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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-1927**

State of Minnesota,  
Respondent,

vs.

James Ernest Piere,  
Appellant.

**Filed May 23, 2011  
Affirmed in part, reversed in part, and remanded  
Larkin, Judge**

Douglas County District Court  
File Nos. 21-CR-08-2147, 21-CR-09-2622, 21-CR-10-859

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Considered and decided by Wright, Presiding Judge; Larkin, 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## UNPUBLISHED OPINION

**LARKIN**, Judge

Appellant challenges the district court's order revoking probation on his gross-misdemeanor harassment conviction and continuing probation, with intermediate sanctions, on his two gross-misdemeanor driving-while-impaired (DWI) convictions. Appellant argues that the district court abused its discretion by revoking probation without making the findings required by *State v. Austin*, 295 N.W.2d 246 (Minn. 1980). We affirm in part, reverse in part, and remand.

### FACTS

This probation-revocation appeal involves three convictions: appellant James Ernest Piere's January 15, 2009 conviction of gross-misdemeanor harassment and his May 20, 2010 convictions of third- and second-degree driving while impaired. When the district court sentenced Piere for his two DWI convictions, he was on probation for the harassment conviction. The district court imposed probationary sentences on the DWI offenses and ordered Piere to comply with the following conditions of probation: serve jail time, complete an updated chemical-use assessment within 30 days of completion of his jail sentence, and comply with all treatment recommendations. Although the district court found that Piere had violated the terms of probation on his harassment conviction and imposed jail time as an intermediate sanction, the district court did not modify the terms of probation on this offense to include the requirement that Piere complete an updated chemical-use assessment and comply with all treatment recommendations.

Piere completed an updated chemical-use assessment, as ordered, while serving his jail sentence. But probation-violation proceedings were initiated based on an allegation that Piere refused to sign a release of information form necessary for his referral to an in-patient treatment center. The state also alleged that Piere became angry with the rule 25 assessor and at one point stated that “she could shove [the] assessment up her a\*\*” and proceeded to call her a “fu\*\*ing bit\*\*” and told her to “go fu\*\* someone else’s life up.” Piere denied the violation, arguing that he merely disagreed with the recommendation for in-patient treatment. He also argued that he intended to complete another chemical-use assessment after being released from jail. After a contested probation-revocation hearing, the district court found that Piere had violated probation “by failing to cooperate with the process” that followed the required chemical-use assessment. The district court noted that “[i]t is clear to me after the testimony that Mr. Piere did not object to the release, he was objecting to [the rule 25 assessor’s] recommendations for inpatient treatment.”

The district court revoked probation on Piere’s gross-misdemeanor harassment conviction and ordered execution of his remaining jail time. But the district court did not revoke probation on Piere’s DWI convictions. Instead, the district court ordered Piere to serve 90 and 60 days in jail, in addition to 30 days of electronic home monitoring, consecutively, as intermediate sanctions. This appeal follows.

## **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.” *Austin*, 295 N.W.2d at 249-50. Before the district court may revoke a defendant’s probation and execute a stayed sentence, 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.” *Id.* at 250.

Piere claims that the district court abused its discretion by revoking probation without making *Austin* findings. With regard to his harassment conviction, Piere argues, and the state concedes, that completion of an updated chemical-use assessment and compliance with any resulting treatment recommendations was not a condition of probation on this offense. Piere and the state therefore both request that we reverse the district court’s revocation of probation on this offense. A district court abuses its discretion when it revokes probation based on a condition of probation that has not actually been imposed. *See State v. Ornelas*, 675 N.W.2d 74, 75 (Minn. 2004) (“In order to support a probation revocation, the condition alleged to have been violated must be a condition of probation that has in fact been imposed by the district court.”). Because the district court revoked Piere’s probation on the harassment conviction based on a condition that had not been imposed, the revocation was in error.

With regard to the DWI convictions, although the district court found that Piere violated probation, it did not revoke probation on these offenses. Instead, the district court continued probation and imposed additional jail time as an intermediate sanction. “The findings required by *State v. Austin* . . . are necessary only when the district court revokes a defendant’s probation and executes the defendant’s underlying sentence, not

when the court imposes local incarceration as an intermediate sanction for a probation violation.” *State v. Cottew*, 746 N.W.2d 632, 633 (Minn. 2008). Thus, Piere’s argument that the district court erred in failing to make *Austin* findings in support of its orders on the DWI convictions is unavailing.

Piere also contends that the district court erred in finding that he violated probation because “[he] still had time to follow this particular condition of probation.” Piere argues that he was required to “complete an updated chemical use assessment and follow all recommendations within 30 days of his release from custody,” thereby suggesting that he could not violate probation by failing to cooperate with treatment recommendations until 30 days after his release from custody. But Piere misstates the condition. The district court ordered Piere to “complete an updated Chemical Use Assessment within 30 days of [his] release from custody and follow all recommendations.” The timing element of this condition is clearly tied to completion of the updated chemical-use assessment and not to completion of treatment.

Moreover, there is sufficient evidence in the record to support the district court’s finding that Piere violated the condition of probation requiring him to “follow all recommendations” of an updated chemical-use assessment. *See Austin*, 295 N.W.2d at 249 (stating that “[t]he [district] court has broad discretion in determining if there is sufficient evidence to revoke probation”). After the assessor completed Piere’s chemical-dependency assessment, she sent Piere a letter explaining her treatment recommendation. The assessor included a release form with the letter and directed Piere to sign and return the form so she could start the referral process. Piere did not respond. Next, the assessor

visited Piere at jail and asked him to sign the release. Piere refused to sign the release, but he did not formally dispute the recommendation. And although he testified that he was willing to obtain another assessment, when asked at the revocation hearing if he would follow the resulting recommendations, Piere stated, “I don’t know.”

Lastly, the district court has broad discretion in determining whether to impose an intermediate sanction. *Cottew*, 746 N.W.2d at 638. We discern no abuse of discretion in the district court’s decision to require Piere to serve additional jail time and 30 days on electronic home monitoring as an intermediate sanction for his refusal to follow the recommendations of his updated chemical-use assessment. The district court’s reasoning was sound: “[I]t is a serious violation when a defendant does not follow the recommendations of a Chemical Use Assessment when he has had such a significant history of chemical abuse.”

In summary, we affirm the district court’s finding that Piere violated probation on his DWI convictions and its imposition of intermediate sanctions. But we reverse the revocation of probation on Piere’s harassment conviction and remand for reinstatement of probation on this offense.

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

Dated:

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Judge Michelle A. Larkin