STATE OF MINNESOTA
IN COURT OF APPEALS
A07-600

State of Minnesota,
Respondent,

vs.

Troy L. Bruce,
Appellant.

Filed May 13, 2008
Reversed
Willis, Judge

Hubbard County District Court
File No. K3-99-306

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Donovan D. Dearstyne, Hubbard County Attorney, Hubbard County Courthouse, 301 Court Avenue, Park Rapids, MN 56470 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Willis, Judge; and Crippen, Judge.[*]

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

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

Appellant challenges the district court's revocation of his probation, arguing that he did not violate a condition of his probation and that even if he did, the district court failed to make the necessary findings required by *State v. Austin*, 295 N.W.2d 246 (Minn. 1980). We reverse.

FACTS

In October 1999, appellant Troy Lee Bruce pleaded guilty to fourth-degree criminal sexual conduct. The district court sentenced him on March 3, 2000, to 21 months' imprisonment but stayed execution of the sentence and placed him on probation for ten years. One of the conditions of Bruce's probation was that he complete sex-offender treatment through Upper Mississippi Mental Health Center (UMMHC) or a "different institution." After a probation-revocation hearing in November 2006, the district court found that Bruce had violated this condition, revoked Bruce's probation, and ordered the execution of his sentence. This appeal follows.

D E C I S I O N

A district court has broad discretion in determining whether there is sufficient evidence to revoke probation, and this court will not reverse the district court's decision absent an abuse of discretion. *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004). But whether a district court has made the required findings to revoke probation is a question of law reviewed de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Before revoking a defendant's probation, a district court must make three findings:

> First, courts must designate the specific condition or conditions of probation the defendant has violated. Second, courts must find the violation was inexcusable or intentional. Once a court has made findings that a violation has occurred and has found that the violation was either intentional or inexcusable, the court must proceed to the third *Austin* factor and determine whether the need for confinement outweighs the policies favoring probation.

Id. at 606 (citing *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980)). To ensure a "thorough, fact-specific record[] setting forth [the] reasons for revoking probation," a district court should explain its substantive reasons for revocation and the evidence relied on in reaching that determination. *Id.* at 608. And a violation must be proved by clear-and-convincing evidence before a district court may revoke probation. *Id.* at 607 n.3.

Here, the district court made the first required *Austin* finding, determining that Bruce "failed to complete sex offender treatment as was a condition of his probation set on or about March 3, 2000." The explanations given by the district court for this finding were that UMMHC terminated Bruce from the center's sex-offender treatment program and that Bruce had had more than six years to comply with the condition of his probation that he complete sex-offender treatment but failed to do so. Bruce challenges the district court's finding, arguing that the evidence fails to clearly and convincingly show that he has violated the condition because the terms of his probation provided no deadline by which the sex-offender treatment must be completed. We agree.

Although not precedential, we find persuasive the reasoning in our unpublished opinion in *State v. Davisson*, No. C3-98-1064, 1998 WL 747135, at *2. (Minn. App. Oct. 27, 1998), in which this court addressed a similar question of whether a defendant had violated a probationary condition when there was no deadline for the defendant's performance of the condition and the defendant still had time remaining on probation. In *Davisson*, this court noted that the district court "gave neither a specific deadline nor a guideline—such as 'promptly,' 'immediately,' 'without delay,' or within '60 days'—for the performance of the probationary condition." *Id.* This court held, therefore, that "[i]t cannot be said with any support in the record that performance was clearly due as of the revocation date," and "under these circumstances, the [district] court abused its discretion" by revoking the probation. *Id.*

Likewise, here, there was no deadline or guideline for Bruce's completion of sex-offender treatment. The terms of Bruce's probation required only that he complete sex-offender treatment at UMMHC or a "different institution." Although Bruce had been terminated from the UMMHC treatment program, apparently for reasons related to his inability to make advance payments for treatment, that termination does not preclude the completion of a different program. In addition, the record shows that Bruce was not unwilling to complete treatment; before his termination from the program, he had been making progress and, after his termination, he contacted three other facilities about enrolling in treatment programs. Moreover, the record suggests that the more than three years that Bruce had left on probation would have been enough time for him to enroll in a program and complete treatment. We note that the absence of a deadline or guideline for

completion of sex-offender treatment does not inevitably mean that a violation of such a condition cannot occur until the probationary term has ended. Indeed, even in the absence of a deadline, a probation revocation for failing to complete sex-offender treatment has been affirmed when the evidence showed that a probationer had no intention of participating in treatment or that he was unamenable to any treatment. *See State v. Rock*, 380 N.W.2d 211, 212-13 (Minn. App. 1986) (affirming a probation revocation when the evidence showed that a probationer was "not interested in trying to change" and was unwilling to participate in sex-offender treatment), *review denied* (Minn. Mar. 27, 1986); *State v. Hemmings*, 371 N.W.2d 44, 46-47 (Minn. App. 1985) (affirming a probation revocation when the evidence supported a district court's finding that a probationer was "unamenable to treatment"). But here the district court made no finding that Bruce is unamenable to treatment, and the record does not show that he is unwilling to complete treatment or that it would have been impossible for him to do so. We cannot conclude, therefore, that there is clear-and-convincing evidence that Bruce violated the condition of his probation requiring that he complete sex-offender treatment.

We are aware that, in a recent unpublished opinion, this court rejected the argument that because, at the time of a revocation hearing, a probationer still had six months of probation in which to complete sex-offender treatment, he had not violated a condition of his probation requiring that he complete such treatment. *State v. Blackorbay*, No. A06-2312, 2008 WL 495668, at *3 (Minn. App. Feb. 26, 2008). We conclude that this case is distinguishable from *Blackorbay*. This court emphasized that Blackorbay failed to "diligently participate" in treatment and had completed only one of

five segments of the treatment program that he was enrolled in. *Id.* Also, Blackorbay had been given a six-month extension of his probation specifically to allow him to complete treatment but, a month later, was discharged from the treatment program for failing to participate regularly. *Id.* at *1. By contrast, in the five months that Bruce participated in the treatment program at UMMHC before his termination he had completed one segment of the program, had been doing "fairly well" in completing a second, and had received "okay" or "competent" ratings on a series of six criteria measuring his performance in treatment. Finally, the record in *Blackorbay* suggests that Blackorbay would not have been able to complete treatment within the six months that remained on his probation. Here, Bruce had more than three years left on probation at the time of his revocation hearing, and the record shows that it would be possible to complete treatment within nine to 12 months.

Because we conclude that the record does not establish that Bruce violated a condition of his probation, we need not reach the issue of whether the district court failed to make the remaining findings required by *Austin*.

Reversed.