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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0293**

State of Minnesota,
Respondent,

vs.

Kristopher Paul Poignee,
Appellant.

**Filed September 30, 2019
Affirmed
Kirk, Judge***

Crow Wing County District Court
File Nos. 18-CR-16-775, 18-CR-16-776, 18-CR-16-840

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

Donald F. Ryan, Crow Wing County Attorney, Candace Prigge, Assistant County Attorney, Brainerd, Minnesota (for respondent)

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

Considered and decided by Worke, Presiding Judge; Hooten, Judge; and Kirk,
Judge.

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

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges the district court's decision to revoke his probation and to execute his prison sentences, arguing that the district court erred in concluding that the need for confinement outweighed the policies favoring continued probation because the court did not inquire as to whether appellant had the ability to pay restitution, and because appellant had completed chemical-dependency treatment while on probation. We affirm.

FACTS

In January 2017, appellant Kristopher Paul Poignee pleaded guilty to first-degree burglary, unauthorized use of a motor vehicle, and two counts of third-degree burglary. The district court sentenced Poignee to 129 months for the first-degree burglary and 30 months for the unauthorized use of the motor vehicle, each stayed for ten years. The district court sentenced Poignee to 36 months for each of the two third-degree burglary convictions, each stayed for five years. The district court's decision to stay execution and instead place Poignee on probation was a dispositional departure. Poignee was required to complete long-term chemical-dependency treatment at Teen Challenge and pay restitution in the amount of \$4,235 as part of his probation.

On October 12, 2018, Poignee's probation officer filed a probation-violation report alleging that Poignee failed to inform probation of a new residence within the required 72-hour period. After a warrant was issued for Poignee, he appeared in district court for a probation-violation hearing, and was ordered to submit to a urinalysis (UA). On November 20, probation amended their probation-violation report to allege that Poignee failed the

UA, failed to keep in contact with probation, and did not pay restitution as ordered. At a November 21 probation-violation hearing, Poignee admitted to violating his probation.

The district court stated that “confinement is necessary to protect[] the public from further criminal activity” and that “it would depreciate the seriousness of these violations if probation were not revoked” because “going off the radar and being out of contact with probation and being dishonest with probation” were not technical violations. Accordingly, the district court revoked Poignee’s probation and executed his prison sentences, to be served concurrently. This appeal follows.

D E C I S I O N

When a probationer violates a condition of probation, the district court may continue probation, revoke probation and execute the stayed sentence, or order intermediate sanctions. Minn. Stat. § 609.14, subd. 3 (2018). The state must prove a probation violation by clear and convincing evidence. Minn. R. Crim. P. 27.04, subds. 2(1)(c)b, 3(1); *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004). To revoke probation, the district court “must (1) designate the specific condition or conditions that were violated; (2) find that the violation was intentional or inexcusable; and (3) find that need for confinement outweighs the policies favoring probation.” *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). In assessing the third *Austin* factor, the district court should consider whether “confinement is necessary to protect the public from further criminal activity by the offender,” “the offender is in need of correctional treatment which can most effectively be provided if he is confined,” or “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Id.* at 251 (quotation omitted). “The decision to revoke 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.* (quotations omitted). The 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." *Id.* at 249-50. Whether the district court has made the required *Austin* findings is a question of law, which we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Poignee asserts that the district court's decision to revoke his probation was an impermissible "reflexive reaction to an accumulation of technical violations." *Austin*, 295 N.W.2d at 251 (quotation omitted). Poignee contends that he "substantially complied with probation by completing inpatient treatment" and that the need for confinement does not outweigh the policies favoring probation because he engaged in prosocial behavior while on probation, has family support, and "wanted to be there for his children." But the district court considered these arguments at the revocation hearing, and weighed them against the nature of Poignee's probation violations. And while the district court may not automatically revoke probation and must instead weigh the *Austin* factors even when there has been a downward dispositional departure, the district court is entitled to consider departure in a case where a defendant was convicted of an underlying case where the legislature had dictated an executed prison sentence. *See State v. Finch*, 865 NW 2d 696, 705 (Minn. 2015) (stating that the district court must apply the *Austin* factors, but noting that "[w]e understand the concerns of the district court when a probationer violates a

condition of his probation, especially when probation was ordered as part of a downward dispositional departure”).

Here, the district court specifically noted that Poignee lied to probation about “needing to attend a daughter’s school play, when, in fact, neither of the daughters had a school play,” and that while Poignee had “tried treatment programs . . . and tried to remain sober, his history is that of committing crimes with victims when using drugs.” The district court also noted that while “there may not have been victims as a result of these specific violations . . . it’s the use of drugs that has continued.” The district court noted that Poignee had a history of “assaultive behaviors . . . while using intoxicants” and thus, “confinement is necessary to protecting the public from further criminal activity because [Poignee], unfortunately, once he gets out of the treatment program, simply has not been able to maintain, and there’s no indication that he’ll be able to maintain sobriety.” The district court further explained that “it would depreciate the seriousness of these violations if probation were not revoked” and that it “did not find going off the radar and being out of contact with probation and being dishonest with probation . . . to be technical. You can’t supervise somebody if you have no idea where they are, and it’s supervised probation.” The district court also noted that it did not agree that “the use of intoxicants is a nonserious violation, because use of intoxicants have historically been tied to the commission of offenses with victims. And not maintaining contact is not a technical violation because you can’t supervise somebody who can’t be reached and is out of contact.”

Based on our review of the record, we conclude that the district court did not abuse its discretion by revoking Poignee’s probation.

Poignee asserts that his case “is the rare case where policy considerations required that the district court not revoke [his] probation, even though the facts may have allowed it,” and that the district court abused its discretion in revoking his probation. Poignee argues that while the district court “inquired whether Poignee knew he should have made more than one payment,” the court did not ask why or whether Poignee had the ability to pay more, and thus abused its discretion. But the district court acknowledged on the record that Poignee was not expected to have completed paying restitution. And as Poignee acknowledges, the failure to pay restitution was only one of the probation violations. In its analysis of the *Austin* factors, the district court weighed the seriousness of Poignee’s other probation violations. The record reflects that it was the nature of Poignee’s other violations which led to the district court’s decision to revoke Poignee’s probation. The district court did not abuse its discretion because the failure to pay restitution was not the determining factor in whether to revoke or continue Poignee’s probation.

Affirmed.