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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1203**

State of Minnesota,
Respondent,

vs.

Pierre Wayne Sherer,
Appellant.

**Filed March 4, 2013
Affirmed
Cleary, Judge**

Cook County District Court
File No. 16-CR-05-9

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

Timothy C. Scannell, Cook County Attorney, Molly C. Hicken, Assistant County
Attorney, Grand Marais, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jennifer L. Lauermann, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Ross, Judge; and Hooten,
Judge.

UNPUBLISHED OPINION

CLEARY, Judge

Appellant Pierre Sherer challenges the revocation of his probation and the execution of his sentence on the grounds that the need for his confinement does not outweigh the policies favoring probation and that his failure to pay restitution is not a sufficient reason to revoke his probation. We affirm.

FACTS

In March 2005, Pierre Sherer broke into Ryden's Border Store in Grand Portage with two friends and stole a large sum of money. Sherer pleaded guilty to one count of second-degree burglary pursuant to Minn. R. Crim. P. 26.01, subd. 4. *See State v. Lothenbach*, 296 N.W.2d 854, 857–58 (Minn. 1980). The district court sentenced Sherer to 28 months in prison, with execution stayed for five years while on probation. The district court also ordered Sherer to pay \$28,065.31 in restitution to the victims of his crime because much of the stolen money was not recovered.

Sherer struggled to follow the terms of his probation. In 2006, a probation violation hearing was held on allegations that Sherer had been drinking at a local bar and had failed to report to his probation officer on multiple occasions. Sherer was found to have violated his probation and ordered to serve 30 days in jail.

Sherer again had problems with his probation in 2007. Although he worked at Lutsen Mountains and at a local casino, Sherer consistently failed to make payments toward his required restitution. This unpaid restitution led to a warrant, forcing Sherer to finally make a small payment. Soon after, Sherer voluntarily left both jobs and moved to

Duluth. Once in Duluth, he failed to respond to several probation reporting letters and the Duluth probation department subsequently refused to supervise his probation.

Throughout 2007 and 2008 Sherer missed numerous probation reporting sessions with his probation officer. In August 2008, Sherer's probation officer received reports that Sherer had been drinking at a party where an assault occurred. A hearing was held on this alleged probation violation, but Sherer was found not to be in violation of his probation. Sherer again stopped reporting to his probation officer from October 27, 2008 until March 17, 2009, at which time he finally appeared for a probation violation hearing and admitted to his past failures to report. He was ordered to serve four days on a sentence-to-service work crew, but he did not report to the work crew for two months.

Sherer again failed to report to his probation officer from July 29, 2009 to October 12, 2009. Sherer's continued failure to report resulted in a "last chance letter" on December 10, 2009. Sherer responded positively to this letter and attended his monthly reporting meetings with his probation officer for the next seven months with only one absence. Despite this improved attendance, Sherer failed to pay any restitution to the victims of his crime. On the request of his victims, the court extended Sherer's probation an additional year in October of 2010, and he was ordered to make progress toward gaining employment and making restitution payments.

During this year of extended probation, Sherer stopped reporting to his probation officer and failed to make any restitution payments or demonstrate any attempt to secure employment as required by the court order. He admitted to his probation officer that he had avoided his probation due to resentment about his victims. His probation officer's

report included concerns that Sherer has also returned to illegal drug use. Due to these continuing issues, Cook County probation requested that the court revoke Sherer's stayed sentence on September 27, 2011, alleging that Sherer had failed to pay his restitution, provide proof of employment efforts, or report to probation officers as directed.

Sherer failed to appear at a probation hearing scheduled for October 18, 2011, and a bench warrant was issued for his arrest. After he turned himself in, a probation violation hearing was held on April 3, 2012, followed by a disposition hearing held on April 11, 2012. The district court found that Sherer had violated the conditions of his probation by failing to report to his probation officer on a regular basis and by failing to make reasonable efforts to pay restitution. The court found that these violations were intentional and inexcusable, and after weighing the relevant evidence it determined that the need for confinement outweighed the benefits of continued probation. The district court considered further probation or other sanctions, but reasoned that Sherer had shown that he was not amenable to probation by his consistent failures to comply with the terms of his probation and with his reporting requirements. The district court revoked Sherer's stay of execution and committed him for 28 months. This appeal followed.

DECISION

The district court has broad discretion in determining if there is sufficient evidence to revoke probation, and we will only reverse if there is a clear abuse of that discretion. *State. v. Austin*, 295 N.W.2d 246, 249–50 (Minn. 1980). Before a district court may revoke probation it must designate the specific condition or conditions that were violated, find that the violation was intentional or inexcusable, and find that the need for

confinement outweighs the policies favoring probation. *Id.* at 250. Revocation should be used only as a last resort after treatment or intermediate sanctions have failed. *Id.* Whether the district court satisfied the requirements under *Austin* is a question of law that we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Sherer disputes the revocation, arguing that the evidence does not support a finding that the need for confinement outweighs the policies favoring probation under *Austin*. He argues that despite his violations, he has reformed his life and that an inability to pay restitution is not a sufficient reason for revocation. Sherer asserts that his financial status, the bad economy, and his inability to find childcare have hindered his ability to find employment and pay the required restitution to the victims of his burglary. Sherer argues that for these reasons, the district court abused its discretion, acted “reflexively,” and failed to exercise the necessary judgment for revocation. *See id.* at 608. We disagree.

The district court specifically made each of the findings required by *Austin*. The court found that that Sherer had violated his probation by continuously failing to report to his probation officer and by failing to make reasonable efforts to gain employment or to pay his restitution. The court further found that these violations were intentional and inexcusable because Sherer was aware of these probation requirements. The court also explicitly weighed whether the need for confinement outweighed the policies favoring probation and outlined the factors that led it to conclude that the need for confinement outweighed any policy favoring probation. The court was troubled by Sherer’s long

history of failing to comply with probation and failing to report on a regular basis. It stated that

you've shown that you're not amenable to probation in this case; that . . . continued probation and additional requirements of probation would probably just go by the wayside. You wouldn't report; you wouldn't comply with those required terms of probation, and I think your history demonstrates that.

The district court further stated that because of Sherer's history, "the need for confinement certainly outweighs the benefit of continued probation."

The record supports these findings. Sherer was sentenced to 30 days in jail after his probation violation in 2006. Sherer was also ordered to serve four days of sentence-to-service work crew after a failure to report violation in 2009. And in 2010, after his continuous failure to pay restitution, the district court extended his probation for a period of one year and emphasized that Sherer needed to "make a demonstrated effort paying restitution." Sherer failed to make any reasonable effort to find employment or to pay restitution, and he consistently failed to attend his required meetings with his probation officer. Because the district court considered this past, it did not partake in a "reflexive" decision as suggested by Sherer. The district court instead revoked probation "reluctantly" after weighing the necessary factors.

Sherer now claims that his failure to pay restitution is excusable because he cannot find a job and does not have the ability to pay. But the record tells a different story. Since his sentencing on October 19, 2005, when he was ordered to pay \$28,065.31 in restitution, Sherer has paid only a total of \$275.00. After Sherer's probation was

extended for a year for the sole reason of failure to pay restitution, Sherer failed to make even a single payment. Sherer also voluntarily quit two jobs in 2007 and has failed to present any evidence that he has since attempted to find employment. That state has a “fundamental interest” in punishing those who violate criminal laws, and “poverty in no way immunizes” anyone from punishment. *State v. Morrow*, 492 N.W.2d 539, 544 (Minn. App. 1992). Instead of working toward finding employment, Sherer’s probation officer notes that he has shown “contempt for his victims” and taken on “a Robin Hood sort of mentality.” These actions and attitudes do not weigh in favor of further probation.

Sherer also claims that the lack of a formal payment schedule for restitution has created a situation where he could not knowingly violate the probationary condition to pay restitution. While it is correct that there has never been a set schedule or standard for Sherer’s repayment, Sherer would be in violation of any reasonable standard for repayment by his failure to make any effort at repayment. This is particularly true because he was on notice of his responsibility to pay the restitution and to try to find employment. The court and Sherer’s probation officers provided him with steps that he could take to indicate effort toward repayment, such as producing proof of efforts to find employment and reporting his efforts at his monthly probation meetings. But Sherer produced no such evidence and did not attend most of these meetings. His argument is therefore without merit.

As required, the court demonstrated that it weighed the relevant evidence and determined that the “need for confinement certainly outweighs the benefit of continued probation given the history that [Sherer has] shown with respect to probation and

[Sherer's] failure to report on a regular basis." The district court had sound and persuasive reasons for revoking Sherer's stay of sentence that are supported in the record. The determination to impose Sherer's sentence therefore does not represent an abuse of discretion.

Affirmed.