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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2199**

State of Minnesota,
Respondent,

vs.

Derek John Smith,
Appellant.

**Filed June 4, 2012
Affirmed
Chutich, Judge**

Mille Lacs County District Court
File No. 48-CR-08-3232

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

Janice S. Jude, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney,
Milaca, Minnesota; and

Heather Eller, Justice Center, Milaca, Minnesota (for respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and
Chutich, Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Appellant Derek John Smith challenges the revocation of his probation. Conceding that he violated probation, Smith nonetheless contends that the district court abused its discretion when it found that the need for incarceration outweighed policies supporting probation. Because we conclude that the district court acted within its broad discretion in revoking Smith's probation, we affirm.

FACTS

On November 30, 2008, Smith and another man entered a home and physically assaulted the person inside. Smith pleaded guilty to one count of first-degree burglary (assault) in violation of Minn. Stat. § 609.582, subd. 1(c) (2008). At the plea hearing, Smith explained that he committed the assault because he “was drunk. Stupid. Wasn't thinkin[g],” and because he just wanted to “retaliate against [the victim].” After entering the guilty plea, defense counsel informed the district court that, based on Smith's amenability to treatment, he would be arguing for a dispositional departure at sentencing.

On November 24, 2009, the district court continued Smith's scheduled sentencing hearing because of ongoing “public safety concerns” about Smith and a desire to see how he would respond. Three months later, the sentencing hearing was held. The same judge presided over Smith's guilty plea, sentencing, and probation revocation hearings. At the hearing, the parties discussed Smith's “slip” with alcohol sometime between late

November and late February.¹ In response, the district court again continued sentencing to see how Smith “would do with yet another opportunity not to go to prison.”

On May 13, 2010, approximately nine months after pleading guilty, Smith was sentenced to 93 months in prison. Defense counsel asked the district court to stay Smith’s sentence and place him on probation. In considering the downward departure, the district court noted that Smith appeared amenable to probation because he had been attending alcohol-related treatment and was working with young people in a mentorship role. The court also emphasized the following:

[I]f you really mess up, it’ll go straight to a commit...[Y]ou’re really gonna have to walk a very fine line. You messed up once. You just can’t mess up anymore. Because even though I’m granting [the departure] to you, it’s still part of the record that ‘ya had a lapse.

Smith’s sentence was stayed, and he was placed on probation for 20 years. His probationary terms included local jail time, abstinence from alcohol and non-prescription drugs, and participation in random drug testing. The district court judge again warned Smith that if he failed to remain “in compliance [with the probation conditions]. . . I’m probably just gonna commit to the Commissioner. You’re walking that kind of a line.”

Approximately two and a half months after sentencing, law enforcement officers found Smith passed out behind a school, intoxicated and unresponsive. One week later, officers received a report that Smith was being disruptive and was kicking a door. When police arrived, Smith was found in possession of a half-full bottle of vodka, was

¹ Smith was being monitored for alcohol use under the terms of probation imposed for a different crime.

described as having difficulty standing, was slurring his speech, and gave a preliminary breath test of .320. In another incident approximately two weeks later, Smith was caught after fleeing police officers and gave a preliminary breath test of .154.

A probation violation report was filed on August 27, 2010, and amended in March 2011, after Smith tested positive for marijuana. On September 8, 2011, the probation revocation hearing occurred.

At the hearing, Smith admitted that he had used alcohol on three occasions. He contended, nonetheless, that the need for incarceration did not outweigh the policies in favor of probation because he broke no laws while on probation; he has been under extreme personal stress (issues with his ex-wife, holding a full-time job, raising kids, attending college) and yet has abstained from alcohol since his initial probation violation; he did not hurt anyone while on probation; and he has been doing well with ongoing chemical-dependency treatment despite difficult personal circumstances.

The district court first found that Smith excessively used alcohol three times, and that these actions were inexcusable, unjustified, and in violation of his probation conditions. The district court then discussed “whether public considerations [in] favor of probation are . . . outweighed by the need [for] incarceration.” The district court emphasized that the reason it placed Smith on probation in the first place was Smith’s ability to abstain from alcohol use. The “use of alcohol was the primary . . . consideration of this court from the beginning. Abstinence was essential.” The court stated that if the binge drinking had occurred before sentencing, “there’s no way I would have downward departed. I would not have considered it for a second.”

The court next found that Smith's confinement was necessary to protect public safety. Public safety was at issue because alcohol was a component in the first-degree burglary, a "serious person crime." The court reiterated that public safety had been a concern at sentencing and that the court had delayed sentencing, in part, because it wanted to be absolutely sure that "alcohol was no longer playing a role" in Smith's life. The court then found that not revoking probation would depreciate the seriousness of Smith's violations.

The court further found that Smith was in need of treatment which only a commitment to corrections could provide. It stated, "I don't feel there's any way that I can be satisfied at this point in time that . . . continued probation would assure me that there would be . . . not a return to . . . the use of mood-altering chemicals" Accordingly, the court committed Smith to the Commissioner of Corrections for a period of 93 months. This appeal followed.²

DECISION

"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." *State v. Austin*, 295 N.W.2d 246, 249–50 (Minn. 1980). If a probationer violates conditions of probation, the district court may continue probation, revoke probation and execute the sentence previously imposed, or order intermediate sanctions.

² Respondent contends that this appeal should be dismissed because Smith failed to comply with procedural rules. This argument is meritless. Dismissal for noncompliance with procedural rules is not appropriate when the failure to follow rules, as here, neither affects the court's jurisdiction nor causes delay or prejudice. *See Boom v. Boom*, 361 N.W.2d 34, 36 (Minn. 1985).

Minn. Stat. § 609.14, subd. 3 (2010). 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.” *Austin*, 295 N.W.2d at 250. These considerations are commonly referred to as the *Austin* factors. *See, e.g., State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005).

“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.” *Austin*, 295 N.W.2d at 251 (quotations omitted). It is inadequate to simply recite the three *Austin* factors and offer “general, non-specific reasons for revocation”; instead, district courts must “convey their substantive reasons for revocation and the evidence relied upon,” thereby creating a “thorough, fact-specific record[] setting forth their reasons for revoking probation.” *Modtland*, 695 N.W.2d at 608. Written orders are not required; instead, the district court may convey its reasoning by “stating its findings and reasons on the record, which, when reduced to a transcript, is sufficient to permit review.” *Id.* at n.4.

Smith is challenging only the district court’s finding pertaining to the third *Austin* factor—whether the need for incarceration outweighs public policy considerations favoring probation. When making findings concerning this factor, a court “must balance the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety. . . .” *Id.* at 607 (quotation omitted). This balance involves considering whether “confinement is necessary to protect the public from further criminal

activity by the offender; or [if] the offender is in need of correctional treatment which can most effectively be provided if he is confined; or [if] it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Id.*

Smith argues that considerable stress in his personal life when he violated probation should excuse the violations, his good behavior shows that he is amenable to probation, and that, given his “first time” violations,³ the district court should have considered local jail time instead of a commitment to prison. We acknowledge some positive steps that Smith was undertaking on probation, but conclude that the overall record supports the court’s finding that Smith had failed at treatment.⁴ Although execution of local jail time is an option when grounds for revoking probation are found, Minn. Stat. § 609.14, subd. 3, the district court, after previously offering Smith many chances to succeed, did not abuse its broad discretion in declining to use that option.

We conclude that the record amply supports the district court’s specific findings on the relevant factors: Smith was not amenable to probation; he was in need of correctional treatment that could most effectively be provided if he were confined; and, failure to impose his prison sentence would unduly depreciate the seriousness of his violations. The court made clear that, given its concern about the demonstrated link between Smith’s alcohol use and public safety concerns, Smith’s continued abstention

³ Smith’s assertion that these were first-time violations is inaccurate. The record shows that Smith was on probation for other crimes and violated *those* probation conditions when committing the crime at issue here.

⁴ The record also shows that Smith chose to smoke marijuana approximately seven months *after* his binge drinking episodes. *See Austin*, 295 N.W.2d at 251 (recognizing that treatment failure supports probation revocation).

from alcohol was essential. It clearly warned Smith about the consequences of violating this key condition of probation, and when Smith did, the court properly conveyed its “substantive reasons for revocation and the evidence relied upon.” *Modtland*, 695 N.W.2d at 608.

Affirmed.