention to what was going on. That was exacerbated by the fact that you were clearly dishonest, intentionally, strategically dishonest with your probation officer when they came out to check things out.”

The district court found appellant’s violations were not “excusable. I think the no contact was clear. I think we talked about it on multiple occasions And I think the fact that you were strategically dishonest about it helps me understand how clear it was to you too.” The district court chastised appellant for having B.B. “participat[e] in the dishonesty in front of these kids as well, [by] locking the trailer house and hiding.” The district court executed appellant’s stayed 36-month sentence.

This appeal follows.

DECISION

I. The district court did not abuse its discretion in revoking appellant's probation.

“The [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.” *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). Whether a lower court has made the required *Austin* findings is a question of law, which this court reviews de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). Before revoking a defendant's probation, the district court must make specific findings on all three *Austin* factors. *State v. Cottew*, 746 N.W.2d 632, 636-37 (Minn. 2008). Under *Austin*, the 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.” 295 N.W.2d at 250. The Minnesota Supreme Court in *Modtland* reaffirmed *Austin*'s core holding that district courts are required to make thorough, fact-specific findings on the record before revoking probation. *Modtland*, 695 N.W.2d at 606, 608.

A. Contact with B.B.'s minor children

Appellant challenges the district court's findings on the first *Austin* factor, that he violated the conditions of his probation by having prohibited contact with B.B.'s minor children. To satisfy the first *Austin* factor, the district court must designate the specific probation condition that was violated. 295 N.W.2d at 250. The district court may find a

probation violation if the state presents clear and convincing evidence of a violation or if the probationer admits to the probation violation. See *Cottew*, 746 N.W.2d at 636.

Appellant asserts that the district court wrongly relied upon circumstantial evidence of unauthorized indirect contact. Appellant also argues that the district court violated Minn. R. Evid. 404(b) by using evidence of appellant's past violations of the no-contact order in support of its finding of a probation violation.

In its written order and memorandum, the district court concluded that there was clear and convincing evidence, although circumstantial, that appellant had violated a condition of his probation by having contact with B.B.'s children while they resided in the middle trailer. The district court cited to numerous pieces of record evidence demonstrating that appellant knew that the no-contact condition "was clearly broader than a prohibition against immediate physical contact" because the court had previously found him in violation when he spoke with B.B. while the children were seated inside a vehicle. The district court cited appellant's previous efforts to circumvent the no-contact condition by hiding in a bathroom while the children hid in a bedroom during a probation check. Additionally, the district court noted that appellant knowingly failed to disclose to his probation agent that he had invited B.B. and the children to move onto the property where he resided. The district court found appellant continued his evasive antics on June 23 when he made no effort to provide access to the middle trailer to Deputy Iverson and Agent Schueller, despite the fact that he admitted that B.B.'s children were residing in the trailer, and that B.B.'s vehicle was parked in the driveway. But for E.M.'s aggressive behavior towards the law enforcement officers, the district court concluded that they "would likely

have made further attempts to access the trailer, but they retreated when [E.M.] angrily confronted them.” We agree with the district court’s reasoning.

In *State v. Xiong*, this court addressed whether a probationer’s contact with a prohibited person violated a condition of his probation. 638 N.W.2d 499 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). In *Xiong*, one of the conditions of Xiong’s probation included having no contact with gang members. *Id.* at 501. At a probation-violation hearing, Xiong admitted that he was at his girlfriend’s house when a gang member unexpectedly arrived, who stayed at the house for only “a couple of minutes, a couple of seconds” and then left. *Id.* Xiong claimed that his contact with the gang member was inadvertent, not initiated by him, and was therefore unintentional. *Id.* at 503. We disagreed, concluding that Xiong intentionally and inexcusably violated the no-contact condition of his probation.

In light of the warnings the district court gave Xiong at the time of the original sentence, and reiterated when he was first cited for probation violations, it was clear that Xiong was expected to avoid any gang contact whatsoever. The court acted within its discretion by finding that Xiong’s presence at his girlfriend’s home, where he could expect gang members to visit, was an intentional and inexcusable violation of the condition of his probation.

Id. We held that a probation violation occurred because Xiong had indirect contact with a gang member and that the violation was intentional and inexcusable because the defendant knew that he was acting beyond the scope of his probation conditions. *Id.* Accordingly, a probationer should not visit places that he could expect prohibited persons to visit. *Id.*

Applying *Xiong* to the facts of this case, the district court did not abuse its discretion in revoking appellant's probation for having prohibited contact with B.B.'s children. Here, there is no dispute that appellant and the children occupied the same parcel of property. We conclude that under *Xiong*, the close, physical proximity between appellant and the minor children on E.M.'s property constitutes indirect contact. Appellant admitted at the probation-violation hearing that B.B. and her children were residing on his father's property, which is the same location that appellant had resided since he was placed on supervised probation. The district court also clarified to appellant prior to the challenged violation that appellant would be in violation of his probation if he had any incidental contact with B.B.'s children.

The district court did not improperly use past crimes evidence under Minn. R. Evid. 404(b) when it recited in the memorandum appellant's previous efforts at evading the no-contact condition. See Minn. R. Evid. 1101(b)(3) (stating that the rules of evidence do not apply in proceedings "granting or revoking probation"). Accordingly, the district court did not err in finding that appellant violated his probation by having prohibited contact with B.B.'s children.

B. Refusal to search

Appellate courts review de novo a district court's ruling on constitutional questions involving searches and seizures. *State v. Wiegand*, 645 N.W.2d 125, 129 (Minn. 2002). "We will not reverse the court's factual findings unless the findings are clearly erroneous or contrary to law." *State v. Anderson*, 733 N.W.2d 128, 136 (Minn. 2007). The Fourth Amendment prohibits unreasonable searches and seizures upon areas where there is a

legitimate expectation of privacy. U.S. Const. Amend. IV; Minn. Const. art. I, § 10. In *State v. Earnest*, the Minnesota Supreme Court held that a probation search falls within the scope of the Fourth Amendment and “must therefore comport with a standard of reasonableness, [however] we also recognize that, because of this special relationship between the probation officer and probationer, the law relating to probation searches cannot be strictly governed by automatic reference to ordinary search and seizure law.” 293 N.W.2d 365, 368 (Minn. 1980) (citations omitted).

A warrantless search of a probationer’s residence is reasonable when (1) the probation officer’s supervisor approves the search; and (2) the officer has reasonable grounds to believe the residence contains contraband. *Griffin v. Wisconsin*, 483 U.S. 868, 871, 880, 107 S. Ct. 3164, 3167, 3172 (1987). The reasonableness of a warrantless search of a probationer is viewed under the totality of the circumstances. *State v. Anderson*, 733 N.W.2d 128, 137 (Minn. 2007). A valid probation agreement makes a warrantless search of a probationer reasonable. *State v. Kouba*, 709 N.W.2d 299, 306 (Minn. App. 2006). And appellant’s reasonable expectation of privacy is diminished merely by virtue of his status as a probationer. *Anderson*, 733 N.W.2d at 139.

Appellant argues that the district court erred in finding that he refused a search of his residence, asserting that he acted in good faith in attempting to access the middle trailer, but he did not have the keys to unlock or the permission to enter the residence of another person.

Under the totality of the circumstances, it is evident that appellant refused the search of his residence. *Id.* at 138-39. Here, there is no dispute concerning whether Agent

Schueller's supervisor approved the search or that Agent Schueller had reasonable grounds to search the middle trailer, given that appellant admitted that B.B. and the children were living there. The record evidence establishes that appellant had access to the middle trailer. Appellant had lived in all three residences on E.M.'s property throughout appellant's supervised probation. As a condition of his probation, appellant agreed to the search of his residence, which would necessarily mean that Agent Schueller could access all three residences on the property during a probation check. It was also reasonable for Deputy Iverson and Agent Schueller to believe that B.B. and appellant were sharing living quarters in some capacity on the property, given that they co-owned a vehicle together, had a child together, and were in a romantic relationship. E.M. also testified that appellant had access to the middle trailer on the day in question. Collectively, the circumstances in this case present ample, reasonable justification for law enforcement to enter and search the middle trailer. Accordingly, the district court did not err in finding that appellant violated a condition of his probation when he refused to allow law enforcement's search of the middle trailer.

Affirmed.