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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1508**

State of Minnesota,
Respondent,

vs.

Thomas Brian Sobotzak,
Appellant.

**Filed July 9, 2018
Affirmed
Reyes, Judge**

Itasca County District Court
File No. 31-CR-14-743

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

John J. Muhar, Itasca County Attorney, Todd Webb, Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

REYES, Judge

On appeal from the district court's revocation of stay of execution for violating the terms of his probation, appellant argues that the district court abused its discretion by

reacting reflexively to the violations. We affirm.

FACTS

On December 5, 2011, appellant Thomas Brian Sobtzak was convicted of domestic assault against A.A.S., the mother of two of his children. In September 2013, appellant was convicted in Itasca County for stalking A.A.S., and the district court entered a domestic-abuse no-contact order (DANCO) prohibiting appellant from contacting her.

Between October 2013 and February 2014, A.A.S. received numerous text messages from appellant, and on one occasion, appellant went to A.A.S.'s residence, physically intimidated her, and yelled profanities at her. As a result, Itasca County charged appellant with 29 counts of felony DANCO violation, Minn. Stat. § 629.75, subd. 2(d)(1) (Supp. 2013). Appellant pleaded guilty to each of the 29 counts pursuant to a plea agreement with the state. The district court sentenced appellant to an aggregate sentence of 72 months and four days and stayed execution of the sentences pending appellant's completion of ten years of supervised probation.

Appellant's first probation violation in Itasca County arose from his admitted use of controlled substances. The district court found that appellant violated this term of his probation, reinstated his probation, and ordered him to successfully complete alcohol and drug treatment.

Appellant's second probation violation in Itasca County arose from an incident in neighboring Crow Wing County. Appellant was charged with the domestic abuse of K.O., the mother of his third child. K.O. then obtained an order for protection (OFP) against appellant. After a jury acquitted appellant of the domestic-abuse charge, Crow Wing

County charged appellant with 23 counts of violating K.O.'s OFP for contacting K.O. numerous times while he was in jail awaiting trial for the domestic abuse of her. Appellant pleaded guilty to each of the 23 counts in Crow Wing County District Court, which triggered his second probation violation in Itasca County for violating the term of his Itasca County probation that he remain law abiding. Appellant admitted to violating this condition of his probation, and the Itasca County District Court agreed and again reinstated his probation.

Appellant's third probation violation in Itasca County resulted from his further violation of the conditions of his probation. During the resulting probation-revocation hearing, the district court heard testimony from appellant and his Crow Wing County and Itasca County probation agents and determined that appellant had four probation violations and executed his sentence.¹ This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion when it revoked his probation and executed his sentence because it failed to offer substantive reasons for the revocation in its findings for the second and third factors, as required by *State v. Austin*, 295 N.W.2d 246 (Minn. 1980). We disagree.

A district court has broad discretion to determine whether the state produced sufficient evidence to revoke probation, and we will not reverse its decision absent an abuse

¹ This court recently affirmed the district court's revocation of appellant's probation in Crow Wing County. *State v. Soltzak*, No. A17-1655, 2018 WL 1787972 (Minn. App. Apr. 16, 2018). The Crow Wing County violation was based in part on his Itasca County probation violation that is the subject of this appeal. See *id.* at *1.

of that discretion. *Austin*, 295 N.W.2d at 249–50. 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.* at 251 (quotations omitted). A district court must make three requisite *Austin* findings before revoking probation: (1) the probationer violated a designated condition of probation; (2) the violation was intentional or inexcusable; and (3) the need for confinement outweighs the policies favoring probation. *Id.* at 250. Whether the district court made sufficient *Austin* findings presents a question of law that we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

“When determining if revocation is appropriate, courts must balance the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety, and base their decisions on sound judgment and not just their will.” *State v. Rottelo*, 798 N.W.2d 92, 95 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. July 19, 2011). Specific to the third *Austin* factor, the district court should consider three sub-factors to assess if:

- (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.

Modtland, 695 N.W.2d at 607. The district court need only find the existence of one sub-factor in fulfilling the third *Austin* factor. *See Austin*, 295 N.W.2d at 251.

I. The district court did not abuse its discretion in determining that appellant intentionally violated the terms of his probation.

Appellant first argues that the district court made insufficient findings to support the requirements of the second *Austin* factor. In making its findings, the district court cited appellant's testimony at the hearing indicating that he was aware of the conditions of probation and concluded that he intentionally violated four probation conditions; that he: (1) maintain full time employment or schooling or 20 hours of community service per week; (2) complete the domestic-violence-intervention-program inventory; (3) abstain from the use of mood-altering chemicals; and (4) provide his probation agent notice of residence changes. We address each in turn.

A. Failure to maintain full-time employment or schooling or 20 hours of community service per week.

Appellant testified that he was employed in construction sales until October 2017, but "decided to seek work elsewhere" because his employer was not scheduling him to work the number of hours he desired. Appellant turned in several applications elsewhere, but did not hear anything after that. He then stated:

At that point it was right around December, that's when we were starting to come across in Crow Wing with a plea deal and all that so I was kind of thinking well, there's going to be some jail time. I don't know if I want to jump in to a full-time job.

Appellant also admitted that he was not in school and did not complete 20 hours of community service each week. The district court did not abuse its discretion in concluding that appellant violated this condition of probation because appellant's testimony expressed his intent to violate and knowledge of this condition of his probation.

B. Failure to complete a domestic-violence-intervention-program inventory within fifteen days of sentencing.

The district court found that appellant violated his probation because he failed to complete a domestic-abuse-intervention-program inventory within fifteen days of his sentencing. But the district court did not include this as a probation condition.² It instead required appellant to “Complete [the] Domestic Abuse Batterer’s Intervention Program” and does not specify a time limit. Therefore, the district court abused its discretion by relying on this probation condition. *See id.* at 81 (district court abused its discretion when it revoked defendant’s probation based on a condition of probation that had not actually been imposed). However, appellant violated three other conditions of probation for which the district court permissibly remanded him to custody.

C. Failure to abstain from the use of mood-altering chemicals.

On March 1, 2017, Crow Wing County filed a probation-violation report for failure to comply with various conditions of his probation there. After Crow Wing County issued a warrant for his arrest, police arrested appellant in a motel room with hypodermic needles in his possession. Upon arrival at the Crow Wing County jail, appellant took a urinalysis and tested positive for opiates and methadone. Appellant admitted to all of this during the third Itasca County probation-revocation hearing now before us on appeal. Appellant

² Neither appellant nor the state argue that this was not a condition of appellant’s probation imposed by the district court, but it is clear that it was not. Although we generally are reluctant to address issues that have not been raised in the lower courts, we will review such issues on the merits in the interests of justice. *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004) (although neither party briefed issue, interests of justice served in analyzing identical issue as present case).

testified that he was prescribed methadone but admitted that he was not prescribed any of the other opiates for which he tested positive. As a result, the district court did not abuse its discretion in relying on appellant's admissions in concluding that he intentionally violated this condition of probation.

D. Failure to provide his probation agent with notice of residence changes.

Appellant completed drug and alcohol treatment after the district court modified his probation conditions to include such treatment. He moved into a halfway house as part of his aftercare treatment but was subsequently discharged. He then resided with his significant other (neither A.A.S. nor K.O.), then with his brother for ten days, and then at a Motel 6 for thirteen days after that. Police discovered hypodermic needles in appellant's possession when they arrested him at the Motel 6, and one of his probation agents indicated during her probation-revocation testimony that he had been struggling with his addiction. During the hearing, appellant admitted that he knew that his probation required him to notify his probation agent of residence changes and that he had failed to do so when he resided at the Motel 6. Once again, appellant's testimony supports the district court's determination that appellant intentionally violated this condition of his probation.

We conclude that the district court did not abuse its discretion in determining that appellant intentionally violated three of the conditions of his probation because he admitted to each intentional violation during his own testimony.

II. The district court did not abuse its discretion in determining that the need for appellant's confinement outweighed the policies favoring probation.

Appellant also argues that the district court's findings were a reflexive reaction to his probation violations and that the district court failed to cite specific evidence detailing the reasons why the need for his confinement outweighs the policies favoring probation. We disagree.

In making its *Austin* findings, the district court stated that the need for appellant's confinement outweighed the policies favoring probation because he is not amenable to probation and his confinement is necessary to protect the public from further criminal activity. These findings are consistent with the evidence in the record. During his probation-revocation-hearing testimony, appellant detailed his lengthy criminal history and testified that he has completed three chemical-dependency treatments but struggles to remain clean and sober.

A district court does not abuse its discretion in revoking an offender's probation based upon his "lengthy history of criminal activity and chronic probation and treatment failures." *State v. Osborne*, 732 N.W.2d 249, 256 (Minn. 2007). As such, the district court did not abuse its discretion in determining that the need for appellant's confinement

outweighed the policies favoring probation. Its findings were not a reflexive reaction to appellant's violations and were instead a reasonable assessment that appellant cannot be counted on to remain law abiding.³

Affirmed.

³ We note that the district court also considered *Modtland*'s third sub-factor and determined that it would unduly depreciate the seriousness of the probation violations if appellant's probation was not revoked. And after a careful review of the record, we agree.