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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0647**

State of Minnesota,
Respondent,

vs.

Johnathan Demetrius Lee Henry,
Appellant.

**Filed January 14, 2019
Affirmed
Florey, Judge**

Hennepin County District Court
File Nos. 27-CR-14-22664; 27-CR-16-9401

Keith M. Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Patrick Lofton, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Schellhas, Presiding Judge; Reilly, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

In this probation-revocation appeal, appellant argues that the record does not support the district court's finding that the need for confinement outweighs the policies

favoring continued probation. Because the record supports the finding and the district court did not abuse its discretion by revoking probation, we affirm.

FACTS

During a vehicle search, officers found a large amount of cocaine and a small amount of heroin in a bag. Appellant Johnathan Demetrius Lee Henry admitted that the bag containing the drugs was his, and the state charged him with first-degree possession of cocaine. The state amended the complaint, adding charges of first-degree sale of cocaine and fifth-degree possession of heroin. The state again amended the complaint, adding a charge of bribing a witness based on the allegation that appellant induced another individual, who was a passenger in the vehicle, to claim possession of the drugs.

In April 2015, appellant pleaded guilty to first-degree possession, and the other charges were dismissed. He had three criminal-history points for convictions of second-degree criminal sexual conduct, failure to register, and simple robbery. The presumptive sentence was 122-months executed. Minn. Sent. Guidelines 4.A (2014). He received a 122-month sentence, with execution stayed, and he was placed on probation for five years. The sentence constituted a downward dispositional departure, based primarily on his amenability to probation.

Approximately five and a half months after sentencing, appellant was charged with two counts of fifth-degree possession: one count involving alprazolam, and the other heroin, and because of these charges, a probation violation was alleged. In September

2016, appellant pleaded guilty to possession of heroin.¹ He received a 21-month sentence, with execution stayed, and he was ordered to serve 365 days in the workhouse. On the probation violation, he was reinstated on probation and ordered to serve 365 days concurrently with his workhouse sentence. He was also ordered to complete cognitive skills and chemical-dependency programming. The remaining possession charge was dismissed.

While in the workhouse, appellant was charged with fifth-degree possession and introducing contraband into jail after he was discovered passing a newspaper filled with controlled substances to another inmate. He was placed into a separation unit and was unable to complete programming required under his probationary terms. A probation violation was alleged because of his failure to remain law abiding and his failure to complete cognitive skills and chemical-dependency programming. In January 2018, a contested probation-violation hearing was held.

At the hearing, a correctional officer testified that, on May 30, 2017, she saw appellant, who was a “trustee” with outside access, trying to pass a newspaper to another inmate. Inside the newspaper was marijuana and white pills broken into four pieces, which later tested positive for oxycodone.

Appellant’s probation officer testified that, since appellant’s release from the workhouse in August 2017, he had found stable housing, maintained employment, and maintained mental-health appointments. The probation officer had no concerns about

¹ Appellant also pleaded guilty to misdemeanor theft in regard to a shoplifting offense that occurred on March 8, 2016.

appellant being in the community since his release. However, the probation officer acknowledged that appellant had “some significant criminal history in the past,” and “his criminal behavior has been ongoing since he’s been on probation.”

A corrections supervisor testified that appellant never tested positive for chemical substances while participating in a work program run by the workhouse, and appellant did not test positive on May 30, the date of the contraband incident. The corrections supervisor generally had a positive impression of appellant.

The district court revoked appellant’s probation. The court found that appellant had not remained law abiding, that appellant knowingly possessed controlled substances in the workhouse, and that appellant transferred contraband in the workhouse. The court found that the violations were intentional and inexcusable. The court acknowledged that appellant had “done well the last few months.” But given appellant’s “long history of criminal behavior,” his violations while in custody, the fact that he abused his position as a trustee in the workhouse, the fact that he twice failed to remain law abiding since being given a dispositional departure, and the fact that the violations were felonies and not merely technical violations, the court concluded that revocation was appropriate.

The court found that appellant was “currently a threat to the public safety” because he may commit property crimes or other types of crimes in the future. The court found that appellant’s behavior demonstrated “that he cannot be counted on to avoid future criminal or antisocial activity,” and that not revoking probation based on appellant’s second violation would “unduly depreciate the seriousness” of the violation. The court ordered

that appellant's 122-month sentence be executed. The court ordered that appellant's 21-month sentence be executed concurrently. This appeal followed.

DECISION

Appellant argues that the district court abused its discretion by revoking his probation because the record does not support a finding that his need for confinement outweighs the policies favoring probation. "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. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004) (quoting *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980)).

Before a district court may revoke probation, it must make specific findings on the three *Austin* factors. *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). First, the district court must designate the specific probation condition or conditions that were 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.* Appellant does not challenge the district court's findings on the first two factors. He focuses on the third *Austin* factor.

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." *Modtland*, 695 N.W.2d 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 freedom, the district court should consider the following:

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 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 (quotation omitted).

Appellant points to the testimony of his probation officer and argues that his mental-health maintenance has “helped him succeed on supervision,” and chemical dependency is no longer an issue. Appellant also argues that his success since being released from the workhouse cuts against the district court's finding that he “cannot be counted on to avoid future criminal or antisocial activity.” He asserts that intermediate sanctions are more appropriate and would not unduly depreciate the seriousness of the violations.

The district court weighed the relevant factors and did not abuse its discretion by revoking probation. The court found that confinement was necessary to protect the public and that not revoking probation would unduly depreciate the seriousness of appellant's actions, and the record supports these findings. The district court acknowledged appellant's success since being released from the workhouse, but was swayed by

appellant's repeated violations and offenses, his abuse of his position as a trustee at the workhouse, his repeated failure to remain law abiding since receiving a dispositional departure, and the fact that his probation violations have been felony offenses and not mere technical violations. The record supports the district court's finding that the need for confinement outweighs the policies favoring continued probation.

Affirmed.