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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1555**

State of Minnesota,
Respondent,

vs.

Andrew Jon Selzler,
Appellant.

**Filed June 11, 2018
Reversed
Reyes, Judge**

Beltrami County District Court
File No. 04-CR-11-889

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

David L. Hanson, Beltrami County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Connolly, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

REYES, Judge

On appeal from the district court's order revoking probation and executing sentence, appellant argues that the district court: (1) abused its discretion by revoking his probation without making findings pursuant to *State v. Austin*, 295 N.W.2d 246 (Minn. 1980);

(2) extended his probationary period past the five-year statutory maximum; and (3) abused its discretion in sentencing him to a double-upward durational departure on his third count of possession of child pornography. We reverse.

FACTS

On March 23, 2011, respondent State of Minnesota charged appellant Andrew Jon Selzler with one count of solicitation of a child to engage in sexual conduct in violation of Minn. Stat. § 609.352, subd. 2a(2) (2010), and ten counts of possession of child pornography in violation of Minn. Stat. § 617.247, subd. 4(a) (2010). Appellant pleaded guilty to one count of solicitation of a child and three counts of possession of child pornography.

On August 8, 2011, the district court imposed concurrent sentences on each count, of which the longest was for 60 months for possession of child pornography. The district court stayed execution of the sentences and placed appellant on probation for four years for solicitation of a child and five years for each of the three counts of possession of child pornography, also to run concurrently. One of the conditions of his probation was that he “[e]nter into and successfully complete outpatient sex offender treatment as arranged by agent.” Appellant completed inpatient sex-offender treatment and entered outpatient sex-offender treatment thereafter. It is undisputed that appellant was a model probationer.

On August 2, 2016, appellant’s probation officer filed a probation-violation report because appellant had not yet successfully completed the aftercare portion of his sex-offender treatment and was not likely to complete it within the probationary period. The

next day, the district court revoked appellant's stay of execution. Appellant's probation expired on August 7, 2016.

The district court held an order-to-show-cause hearing on September 19, 2016. During the hearing, the state indicated that appellant had four months remaining in his sex-offender-treatment program. The parties agreed that the district court had no authority to extend appellant's probation because no extension had been requested at least 60 days prior to expiration of appellant's probation under Minn. Stat. § 609.135, subd. 1c (2016). The district court continued the matter and scheduled a probation-revocation hearing for January 31, 2017, to permit appellant to successfully complete the outpatient treatment program.

By January 31, 2017, appellant had successfully completed all requirements of treatment except the polygraph test. The district court continued the matter to permit appellant to complete the polygraph test.

Appellant completed and passed the polygraph test on February 20, 2017, but admitted during the test that he had watched adult pornography on a work computer in November 2016. In lieu of being unsuccessfully discharged from outpatient sex-offender treatment, appellant's treatment team extended his treatment programming.

During the March 27, 2017 probation-revocation hearing, the district court noted that, procedurally, it had instituted revocation proceedings on August 29, 2016, on its own motion pursuant to Minn. Stat. § 609.14, subd. 1(b) (2016), which was within six months of the expiration of the probationary term date of August 7, 2016, as required by the statute. After defense counsel offered the option of extending appellant's probationary period, the

district court noted that it did not have the authority to do so because appellant had been on probation for five years, the maximum permitted by Minn. Stat. § 617.247, subd. 4(a) (2016), and that appellant was no longer on probation.

After several continuances, on July 3, 2017, appellant failed his final polygraph examination because he showed a significant response to questions related to contact with minors and sexual fantasies related to minors. Following the examination, appellant told treatment staff that he had had such fantasies involving minor females and that he had not reported them to treatment for the past few months. Appellant was unsuccessfully discharged from sex-offender treatment because treatment staff believed that there was nothing more that the program could do for him. On July 10, 2017, the district court revoked appellant's probation and executed his sentence. This appeal follows.

DECISION

Appellant contends that the district court abused its discretion when it revoked his probation because it failed to make *Austin* findings before doing so. For the reasons set forth below, we reverse.

“A 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. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005) (quoting *Austin*, 295 N.W.2d at 249-50). Prior to revoking probation, the district court must “1) designate the specific condition or conditions [of probation] that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that need for confinement outweighs the policies favoring probation.” *Austin*, 295 N.W.2d at 250. The state has the burden to prove a

probation violation by clear and convincing evidence. *State v. Ornelas*, 675 N.W.2d 74, 81 (Minn. 2004).

In *Ornelas*, the district court revoked the appellant's probation, which had been imposed for a conviction of third-degree criminal-sexual conduct, for having unsupervised contact with a minor after the appellant's probation officer observed him walking with his girlfriend and her 16-year-old daughter. 675 N.W.2d 74, 78 (Minn. 2004). The appellant challenged his probation revocation, arguing that having no contact with individuals under 18 years of age was never made a condition of his probation for his conviction of criminal-sexual conduct. *Id.* at 76. The supreme court stated that "[i]nherent in [its] consideration of the specific condition designated as having been violated is the question of whether the condition was actually imposed as a condition of probation." *Id.* at 79. The supreme court reversed the appellant's probation violation after it found no evidence in the record indicating that the no-contact provision was ever made a condition of his probation. *Id.* at 81.

Similarly, here, inherent in our consideration of the first *Austin* factor, the specific probation-condition violation relied upon to revoke probation, is the question of whether the evidence shows that the designated conduct actually occurred within the probationary period. *See Modtland*, 695 N.W.2d at 608 (stating that in making *Austin* findings, district courts "must seek to convey their substantive reasons for revocation and *the evidence relied upon*" (emphasis added)). If the violation occurred after the probationary period ended, "it would be anomalous to conclude that the first *Austin* factor had been satisfied and go on to consider whether the violation was intentional or inexcusable or whether the policies

favoring probation outweigh the need for confinement.” *Ornelas*, 675 N.W.2d at 79. Thus, if we are to address the *Austin* factors in this case, we must determine whether the district court relied upon evidence of conduct that occurred within the probationary period in determining whether appellant violated a condition of his probation. *See id.*

When the district court executed appellant’s sentence, it made its first *Austin* finding and specified the condition of probation that appellant had violated:

Mr. Selzler, I really did not want this to happen. And I was hoping all the way from last summer that you were going to be able to successfully complete the treatment program, pass your polygraph, and we would all be on our way, hoping that you would have achieved.

It is true that appellant’s August 2017 probation-violation report was the result of appellant’s violation of the same condition of probation. However, each relied on distinct evidence of conduct by appellant that gave rise to the probation violation. *See Modtland*, 695 N.W.2d at 608. Appellant’s probation-violation report stated that appellant had failed to successfully complete sex-offender treatment simply because he had not done so within his probationary period.

Conversely, the district court set forth the specific evidence it relied upon in determining that appellant had violated this condition of his probation: appellant’s continued arousals involving children, accessing porn in November 2016, and failing to disclose such until he failed the polygraph tests in March 2017 and July 2017. All of this conduct occurred after appellant’s probation expired in August 2016. While appellant was indeed unsuccessfully discharged from sex-offender treatment for these reasons, it was improper for the district court to rely on this evidence of conduct in determining that

appellant had violated this condition of his probation. Implicit in a probation violation is that the violation be imposed for conduct that occurred while the person was actually on probation.

We commend the district court for giving appellant many opportunities to successfully complete sex-offender treatment. However, because the state did not meet its burden to prove that appellant violated a condition of probation during the probationary period by clear and convincing evidence, we conclude that the district court abused its discretion in relying on evidence of conduct that did not satisfy the first *Austin* factor because it occurred after appellant's probation had expired.¹

Reversed.

¹ Because we conclude that the first *Austin* factor has not been satisfied, we need not address whether the second and third factors were satisfied. *Ornelas*, 675 N.W.2d at 81. And because we reverse for this reason, we do not address appellant's remaining arguments.