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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0952**

State of Minnesota,
Respondent,

vs.

Kenneth Bernard Smith,
Appellant.

**Filed February 20, 2018
Affirmed
Smith, Tracy M., Judge**

Stearns County District Court
File No. 73-CR-16-1577

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

Janelle P. Kendall, Stearns County Attorney, Luke T. Godzala, Assistant County Attorney,
St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Kenneth Smith challenges the revocation of his probation, arguing that
(1) the state failed to prove by clear and convincing evidence that he violated a condition

of probation, (2) the district court did not make an adequate factual finding that the violation, if it was proved, was intentional or inexcusable, and (3) the district court abused its discretion in concluding that the need for confinement outweighed the policies favoring probation. We affirm.

FACTS

This case arises from the discovery of pills concealed within Smith's bedsheet while Smith was jailed due to a probation violation.

On July 29, 2016, Smith was sentenced on one count of first-degree burglary and one count of violating a domestic abuse no contact order. The district court sentenced him to 57 months in prison, stayed that sentence, and placed Smith on probation for 10 years. As a condition of his probation, Smith was required to follow all state and federal laws.

Five months later, on December 16, Smith violated another condition of probation not at issue here. On December 29, he admitted to the violation. As a result, the district court ordered Smith to serve 30 days in jail and continued him on probation.

From December 22 (while Smith was awaiting his probation-violation hearing) to January 1, 2017 (the date of the violation at issue here), Smith was assigned a jail cell. At the time Smith was first assigned the cell, an inmate worker, supervised by a correctional officer, gave Smith clean sheets and blankets for his cell. Because inmates receive only

nonfitted sheets, most inmates tie knots in the corners of one of the sheets to secure it to their mattress. However, the sheets are given to inmates without knots.¹

On December 26, four days after Smith was assigned to his cell, correctional officers conducted a routine search of Smith's cell. No contraband was found. Four days later, on December 30, Smith was given a furlough to obtain a vocational-rehabilitation voucher from a Veterans Affairs medical center and to register for classes at the technical college where he was enrolled. When Smith returned to the jail that same day, he was strip searched; again, no contraband was found.

On January 1, 2017, Smith's cell was again searched. When the correctional officer performing the search unknotted Smith's sheet, she discovered a small piece of rubber glove within one of the knots. Upon searching the piece of glove, the officer found several pills. Another correctional officer compared the pills to a drug database and determined that the pills were oxycodone.

Based on this discovery, the state filed a probation-violation report alleging Smith had failed to remain law abiding. A contested violation hearing was held, and the state offered testimony from a deputy who had reviewed surveillance footage of the outside of Smith's cell from December 26 to January 1. The deputy testified that no one, including Smith, brought bedding into or out of Smith's cell during that time period. Further, during

¹ Smith argues there is contradictory testimony regarding whether he was given knotted or unknotted sheets and whether he received new bedding sometime after his first day in jail. The district court, however, made a credibility determination and found that the sheets were given to Smith unknotted. We defer to that determination. *See State v. Vasko*, 889 N.W.2d 551, 559 (Minn. 2017). Accordingly, we assume that the sheets Smith initially received were unknotted and that he never received new bedding.

that interval, only Smith and correctional officers entered Smith's cell. The state also offered testimony that inmates can get contraband past the strip search if "they have swallowed something or inserted something in their rectum." Finally, the state offered evidence that the piece of glove found in Smith's sheet did not match the type of gloves used at the jail but was consistent with the gloves used at and "widely dispersed through the VA complex."

The district court found that Smith had failed to remain law abiding by committing fifth-degree controlled-substance crime. The court further concluded that "obviously possessing drugs is an intentional and/or inexcusable act." The district court then considered whether continuing Smith on probation would diminish the seriousness of the violation, reasoning that "bringing drugs into the jail is a very serious offense." The court revoked Smith's probation and executed his prison sentence.

Smith appeals.

D E C I S I O N

When an offender violates a condition of probation, the district court may revoke probation and execute the previously stayed sentence. Minn. Stat. § 609.14, subds. 1, 3 (2016). Before revoking 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 the need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). The state must prove a probation violation by clear and convincing evidence. Minn.

R. Crim. P. 27.04, subds. 2(1)(c)(b), 3(1); *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004).

Smith challenges the district court’s findings on all three *Austin* factors.

I. Smith violated a condition of probation.

Smith challenges the district court’s finding that Smith violated a condition of probation—the first *Austin* factor. We first address the standard of review. Smith argues there was not clear and convincing evidence to prove he violated a condition of probation because his probation violation was proved entirely with circumstantial evidence, and the state’s evidence was consistent with a reasonable inference other than a violation. He thus asks us to import the standard of review for reviewing the sufficiency of the evidence in criminal convictions involving circumstantial evidence into reviews of probation violations. *See State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017) (describing how, in reviewing criminal convictions based on circumstantial evidence, Minnesota appellate courts first identify the circumstances proved, and then determine whether the reasonable inferences from those circumstances are consistent with guilt and inconsistent with any rational hypothesis other than guilt).

We reject this request. Smith cites no caselaw supporting this position, and, to the contrary, the Minnesota Supreme Court has made clear that the state’s burden of proof is lower in the probation-violation context than in the criminal-conviction context. *See State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008) (“When a probationer challenges the probation violation, the state must prove the violation by clear and convincing evidence.”); *see also* Minn. R. Crim. P. 27.04, subds. 2(1)(c)(b), 3(1) (requiring probation violation to

be proved by clear and convincing evidence). Requiring the state to eliminate any reasonable inference other than a probation violation would effectively require the state to prove probation violations beyond a reasonable doubt, which is not required by Minnesota law.

Instead, the accepted standard of review is whether the district court abused its discretion. *See Austin*, 295 N.W.2d at 249-50. “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017). We now turn to that question.

A condition of Smith’s probation was that Smith “[f]ollow all State and Federal criminal laws.” The district court found that Smith violated this condition by committing fifth-degree controlled-substance crime because he possessed the pills found in his sheet. *See Minn. Stat. § 152.025, subd. 2(1) (2014) (criminalizing possession of oxycodone)*. To support this finding, the district court must have concluded that Smith constructively or physically possessed the pills. *See State v. Florine*, 303 Minn. 103, 104-05, 226 N.W.2d 609, 610-11 (1975). Constructive possession can be proved by showing

(a) that the police found the substance in a place under defendant’s exclusive control to which other people did not normally have access, or (b) that, if police found it in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.

Id. at 105, 226 N.W.2d at 611.

Smith argues he did not possess the pills because he did not physically possess them nor did he know that they were in his sheet. Rather, according to Smith, someone else placed the pills in his sheet. Smith testified that inmate workers do the laundry and hand out sheets with little to no supervision by correctional officers. Smith further testified that, when he received his sheets, they came with “knots so tight you couldn’t undo them.” Smith argues that this testimony, combined with the fact that he was strip searched each time he entered the jail, precludes a finding that it was “highly probable” that Smith placed, or was otherwise aware of, the pills in his sheet.

We are unpersuaded. Although Smith testified that he received his sheets already knotted, the district court explicitly rejected that testimony as not credible, and we defer to that credibility determination. *See Vasko*, 889 N.W.2d at 559. Furthermore, the evidence, when viewed in the light most favorable to the district court’s findings, establishes that (1) when Smith’s cell was searched on December 26, no pills were found, (2) Smith did not receive new bedding between December 26 and January 1, nor did anyone other than Smith or correctional officers enter his cell between those dates, and (3) pills were found in Smith’s bedding on January 1. These facts create a high probability that Smith obtained the pills after December 26 and knotted them into his sheet, supporting the determination that Smith was “consciously exercising dominion and control” over the pills. The district court did not abuse its discretion in concluding that Smith committed fifth-degree controlled-substance crime, violating a term of his probation.

II. Smith’s probation violation was intentional or inexcusable.

Smith argues that the district court did not make an adequate finding regarding the second *Austin* factor—whether Smith’s probation violation was intentional or inexcusable. Whether a district court has made adequate findings of fact under *Austin* is a question of law, which we review de novo. *See State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

The district court admittedly did not spend significant time discussing this second *Austin* factor, merely noting that “obviously possessing drugs is an intentional and/or inexcusable act.” Smith argues that this one-sentence remark does not provide any support for such a finding and instead shows that the district court did not fully consider any arguments by Smith that his violation was not intentional and inexcusable.

We disagree. Finding that Smith committed fifth-degree controlled-substance crime entails finding that Smith’s probation violation was intentional or inexcusable. To prove possession, the state needed to establish that Smith “*consciously* possessed, either physically or constructively,” the pills. *See State v. Arnold*, 794 N.W.2d 397, 400 (Minn. App. 2011) (emphasis added). In concluding that Smith had committed fifth-degree controlled-substance crime, the district court necessarily concluded that Smith (1) knew the pills were a controlled substance and (2) with that knowledge, intended to exercise dominion or control over the pills. *See State v. Garcia-Gutierrez*, 844 N.W.2d 519, 524-25 (Minn. 2014) (noting that the court has read an “intent to possess an illegal drug” mens rea requirement into controlled-substance laws). Thus, the district court’s conclusion on the first *Austin* factor entailed the requisite intentionality to satisfy the second *Austin* factor.

The district court made an adequate finding of fact to support its conclusion that Smith's violation was intentional or inexcusable.

III. The need for Smith's confinement outweighs the policies favoring probation.

Smith argues the district court abused its discretion in finding that the need for confinement outweighs the policies favoring probation because "the court provided no analysis or explanation as to why public safety outweighed the policies favoring probation." This third *Austin* factor is met if a district court finds that:

- (i) confinement is necessary to protect the public from further criminal activity by the offender; or
- (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
- (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Austin, 295 N.W.2d at 251. We evaluate the district court's determination that the need for confinement outweighs the policies favoring probation for an abuse of discretion. *Id.* at 249-50.

At the probation-revocation hearing, Smith argued that, rather than being committed to the department of corrections, he should be released to the Veterans Affairs treatment program because "many of his issues in the past were due to his mental health issues and his new doctor from the VA finally had him on a medication combination that relieved those issues." Smith also expressed concern regarding what would happen to his significant other, his child, his housing, and his pension if probation was revoked. Smith argues the district court abused its discretion because, rather than balancing the arguments Smith presented in favor of continuing probation versus the need for confinement, "the

court gave [them] no credence.” According to Smith, this shows a lack of “the deliberate consideration expected when [a] district court conducts an authentic balancing of reasons favoring incarceration against the policies that would favor continuing . . . probation.”

We disagree. The district court explicitly stated that it had to consider whether continuing probation would depreciate the seriousness of the violation and went on to explain that “bringing drugs into the jail is a very serious offense.” This discussion indicates that the district court considered one of the three factors justifying a conclusion that the need for confinement outweighs the policies favoring probation and determined that the factor was present here. The district court properly decided that bringing drugs into jail is a serious offense and that its seriousness would be depreciated by not revoking probation. To the extent Smith argues that the district court gave “no credence” to Smith’s argument in favor of continuing probation, the record indicates the district court appropriately weighed Smith’s arguments but concluded that confinement was required in this case. The district court therefore did not abuse its discretion in determining that the need for confinement outweighed the policies favoring probation.

Affirmed.