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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0349**

State of Minnesota,
Respondent,

vs.

Donald Cody Tarbell,
Appellant.

**Filed September 24, 2018
Affirmed
Halbrooks, Judge**

Anoka County District Court
File No. 02-CR-13-103

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

Anthony C. Palumbo, Anoka County Attorney, Andrew T. Jackola, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer L. Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hooten, Judge; and Smith, John, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HALBROOKS, Judge

In this probation-revocation appeal, appellant argues that the district court abused its discretion by revoking his probation and executing his sentence after determining that his need for confinement outweighs the policies favoring probation. Because we conclude that the district court acted within its discretion, we affirm.

FACTS

In June 2012, appellant Donald Tarbell drove around a vehicle in front of him that stopped when the traffic light turned red, ran the light, and hit a vehicle crossing the intersection on a green light, killing the driver. The state charged Tarbell with criminal vehicular homicide under Minn. Stat. § 609.21, subd. 1(1) (2010), and careless driving under Minn. Stat. § 169.13, subd. 2 (2010). The state offered a plea agreement whereby Tarbell would plead guilty to the criminal-vehicular-homicide charge and the state would dismiss the careless-driving charge. In October 2014, Tarbell petitioned to enter a guilty plea for the criminal-vehicular-homicide charge and serve 365 days of incarceration. The state dismissed the careless-driving charge.

The district court accepted Tarbell's guilty plea and sentenced him to 81 months but stayed the sentence for ten years. As conditions of the stayed sentence, Tarbell was ordered to serve 365 days in the county jail, placed on probation for ten years, and ordered to pay a fine and restitution. Tarbell's probation conditions also required that he complete a chemical-dependency evaluation, submit to random chemical-use testing, remain law-abiding, report to his probation agent as directed, maintain employment, and pay the

restitution order. The conditions also prohibited him from taking mood-altering chemicals, using or possessing a firearm, driving without a valid license or insurance, or receiving a traffic-related charge, including any misdemeanor or serious traffic violations.

Tarbell was released from jail in August 2015. In January 2016, Tarbell violated his probation conditions by driving an uninsured vehicle without a valid driver's license. The district court held a probation-revocation hearing, and Tarbell admitted to violating his probation conditions by driving without a valid license and without insurance. The district court stated that it could execute the 81-month sentence based on Tarbell's probation violation but instead executed 30 days in jail, as an intermediate sanction, to be served in three ten-day increments. At the end of the hearing, the district court stated, "Mr. Tarbell, don't be back in front of me even with a misdemeanor conviction for something. . . . Succeed. Don't be back."

In September 2017, Tarbell took a drug test that tested positive for marijuana. The department of corrections submitted a probation-violation report, recommending that the district court revoke Tarbell's stay of execution and send him to prison for 81 months. The district court held a hearing, at which Tarbell admitted that he had violated his probation. The district court held a disposition hearing in December 2017 for the second probation violation.

At that hearing, the accident victim's nephew testified that his family struggled with the district court's stayed sentence and initial grant of probation, particularly after Tarbell has repeatedly violated his probation conditions. The nephew asked the district court to revoke Tarbell's probation and execute the stayed sentence based on his concern that

Tarbell could hurt or kill another person with his reckless actions and disregard for the law. The prosecutor also argued that the need for Tarbell's confinement outweighed the policies favoring probation because he had a history of violations and reiterated that "it is [the family's] greatest concern that something bad [could] happen[] to somebody else again."

Tarbell's wife testified that the district court should consider that Tarbell had improved his life, was remorseful for the accident, was needed by his children, and his violations did not hurt anyone. Tarbell's attorney argued that the two violations were technical in nature and did not demonstrate that the need for confinement outweighed the policies favoring probation because Tarbell could receive interventions outside of prison, and his family would suffer if he were incarcerated.

Tarbell testified that he (1) had used marijuana to help him sleep after his father died, (2) constantly relives the accident, (3) turned his life around and is no longer "a junkie," (4) planned on starting a new career, (5) has a good job, (6) passed numerous drug tests before this violation, and (7) is needed by his family. The district court revoked Tarbell's probation and executed his stayed sentence of 81 months, with 480 days of credit for time served. This appeal follows.

D E C I S I O N

Tarbell argues that the district court erred by revoking his probation because it erroneously determined that the need for his confinement outweighed the policies favoring probation. A district court has broad discretion in determining whether there is sufficient evidence to revoke probation. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). This

court will only reverse a district court's probation determination "if there is a clear abuse of discretion." *Id.*

Before a district court may revoke probation, it must make specific findings on the *Austin* factors to ensure the creation of a "thorough, fact-specific record[] setting forth th[e] reasons for revoking probation." *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). First, the district court must designate the specific probation condition or conditions that the defendant violated. *Austin*, 295 N.W.2d at 250. Second, the district court must find that the violation was intentional or inexcusable. *Id.* Third, the district court must determine whether the need for confinement outweighs the policies favoring probation. *Id.* Whether the district court made the required findings under *Austin* is a question of law that we review de novo. *Modtland*, 695 N.W.2d at 605.

Tarbell's challenge focuses on the third *Austin* finding. When analyzing the third *Austin* factor, a district court must consider that "policy considerations may require that probation not be revoked even though the facts may allow it and that the purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Id.* at 606 (quotations omitted). The district court must balance the probationer's interest in freedom with the state's interest in ensuring the probationer's rehabilitation and the public's safety. *Id.* at 607. The district court should base its decision on sound judgment, not its own will. *Id.* When analyzing the appropriate balance between public safety and the probationer's rehabilitation, the district court should consider the 1970 American Bar Association Standards for Criminal Justice statement:

(a) Revocation followed by imprisonment should not be the disposition, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:

(i) confinement is necessary to protect the public from further 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 (quoting A.B.A. Standard for Criminal Justice, Probation § 5.1(a) (Approved Draft 1970)). A district court may find the third *Austin* factor is satisfied if any one of the three sub-factors is present. *See id.*

Here, the district court conducted an analysis of the three *Austin* factors before it revoked Tarbell’s probation and executed the stayed sentence. The district court found that Tarbell violated probation by using marijuana and stated that the second *Austin* factor—whether the violation was intentional and inexcusable—was not in dispute.

The district court then considered the third factor, stating:

Looking at all those things, one way of looking at that is looking at the single violation, and saying what we have got here is one proven marijuana use. I will say that is not an uncommon violation for me to see, and it is less serious than other violations I have seen in other cases, and that’s one perspective that I have tried to take in looking at this.

... The presumptive sentence at that time in 2014 would have been for me to send you to prison that day. I felt it was appropriate to dispositionally depart and not send you to prison. And that was specifically because I had concluded that you were unusually likely to be successful on probation. That was the decision made that day, and that’s part of the context.

....

... Proper justice is to bring [the victim] back. Everyone in the room would want that. I can't fix that. None of us can fix it as much as we would all like to do that. Instead, it becomes a matter of trying to properly apply the law, apply the standards as I see them, and use them as I see fit. As I have done that, as I have made that evaluation, I have concluded that in fact the policies that would favor putting you back on probation are outweighed by the need to give you the prison sentence. That given the dispositional departure, given the record of behavior before the offense, before the date of the plea, and since then, given the second violation, given the use of chemicals, I am concluding that is necessary to give you the prison sentence

Tarbell argues that the district court made a reflexive decision to revoke his probation based on a mere “technical violation.” We disagree. The record demonstrates that the district court judge carefully and thoughtfully analyzed the third *Austin* factor:

I went back and I looked at the transcripts again, both from the date of the plea and the date of the last probation violation, really because I wanted to make sure that you were adequately put on notice. That was my big concern, not that I am feeling angry or vengeful or any of those things, but I wanted to make sure that you were given what I would consider fair notice of the consequences of a future violation. And as I reread those transcripts, I do think that was so

The district court considered how Tarbell's conduct could affect public safety by discussing that his initial offense resulted in the death of another driver and how his repeated probation violations, despite receiving clear warning of how future violations would affect him, demonstrated that the policies favoring probation were outweighed by the need to execute Tarbell's sentence. *See Austin*, 295 N.W.2d at 251 (providing that a district court may consider whether “confinement is necessary to protect the public from further activity by the offender” when analyzing the third *Austin* factor). The district court

also considered that it granted him a downward dispositional departure at the initial sentencing hearing. *See State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015) (“Fleming complains that the district court considered its grant of a downward dispositional departure when deciding whether to revoke probation. That was a proper consideration.”), *aff’d*, 883 N.W.2d 790 (Minn. 2016). The district court did not reflexively revoke his probation.

Because the district court thoughtfully considered whether the need for Tarbell’s confinement outweighs the policies favoring probation, we conclude that the district court acted within its discretion by revoking Tarbell’s probation and executing his sentence.

Affirmed.