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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-0586**

State of Minnesota,  
Respondent,

vs.

Jose Fernando Vargas,  
Appellant.

**Filed November 20, 2017  
Affirmed  
Larkin, Judge**

Lincoln County District Court  
File No. 41-CR-15-91

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

Glen A. Petersen, Lincoln County Attorney, Tyler, Minnesota (for respondent)

Robert H. Ambrose, Matthew B. Trevor, Ambrose Law Firm, PLLC, Minneapolis,  
Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith,  
Tracy M., Judge.

## **UNPUBLISHED OPINION**

**LARKIN**, Judge

Appellant challenges the district court's revocation of his probation. We affirm.

### **FACTS**

Appellant Jose Fernando Vargas was convicted of one count of third-degree criminal sexual conduct and one count of fourth-degree criminal sexual conduct following a bench trial. The district court sentenced Vargas to a stayed prison term of 57 months, placed him on probation for 15 years, and ordered him to serve 365 days in the county jail as a condition of probation. This sentence was a downward dispositional departure based on Vargas's amenability to probation. Vargas had a psychosexual assessment prior to sentencing, which recommended that he have no unsupervised contact with minor females. The district court made this no-contact provision a condition of Vargas's probation.

During his first five days in the county jail, Vargas, who was 19, called his girlfriend, who was 16, a total of 13 times. The phone calls began the same day that he was sentenced and ordered to have no contact with minor females. Vargas's probation officer filed a probation report based on the phone calls, and Vargas admitted to the violation. The district court revoked Vargas's probation, finding that Vargas had knowingly violated probation, taken steps to avoid detection, and initially lied about the violation when confronted by his probation officer. The district court found the violation was "intentional or inexcusable" and that it would unduly depreciate the seriousness of the violation for Vargas to continue on probation. Additionally, the district court found that

Vargas’s “willful conduct in violating the terms of his probation within hours of sentencing demonstrates a contempt and disregard for the court-ordered conditions of his probation.”

Vargas appeals.

## DECISION

The trial court has broad discretion in determining whether the facts warrant revocation of probation, and an appellate court will not reverse unless there is a clear abuse of discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). Before a district court may revoke a defendant’s probation, it “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.” *Id.* at 250. Whether a district court has made the required *Austin* findings presents a question of law, which an appellate court reviews de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

In assessing the third *Austin* factor, the district court determines whether “confinement is necessary to protect the public from further criminal activity by the offender,” “the offender is in need of correctional treatment which can most effectively be provided if he is confined,” or “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Austin*, 295 N.W.2d at 251 (quotation omitted). The decision to revoke probation “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.” *Id.* (quotation omitted).

Vargas focuses on the third *Austin* factor, arguing that “the evidence was insufficient” and that the district court did not make adequate findings. The district court made the following detailed findings explaining why continuing probation would unduly depreciate the seriousness of the violation: (1) Vargas violated probation by having contact with a minor female the same day that he was sentenced, (2) “[Vargas] continued to violate this probationary condition on 12 additional occasions in a five-day period until he was confronted by his probation officer [and] [t]here is no reason to believe that [Vargas’s] conduct would have stopped but for the intervention of the probation agent,” (3) “[Vargas] took affirmative steps to hide the fact that he was contacting a minor female,” (4) “[Vargas] initially lied to his probation officer about his contact with the minor female,” (5) “[r]efraining from having contact with minor females was a key component to [Vargas’s] probation supervision,” and (6) “[Vargas’s] willful conduct in violating the terms of his probation within hours of sentencing demonstrates a contempt and disregard for the Court-ordered conditions of his probation.” These findings support the court’s determination that it would unduly depreciate the seriousness of the violation if probation were not revoked, thereby satisfying the third *Austin* factor.

Vargas argues that his dispositional departure “should not have been used as evidence against him.” The record does not support Vargas’s suggestion that the district court based its decision to revoke on the dispositional departure. Although the district court’s revocation order mentions the downward departure, it states that “[t]he Court is not executing sentence because there was a departure.”

Vargas argues that the sentencing guidelines indicate that his violation does not justify revocation. He argues that the district court should have imposed an alternative sanction because he did not commit a new criminal offense, he had not started sex-offender treatment, and other appropriate sanctions were available.

The sentencing guidelines state that revocation is justified when the offender is convicted of a new felony or when the offender continues to violate probation despite the court's use of expanded and more onerous conditions. Minn. Sent. Guidelines 3.B (2015). Although the guidelines urge courts to impose more restrictive conditions before revoking probation, we cannot overlook the fact that the district court revoked Vargas's probation because he immediately and repeatedly disregarded a "key component" of his probationary conditions. And the district court had already imposed a significantly restrictive condition of probation: 365 days in the county jail, which is the longest county jail sentence a district court can order as a condition of probation. Minn. Stat. § 609.135, subd. 4 (2015).

Vargas argues that because the violation was minor and did not involve new charges or convictions and the risk to public safety is weak, execution of his sentence was an abuse of discretion. Admittedly, this may have been a close decision, but 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." *Austin*, 295 N.W.2d at 249-50. The law does not prevent a district court from revoking probation based on an offender's first violation, in the absence of a new conviction, or when additional treatment options and intermediate sanctions are available. Minnesota's district court judges are entrusted to make difficult decisions that balance the probationer's freedom and public

safety. We will not second guess those decisions if the district court makes the necessary *Austin* findings, the record supports the findings, and the district court's reasoning is soundly explained. In this case, these criteria are satisfied, and the district court did not clearly abuse its discretion by revoking Vargas's probation.

**Affirmed.**