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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1501**

State of Minnesota,  
Respondent,

vs.

Khat Dara,  
Appellant.

**Filed May 21, 2012  
Affirmed in part, reversed in part, and remanded  
Wright, Judge**

Lyon County District Court  
File No. 42-K2-04-000848

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

Richard R. Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

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

Considered and decided by Wright, Presiding Judge; Hudson, Judge; and Collins,  
Judge.\*

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\* 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## UNPUBLISHED OPINION

**WRIGHT**, Judge

Appellant challenges the district court's decision to revoke his probation and execute concurrent sentences of 98 months' imprisonment for third-degree criminal sexual conduct and 45 months' imprisonment for third-degree sale of a controlled substance. He argues that the district court (1) abused its discretion by revoking his probation without finding that the need for confinement outweighs the policies favoring probation and (2) erroneously imposed a ten-year conditional-release term for appellant's conviction of third-degree criminal sexual conduct. We affirm in part, reverse in part, and remand.

### FACTS

On September 3, 2004, a county human services employee reported the sexual assault of a 14-year-old girl, M.M., to Marshall Police Detective Tim Tomasek. M.M. subsequently identified her assailant from a photographic lineup as appellant Khat Dara. During the investigation, M.M. advised Marshall Police Sergeant Paula Curry that Dara and another male took her and another minor girl to Dara's apartment and provided the girls with alcohol, cigarettes, and marijuana. After M.M. became intoxicated and dizzy, Dara pushed her into a bedroom and removed her shirt. When M.M. told Dara to stop, he told her to leave. She explained to Dara that she had nowhere else to go, but she did not want him to touch her. Dara removed M.M.'s pants and underwear, forced her legs apart, and penetrated her. After Dara told M.M. that he was going to get a condom, M.M. dressed and drank more alcohol. Her next recollection is waking up with condom

wrappers scattered around her. Criminal charges subsequently were filed against Dara in Lyon County district court.

On February 22, 2005, the district court accepted Dara's *Alford* plea<sup>1</sup> to the charges of third-degree criminal sexual conduct by force or coercion, a violation of Minn. Stat. § 609.344, subd. 1(c) (2004); and third-degree sale of a controlled substance, a violation of Minn. Stat. § 152.023, subd. 1(3) (2004). At a subsequent hearing, the district court sentenced Dara to 98 months' imprisonment for his conviction of third-degree criminal sexual conduct, stayed the execution of the sentence, and stayed the imposition of a sentence for Dara's conviction of third-degree sale of a controlled substance. For each offense, the district court imposed eight years' supervised probation subject to certain conditions. The conditions of Dara's probation require, among other things, that he serve 365 days in jail, abstain from the illegal use or possession of controlled substances, complete a sex-offender evaluation, and follow all recommendations from that evaluation.

On August 19, 2005, Dara's supervising agent filed a probation-violation report, alleging that Dara (1) failed to follow the recommendations of the Adult Sex Offender Assessment, (2) failed to abstain from the illegal use or possession of controlled substances, and (3) failed to be truthful with his supervising agent. That day, the district

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<sup>1</sup> An *Alford* plea permits a district court to accept a guilty plea even though the defendant maintains his or her innocence if the district court examines the factual basis of the guilty plea and concludes through a colloquy with the defendant that there is "evidence [that] would support a jury verdict of guilty, and that the plea is voluntarily, knowingly, and understandingly entered." *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977); *accord North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970)).

court issued a warrant for Dara's arrest. More than five years later, in May 2011, Dara was arrested in St. Paul on the warrant.

At a May 24, 2011 probation-violation hearing, Dara admitted that he failed to follow the recommendations of the Adult Sex Offender Assessment and failed to abstain from the illegal use or possession of controlled substances. The district court found that Dara intentionally violated the conditions of his probation, revoked the stay, and executed Dara's sentence of 98 months' imprisonment for third-degree criminal sexual conduct. The district court also imposed and executed a sentence of 45 months' imprisonment for third-degree sale of a controlled substance. The district court imposed a ten-year conditional-release term to follow Dara's supervised release for his conviction of third-degree criminal sexual conduct. This appeal followed.

## **D E C I S I O N**

### **I.**

When a probation violation is alleged, the state must prove the violation by clear and convincing evidence. Minn. R. Crim. P. 27.04, subd. 3(2)-(3); *State v. Johnson*, 679 N.W.2d 169, 177 (Minn. App. 2004). If this standard is met, the district court may revoke probation and execute a previously stayed sentence. Minn. Stat. § 609.14, subd. 3 (2010). The decision to do so rests within the district court's broad discretion and will not be disturbed absent a clear abuse of that discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). When revoking a defendant's probation, the district court must (1) designate the specific condition that was violated, (2) find that the violation was

intentional or inexcusable, and (3) find that the need for confinement outweighs the policies favoring probation. *Id.* at 250 (the *Austin* factors).

Dara does not dispute that the district court complied with the first two *Austin* factors. As to the first *Austin* factor, the district court found, and Dara does not dispute, that Dara violated the conditions of his probation by failing to follow sex-offender treatment recommendations and by using controlled substances. Regarding the second *Austin* factor, the district court found, and Dara does not dispute, that Dara's violations were intentional. Indeed, Dara's testimony amply supports these findings. But Dara argues that the district court abused its discretion by failing to comply with the third *Austin* factor and revoking his probation without finding that the need for confinement outweighs the policies favoring probation.

To ensure that the balance is properly struck between the probationer's interest in freedom and the state's interest in ensuring rehabilitation and public safety, an offender's probation should not be revoked unless the district court finds 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 [the offender] is confined;
- or
- (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

*State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005) (quotation omitted). This consideration comports with *Austin*'s instruction that "[t]he purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Austin*, 295 N.W.2d at 250.

The district court found that Dara “is not amenable to probation,” he “is in need of correctional treatment that can most effectively be provided if he is confined,” and failure to impose Dara’s sentence would “unduly depreciate the seriousness of the violation.” In support of these findings, the district court also determined that Dara’s behavior suggests an “intent not to follow” the sex-offender treatment recommendations. These findings rest on ample support in the record. Although Dara completed the required sex-offender evaluation, he testified that he “moved away” before he received the treatment recommendations, in part, to avoid complying with the conditions of his probation. The record reflects that Dara fled Marshall to the Twin Cities and ceased contact with his supervising agent. The district court also considered Dara’s admission that he knew of, but disregarded, the district court’s order to abstain from using unlawful controlled substances when he abused cocaine and valium in the months after his release from jail. Additional support for the district court’s findings includes Dara’s evasion of arrest for more than five years. Dara’s argument that the third *Austin* factor is not satisfied ignores the overwhelming evidence to the contrary.

The decision to revoke Dara’s probation is a sound and appropriate exercise of the district court’s broad discretion.

## **II.**

Dara also argues that the district court erred by ordering a ten-year conditional-release term for his conviction of third-degree criminal sexual conduct. We agree, and the state concedes, that the district court erred.

The applicable statute in effect when Dara committed the criminal-sexual-conduct offense in August 2004 required a five-year conditional-release term with credit for time served on supervised release. *See* Minn. Stat. § 609.109, subd. 7(a) (2004). The ten-year conditional-release term applies only to crimes committed on or after August 1, 2005. *See* 2005 Minn. Laws ch. 136, art. 2, § 21, at 932; Minn. Stat. § 609.3455, subd. 9 (2010). Because Dara committed third-degree criminal sexual conduct in August 2004, the district court erred when it imposed a ten-year conditional-release term.

Accordingly, we reverse the imposition of a ten-year conditional-release term and remand to the district court for modification of the conditional-release term to five years.

**Affirmed in part, reversed in part, and remanded.**