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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1609**

State of Minnesota,
Respondent,

vs.

Tor Bernard White,
Appellant.

**Filed June 13, 2011
Affirmed
Ross, Judge**

Ramsey County District Court
File No. 62-CR-08-9824

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

John C. Choi, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Huspeni,
Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

One month after probationer Tor Bernard White completed his 15-month intensive residential drug treatment program at Minnesota Teen Challenge, he failed to submit to a required urinalysis. Two weeks later he provided a urine sample that tested positive for cocaine. Two days later he failed to appear at a scheduled appointment with his probation officer. The district court revoked White's probation and executed the previously stayed 71-month prison sentence that White had received for selling crack cocaine to an undercover police officer. White appeals, highlighting that this was his first violation in 17 months of probation. Because the district court acted within its discretion by revoking White's probation, we affirm.

FACTS

Tor White had committed 11 to 14 prior drug-related felonies and more than 30 misdemeanors when he sold crack cocaine to an undercover officer. He pleaded guilty in September 2009 to third-degree controlled substance crime for the cocaine offense. At sentencing, he moved for a dispositional departure from the presumptive prison sentence, emphasizing that he had been accepted to the residential drug treatment program at Minnesota Teen Challenge.

The district court was reluctant to give White a probationary sentence. It commented that there was no compelling reason to do so because his "lifestyle is a criminal lifestyle." The judge personally remarked, "[T]here are going to be people who think I've lost it, gone to La-La Land, considering anything other than [jail]." She

nevertheless granted the motion and stayed the execution of White's 71-month prison sentence subject to ten years' conditional probation. She added, "[P]eople will be thinking that hell's going to freeze over next due to the fact that I gave you a departure."

White's probation required that he complete the chemical dependency treatment program, remain law abiding, refrain from using alcohol or drugs, submit to random urinalysis, and keep all appointments with his probation officer. After setting the conditions, the district court remarked further:

I have no idea if this is going to be successful, but who knows, Mr. White, maybe you've gotten tired of dribbling your life away in and out of jail. If this doesn't work, the 71 months is going to be the beginning of you dribbling the rest of your life away. Good-bye.

White completed the rigorous 15-month residential treatment program on April 26, 2010. But there were already signs of trouble. Teen Challenge had deemed White to have "completed" the program but, for disciplinary reasons, did not allow him to participate in the graduation ceremony. On May 26, White failed to submit a required urinalysis. On June 9, he submitted a urine sample that tested positive for cocaine. And on June 11, he missed a scheduled appointment with his probation officer. The probation officer recommended that the district court revoke his probation.

White admitted to all of the allegations at his revocation hearing. The district court therefore concluded that clear and convincing evidence supported the determination of a violation. White asked for an intermediate sanction rather than the execution of his prison sentence. The district court refused and revoked his probation. White appeals.

DECISION

White challenges the district court's decision to revoke his probation. The district court may revoke probation and direct that a defendant be taken into custody when it appears that he has violated any of the conditions of probation. Minn. Stat. § 609.14, subd. 1 (2008). Before revoking probation, the district court must make specific findings as required by *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). It must specify the condition or conditions violated; find that the violation was intentional or inexcusable; and find that the need for confinement outweighs the policies that favor probation. *Id.* A district court has broad discretion in determining whether sufficient evidence exists to revoke probation, and we will reverse only when we discern a clear abuse of that discretion. *State v. Modiland*, 695 N.W.2d 602, 605 (Minn. 2005).

The district court made all the required findings. It designated each condition of probation that White violated: failure to submit to a urinalysis, failure to abstain from illegal drugs, and failure to report to probation. It concluded that White's violations were intentional and inexcusable and that the need for his confinement outweighed the policies favoring probation.

White challenges only the district court's conclusion on the third *Austin* factor; he argues that the district court abused its discretion by finding that the need for his confinement outweighs the policies that favor probation. This factor is satisfied if 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 he is confined; or (iii) it would unduly

depreciate the seriousness of the violation if probation were not revoked.” *Id.* at 607 (quotation omitted). Finding against the probationer on at least one of these factors ensures that district courts base their decision to revoke probation “on sound judgment and not just their will.” *Austin*, 295 N.W.2d at 250. The district court expressly found that White’s confinement is necessary to protect the public from further criminal activity.

White challenges the finding and contends that revocation is unwarranted because this episode was his first probation violation after 17 months of good behavior. A district court must keep in mind that “[t]he purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed.” *Id.* The record reflects that the district court specifically considered previous good behavior in relation to the violations. It properly commented on why White cannot be trusted on probation:

I can’t think of anything that would better demonstrate the fact that you’re not amenable to probation than what you did after you completed probably the most intensive chemical dependency treatment program that I’m aware of. Even with that, and even with all the support you got, even with the things that you accomplished, literally within days you’re back using drugs again.

We hold that the district court had ample basis to find that White’s violation after intensive treatment shows that he is not amenable to probation. White’s primary argument—that this is his first violation in 17 months—is misleading. Although White’s three probation violations did occur almost 17 months after his probation period began, they also occurred only days after White completed and was no longer being directly supervised in the residential drug-treatment program. The scrupulous program took up 15 of the 17 months of his now-claimed good behavior. Then, on his own for the first time

since he had received the stayed sentence, he almost immediately returned to essentially the same crime that earned him that sentence.

The district court also appropriately emphasized that White knew the consequences of not obeying his probationary conditions. During White's sentencing, his counsel acknowledged his "abysmal" record and urged that White knew that any slip "in the most minute regard" would usher him "directly to prison for a long time." The district court's decision to grant White probation demonstrated patience, leniency, and an abundance of hope. Its express hesitation, however, echoed by the acknowledgments of White's counsel, put White on plain notice that he had already received all the leniency he should expect.

We recognize that during probation White obtained a WorkForce Center certification of completion, earned his GED, and enrolled in a welding program. But the district court was not persuaded by these accomplishments that White is amenable to probation given that he so quickly returned to the crime for which he was placed on probation. It is hard to imagine a clearer set of circumstances indicating that he is unable or unwilling to follow the terms of his probation for his cocaine offense.

The district court did not abuse its discretion by revoking White's probation.

Affirmed