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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1192**

State of Minnesota,
Respondent,

vs.

Jon Peter Schonberg,
Appellant.

**Filed February 27, 2012
Affirmed
Cleary, Judge**

Chisago County District Court
File No. 13-K7-04-000370

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

Janet Reiter, Chisago County Attorney, Ryan M. Flynn, Assistant County Attorney,
Center City, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Young Middlebrook,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Cleary, Judge; and Collins,
Judge.*

* 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UNPUBLISHED OPINION

CLEARY, Judge

Appellant Jon Peter Schonberg challenges the district court's order revoking probation on his first-degree DWI conviction and executing his prison sentence. Because the evidence is sufficient to support the district court's findings, we affirm.

FACTS

In 2004, Schonberg pleaded guilty to first-degree DWI, in violation of Minn. Stat. §§ 169A.20, subd. 1(5), .24 (2002). The district court sentenced Schonberg to 48 months' imprisonment, stayed execution of the sentence, and placed Schonberg on probation for seven years. The terms of probation prohibited Schonberg from using or possessing alcohol, and required Schonberg to follow all rules of probation.

On March 7, 2011, as Schonberg was nearing the end of his probationary term, Schonberg used alcohol in violation of the terms of his probation. Consequently, the district court revoked Schonberg's probation, executed his 48-month prison sentence, and ordered five years of conditional release. This appeal followed.

DECISION

"The trial 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). The Minnesota Supreme Court has established a three-step analysis that a district court must follow before revoking probation. *Id.* at 250. The district court must (1) designate the specific condition of probation that has been violated; (2) find that the violation was intentional or

inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250. Schonberg argues that the district court abused its discretion in revoking his probation and executing his prison sentence because the evidence is insufficient to support the district court's findings on the second and third *Austin* factors.

A. First *Austin* factor

The district court found that Schonberg violated the terms of his probation by using alcohol. Schonberg does not argue on appeal that the district court erred in this regard.

B. Second *Austin* factor

Schonberg admitted on the record that one of the conditions of his probation prohibited him from using or possessing alcohol. He also admitted that he was required to follow the rules of probation and that one of the rules of probation required him to abstain from using or possessing alcohol. He then admitted that he consumed alcohol on March 7, 2011, in violation of those terms of probation. Accordingly, the evidence supports the district court's finding that Schonberg intentionally used alcohol in violation of the terms of his probation.

Schonberg argues that the evidence is insufficient to show that, by drinking, he intended to violate the terms of his probation. But the second *Austin* factor requires the district court to find that Schonberg intentionally committed the act that violated probation, not that he committed an act with the intent to violate probation. *See Austin*, 295 N.W.2d at 250 (requiring the *violation* to be intentional or inexcusable).

Schonberg also argues that the district court abused its discretion in finding an intentional violation because, although the court heard evidence that he was arrested and charged with domestic assault on March 6, 2011, he was never actually convicted of that crime and the court did not hear any evidence surrounding this incident. But the district court did not revoke Schonberg's probation because he was arrested and charged with domestic assault. The only probation violation the district court identified involved Schonberg's use of alcohol on March 7, 2011.

C. Third *Austin* factor

With regard to the third *Austin* factor, the district court “must balance the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *State v. Modtland*, 695 N.W.2d 602, 606–07 (Minn. 2005) (quotation omitted). The decision to revoke probation 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 (quotation omitted). The third factor is satisfied if any one of three policy goals is present: (1) “confinement is necessary to protect the public from further criminal activity by the offender,” (2) “the offender is in need of correctional treatment which can most effectively be provided if he is confined,” or (3) “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Id.* (quoting A.B.A. Standards for Criminal Justice, Probation § 5.1(a) (Approved Draft 1970)).

Schonberg argues that the district court abused its discretion in weighing the third *Austin* factor because he had “one relapse” and, due to the limited amount of time

remaining on his sentence, any needed treatment would be more effectively administered outside confinement. He also contends that continuing probation would not unduly depreciate the seriousness of the probation violation because using alcohol was “a mere technical violation.”

The district court found that Schonberg placed himself and society at risk by drinking alcohol. The court based its conclusion on Schonberg’s admitted alcohol addiction and his extensive criminal history involving alcohol, including three prior convictions for DWI. Accordingly, it was not an abuse of discretion for the district court to conclude that confinement was necessary to protect the public from further criminal activity by Schonberg, which satisfies the first A.B.A. policy goal. *See Austin*, 295 N.W.2d at 251. Moreover, the district court recognized that drinking alcohol was a serious violation of probation because the underlying conviction was for first-degree DWI. An important factor to the district court was Schonberg’s choice to continue using alcohol despite his criminal history involving alcohol and his knowledge of the consequences that he would face. Thus, it was within the district court’s discretion to conclude that not revoking probation would unduly depreciate the seriousness of the violation, which satisfies the third A.B.A. policy goal. *See Austin*, 295 N.W.2d at 251. These findings are sufficient to support the district court’s weighing of the third *Austin* factor and the court’s ultimate decision to revoke Schonberg’s probation. *See id.*

In sum, the district court did not abuse its discretion by revoking Schonberg's probation and executing his prison sentence.

Affirmed.