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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1280**

State of Minnesota,
Respondent,

vs.

D. E. C.,
Appellant.

**Filed March 12, 2018
Affirmed
Bratvold, Judge**

Nicollet County District Court
File Nos. 52-JV-12-101;
52-CR-17-189;
52-JV-12-138; and
52-CR-17-188

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Scott A. Hersey, Special Assistant Nicollet County Attorney, Minnesota County Attorneys Association, St. Paul, Minnesota (for respondent)

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

Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Johnson,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant challenges the district court's decision to revoke his extended jurisdiction juvenile (EJJ) status and place appellant on adult probation. Because we conclude that the court did not abuse its discretion, we affirm.

FACTS

In May 2012, the state filed a delinquency petition (No. 52-JV-12-101) charging appellant D.E.C. with three counts of first-degree criminal sexual conduct and three counts of third-degree criminal sexual conduct. The petition alleged that D.E.C. sexually penetrated his younger sister over a four-year period. Two months later, in July 2012, the state filed a second delinquency petition (No. 52-JV-12-138) charging D.E.C. with two counts of first-degree criminal sexual conduct. The new charge involved sexual penetration of his younger cousin.

The state moved to certify D.E.C. as an adult and refer both cases to adult criminal court, or alternatively, to designate the cases as EJJ proceedings. At the plea hearing on August 13, 2012, the district court adjudicated D.E.C. an extended jurisdiction juvenile and the state dismissed its motion to certify D.E.C. as an adult. In accordance with a plea agreement, D.E.C. pleaded guilty to one count of first-degree criminal sexual conduct for each case.

At the disposition hearing in September 2012, the district court imposed concurrent adult sentences of 144 months for the May 2012 petition and 180 months for the July 2012 petition. The court stayed both sentences until D.E.C. turned 21 years old on the condition

that D.E.C. remain law abiding and not violate the terms of his juvenile disposition. The court also imposed a juvenile disposition and committed D.E.C. to the custody of the Commissioner of Corrections for placement at the Minnesota Correctional Facility (MCF)-Red Wing, and ordered D.E.C. comply with rules and regulations, as well as recommended programming, and the terms of his supervised release.

In December 2013, D.E.C. completed programming at MCF-Red Wing and moved to Mapletree Group Home in Maplewood, Minnesota. Mapletree is an “aftercare” facility that the Department of Corrections (DOC) often uses for individuals after release from the Red Wing program. While at Mapletree, D.E.C. received treatment and programming, earned his high-school diploma, and began working at a restaurant. During this time, D.E.C.’s supervising agent reported that D.E.C. violated three group home rules, specifically chemical use, assaulting another resident, and absconding; but no formal violation proceedings occurred.

In November 2016, D.E.C. successfully completed the treatment and programming at Mapletree, transitioned to “step down” aftercare treatment, and rented a room in North St. Paul on a month-to-month basis. D.E.C. remained employed at the same restaurant he was working at during his time at Mapletree. D.E.C.’s release conditions included obtaining permission from his supervising agent before leaving the state for any reason.

In December 2016, D.E.C. contacted his social worker, and told him that he planned to move to South Dakota. According to D.E.C., his landlord was terminating his month-to-month lease. The social worker contacted D.E.C.’s supervising agent, who contacted D.E.C. and told him that he was not allowed to leave Minnesota without prior approval

from probation. The supervising agent also told D.E.C. how he could get approval to move out-of-state.

D.E.C. quit his job, left his residence, removed most of the money from his savings account, and on December 23, 2016, D.E.C. moved to South Dakota even though he had not obtained approval to do so. On January 3, 2017, D.E.C. called his supervising agent and told her that he had left Minnesota and was in Tea, South Dakota. D.E.C. later told probation that, while he was in South Dakota, he smoked marijuana on two or three occasions and consumed alcohol on New Year's Eve.

D.E.C. returned to Minnesota on January 4, 2017, turned himself in to probation, and on January 18, 2017, appeared before the Department of Corrections' Hearings and Release Unit. The hearing officer found that D.E.C. had violated several conditions of his release. D.E.C.'s release was revoked, and he was ordered back to MCF-Red Wing.

The district court held an EJJ violation hearing on April 26, 2017. Probation recommended that the court revoke D.E.C.'s EJJ status, stay execution of the 180 month sentence, and place D.E.C. on adult probation for 0-30 years. D.E.C. admitted that he had violated the conditions of his disposition and asked the court to maintain his EJJ status until his 21st birthday on August 28, 2017, when his EJJ status would expire.

D.E.C. argued that despite his recent violations, he had been mostly successful: he had completed the programing at MCF-Red Wing, was successfully discharged from Mapletree, obtained his high-school diploma, and maintained employment. The state responded that D.E.C.'s violations were "serious" because D.E.C. "abscond[ed] from supervision" despite knowledge of the requirements and consequences. The state argued

that D.E.C. needed supervision to ensure that he “make[s] appropriate choices.” While contending that the court should revoke EJJ status, the state recognized mitigating factors in D.E.C.’s case, and asked the court to stay execution and place D.E.C. on adult probation. D.E.C.’s social worker testified that he did not think that D.E.C. would sexually reoffend, but that D.E.C. would benefit from therapy and someone “checking up on him.”

On May 24, 2017, the district court issued an order revoking D.E.C.’s status as EJJ and staying D.E.C.’s adult sentences for 10 years. The district court found that D.E.C. had violated the conditions of his disposition, as proven by clear and convincing evidence, and that the violations were intentional and inexcusable. The court also considered mitigating factors, including that D.E.C. completed required programming, mostly complied with supervised release, had relatively few violations, obtained a high-school diploma, and was employable. Still, the court decided that, given the nature and timing of the violations, it was “appropriate and necessary” to revoke D.E.C.’s EJJ status, treat him as an adult offender, and place him on adult probation. D.E.C. appeals.

D E C I S I O N

The district court “has broad discretion in determining if there is sufficient evidence to revoke probation.” *See State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). Absent a clear abuse of discretion, we will affirm a probation-revocation order and a disposition in a juvenile-delinquency case. *In re Welfare of R.V.*, 702 N.W.2d 294, 298 (Minn. App. 2005). When revoking the juvenile’s probation, the court must make sufficient written findings in support of its disposition order. *Id.* at 302-04.

In *Austin*, the Minnesota Supreme Court established a three-step analysis that must be applied by a district court before revoking probation. 295 N.W.2d at 250. The district court must (1) designate the specific condition of probation that has been violated, (2) “find that the violation was intentional or inexcusable,” and (3) “find that [the] need for confinement outweighs the policies favoring probation.” *Id.* The state argues that the district court was not required to analyze the *Austin* factors before it revoked EJJ status. We disagree. In *State v. B.Y.*, the Minnesota Supreme Court held that the *Austin* factors apply to the revocation of EJJ status. 659 N.W.2d 763, 768-69 (Minn. 2003); *see also R.V.*, 702 N.W.2d at 302 (recognizing *B.Y.* extended application of *Austin* factors to EJJ revocation proceedings). A violation of the terms and conditions of supervised release must be proven by clear and convincing evidence before revocation of EJJ status. Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(1).

In his briefs to this court, D.E.C. has conceded that the first two *Austin* factors were satisfied. At the EJJ revocation hearing, D.E.C. admitted that he moved to South Dakota without obtaining approval from probation and that he used marijuana on two occasions and consumed alcohol on New Year’s Eve. At D.E.C.’s disposition hearing in 2012, the district court stayed execution on the condition that D.E.C. “have no further violations of the law, misdemeanor level or greater” and that D.E.C. comply with the terms of his juvenile disposition which included any release conditions. Upon D.E.C.’s release from Red Wing, he was required to get permission from probation before leaving the state. We conclude that the district court did not err in determining that D.E.C. violated the terms of

his release by clear and convincing evidence.¹ See *State v. Ornelas*, 675 N.W.2d 74, 79-80 (Minn. 2004) (noting that “condition alleged to have been violated must have been a condition actually imposed by the court”). D.E.C. also admitted in his briefs to this court that his violations were intentional and inexcusable. We therefore conclude that the district court did not err in its determination that the first two *Austin* factors were satisfied.

The third *Austin* factor requires the district court to decide whether, on the facts before it, the need for confinement outweighs the policies favoring probation. 295 N.W.2d at 250. When assessing the third *Austin* factor, the court must find at least one of three policies favor revocation: (1) “confinement is necessary to protect the public from further criminal activity by the offender”; (2) “the offender is in need of correctional treatment which can most effectively be provided if he is confined”; or (3) “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005) (quotation omitted).

Here, the district court modified the third *Austin* factor somewhat and found that additional “programming, services, and oversight” were necessary to protect the public from D.E.C.’s further criminal activity. The district court relied on D.E.C.’s failure to remain law-abiding and his use of drugs and alcohol. Specifically, the district court found that D.E.C. “demonstrat[ed] an inability to make sound and mature decisions, [and his] use of chemicals could reasonably result in a lowering of his inhibitions which, in turn, could

¹ D.E.C. made several admissions on other violations of his supervised release conditions, including failure to obtain approval before changing employment; failure to abide by a 9:00 p.m. curfew; failure to obtain and maintain employment; and failure to keep in close contact with his supervising agent. We do not consider these other violations.

reasonably lead to his commission of further sexual assaults.” The court also found that D.E.C. was aware that he was required to obtain approval from probation before he moved out of the state, and “that he did not have that approval, and that he [moved] anyway.” The district court determined that the necessity for adult probation outweighed any policies that might favor D.E.C. retaining his EJJ status until he turned 21 years old. We conclude that the district court did not abuse its discretion in finding that the third *Austin* factor had been satisfied to support revocation of D.E.C.’s EJJ status.²

In this case, the district court placed D.E.C. on adult probation rather than executing his previously imposed prison sentence. Because D.E.C. was convicted of an offense with a presumptive prison sentence,³ the district court must, after finding that reasons existed to revoke the stay of the adult sentence, “order execution of the previously imposed sentence unless the court makes written findings regarding the mitigating factors that justify continuing the stay.” Minn. Stat. § 260B.130, subd. 5(c) (2016); Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(3). Mitigating factors include amenability to treatment, successful completion of a treatment program, and whether the violations show a potential for recidivism. *B.Y.*, 659 N.W.2d at 770.

² D.E.C. relies on an unpublished opinion, in which this court reversed a district court’s decision to revoke EJJ status. Unpublished decisions are not precedent. See Minn. Stat. § 480A.08, subd. 3(c) (2016) (stating that “[u]npublished opinions of the court of appeals are not precedential”); *State v. Ellis-Strong*, 899 N.W.2d 531, 537 (Minn. App. 2017). In any event, D.E.C.’s case is readily distinguishable because the district court appropriately evaluated the *Austin* factors, and considered mitigating factors before staying execution of D.E.C.’s adult sentence.

³ D.E.C. was convicted under Minn. Stat. § 609.342, subd. 1(h)(i) (2012), which is a presumptive commitment offense. Minn. Sent. Guidelines 4.B (2012).

Here, the district court concluded that there were several mitigating factors that justified staying the execution of D.E.C.'s adult sentence. These factors included that D.E.C. completed required programming at MCF-Red Wing and Mapletree, complied with most probation terms and had relatively few violations, obtained a high-school diploma, and was employable. The court also found that supervised release terms and conditions can be imposed to protect public safety "without the need to resort to imprisonment." The district court's decision reflects that the court weighed mitigating factors and determined that they justified continuing the stay.

We conclude that the district court did not abuse its discretion in revoking D.E.C.'s EJJ status, staying execution of his adult sentence, and placing D.E.C. on adult probation.

Affirmed.