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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1214**

State of Minnesota,
Respondent,

vs.

Ernest Carter,
Appellant.

**Filed April 30, 2012
Affirmed
Collins, Judge***

Hennepin County District Court
File No. 27-CR-10-5946

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

Michael O. Freeman, Hennepin County Attorney, Alan J. Harris, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Stauber, Judge; and
Collins, Judge.

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

UNPUBLISHED OPINION

COLLINS, Judge

Appellant challenges the district court's decision to revoke his probation and execute his prison sentence, arguing that the evidence is insufficient to support the district court's finding that the need for confinement outweighs the policies favoring probation. We affirm.

FACTS

Appellant Ernest Carter was charged with third-degree assault, stemming from an incident in February 2010 that resulted in a laceration to his nephew's head that required medical treatment. In May 2010, Carter pleaded guilty to the charged offense. The district court expressed some hesitance regarding the plea agreement for a mitigated dispositional departure, but decided to "give [Carter] this opportunity." The district court imposed and stayed the execution of the presumptive 33-month prison sentence, and placed Carter on supervised probation for five years. The district court specifically admonished Carter that he could not use alcohol and that he must

enter and complete treatment at Reentry House Incorporated, any aftercare that's recommended. Follow all treatment rules. Follow all rules of probation, reasonable rules of probation.

The district court emphasized that "it's zero tolerance," meaning a probation revocation would result in execution of the prison sentence.

On September 14, 2010, Carter admitted to the district court that he had violated probation by getting into a fight and being expelled from his treatment program. The district court clarified the alleged violation, stating, "you were ordered into treatment,

you were ordered to complete that treatment and any aftercare that was recommended, correct?" Carter responded, "Yes," and acknowledged that he had violated probation by failing to meet this condition. The district court then granted Carter "one more chance," revoking 90 days of the stayed sentence and furloughing him to a second treatment program. The district court advised Carter that

chances are not unlimited here . . . the reason I'm allowing this is because you need the treatment. Until you're stabilized I don't think you're safe, and I don't think you're safe with your family. And the reason you aren't is because you just don't have control of your conduct.

On November 10, 2010, Carter completed the designated primary treatment program, with the recommendation that he continue in a residential aftercare program at Prodigal House. And Carter was transported to Prodigal House that day. The following Saturday, November 13, Carter went out on a "pass" with other Prodigal House participants. When Carter returned to Prodigal House, he appeared intoxicated and staff directed him to either go to detox or leave, and to return to Prodigal House on Monday. Carter collected his belongings and left, but he did not return to Prodigal House.

On November 15, Carter called his probation officer, and she directed him to come to her office that day. When Carter arrived at the probation office front desk he asked for breath mints, and when none of the staff could provide him with a breath mint, Carter left the office without seeing his probation officer. On November 17, Carter left his probation officer a message saying that he was residing at an address in Minneapolis. But the address he gave was not valid. Carter's probation officer attempted to locate him,

and involved the court and law enforcement, but she was unable to reach Carter until after he was arrested for probation violation in March 2011.

On April 7, 2011, Carter had a contested probation revocation hearing before the district court. The district court heard testimony and analyzed Carter's failure to complete the Prodigal House treatment program and failure to maintain contact with probation.¹ Citing both its concern for public safety and the serious nature of Carter's violation, the district court revoked probation and executed Carter's 33-month prison sentence, granting Carter credit for the time he spent in treatment. This appeal followed.

D E C I S I O N

The district court has broad discretion in determining whether there is sufficient evidence to revoke probation and we will not reverse the district court's decision absent an abuse of discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). But whether the district court has made the required findings to revoke probation is a question of law that we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

The Minnesota Supreme Court has established a three-step analysis that a district court must follow before revoking probation. *Id.* at 606; *Austin*, 295 N.W.2d at 250. The district court must (1) designate the specific condition of probation that has been violated, (2) determine that the violation was intentional or inexcusable, and (3) conclude that the need for confinement outweighs the policies favoring probation. *Modtland*, 695 N.W.2d

¹ Initially, Carter was also alleged to have violated his probation by failing to abstain from the use of alcohol. The district court, however, focused its analysis on Carter's failure to complete the Prodigal House program and his approximately four-month period of unknown whereabouts.

at 606; *Austin*, 295 N.W.2d at 250. The district court must describe the reasons for revoking probation and the evidence it relies on, not assuming that the *Austin* demands are satisfied by “reciting the three factors and offering general, non-specific reasons for revocation.” *Modtland*, 695 N.W.2d at 608.

Carter contests the district court’s determination as to the third *Austin* factor, the need-for-confinement factor. Specific to this factor, the district court considers whether (1) confinement is needed to “protect the public from further criminal activity,” (2) correctional treatment is necessary and can most effectively be provided during confinement, or (3) a further stay “would unduly depreciate the seriousness of the violation.” *Austin*, 295 N.W.2d at 251 (quotation omitted). The district court need only find the existence of one of these three sub-factors. *See id.* This further analysis ensures that the district court does not “reflexively” revoke probation when a violation is established. *Modtland*, 695 N.W.2d at 608.

Here, the district court found that the third *Austin* factor was satisfied by both the first and the third sub-factors. Addressing the first sub-factor, public safety, the district court noted Carter’s long history with the criminal justice system, emphasized the serious nature of the crime of conviction by reiterating that it carried “an automatic commit,” and observed that this had been Carter’s second chance to comply with the treatment condition of his probation. The district court also noted that “for approximately three or four months [Carter] knew he was on probation for a serious crime, yet chose to ignore probation and to fail to keep in contact with them.” Regarding the third sub-factor, the district court stated:

I think it would depreciate the seriousness of the violation of probation if probation were not revoked. Mr. Carter knew what I was thinking, knew how many breaks I had given him and yet he just walked away from the treatment program, just walked away. Didn't show up for three or four months until arrested. And that's just unacceptable behavior in light of the crime that brought him before the [c]ourt.

On this record, we conclude that the district court was particularly diligent in making the findings required by the third *Austin* factor, and by no means acted reflexively in revoking Carter's probation.

Within his argument addressing the third *Austin* factor, the need-for-confinement, Carter also contends that only one of the three alleged probation violations—failure to maintain contact with his probation officer—was proved by clear and convincing evidence. As to the two other alleged violations, Carter first argues that he “was not required to complete another treatment program at Prodigal House, so his failure to complete the program was not a violation.” The terms of Carter's probation, however, required him to complete treatment *and* any recommendations for aftercare. The district court found that Carter “was abundantly aware that he needed to complete this [Prodigal] House portion” and he “knew that that was part of his relapse prevention and further treatment programming.” We conclude that this probation violation was proved by clear and convincing evidence.

Carter next argues that the witness who testified regarding his alleged alcohol consumption did not have firsthand knowledge of the incident. Even if this is true, the district court did not base the probation revocation on this alleged violation; it focused on Carter's failure to complete the Prodigal House program and failure to maintain contact

with probation. Therefore, the allegation of alcohol consumption is superfluous and is not subject to our *Austin* analysis.

On this record, we readily conclude that the district court made all of the required findings and did not abuse its discretion in revoking Carter's probation.

Affirmed.