STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0384

State of Minnesota,
Respondent,

vs.

Tyrell Langston,
Appellant.

Filed October 29, 2012
Affirmed
Johnson, Chief Judge

Blue Earth County District Court
File No. 07-CR-08-468

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

Ross Arneson, Blue Earth County Attorney, Mankato, 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 Johnson, Chief Judge; Stauber, 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.

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

JOHNSON, Chief Judge

Tyrell Langston challenges the revocation of his probation on the ground that the evidence does not support the district court's finding that the need for confinement outweighs the policies favoring probation. We conclude that the district court did not abuse its discretion because the record supports its findings and, therefore, affirm.

FACTS

Tyrell Langston pleaded guilty in November 2008 to the first-degree sale of a controlled substance, cocaine, in violation of Minn. Stat. § 152.021.1(1) (2006). At his sentencing hearing, the state agreed to a downward departure as a condition of Langston's plea agreement. The district court sentenced Langston to 158 months of imprisonment but granted Langston's motion for a downward dispositional departure and stayed the sentence for 30 years. The district court also ordered Langston to serve 365 days in jail and imposed certain conditions of probation, including a prohibition on the use or possession of alcohol and other mood-altering chemicals. The district court emphasized at the sentencing hearing that a violation of the conditions of probation would result in his imprisonment.

In August 2010, Langston admitted to violating his probation by using cocaine and alcohol in July and August 2010 and by failing to provide his probation officer with an accurate address. The probation officer's report recommended that the district court

revoke Langston's probation and execute 134 months of his sentence. The probation report described Langston's promises to seek treatment as a "smoke screen," stating:

> [Langston] is inappropriate for community supervision. He is unwilling or unable to provide even the basic information regarding his whereabouts to his agent. . . . He has participated in probation in the past and failed, he has violated his current supervision. He has continued to use substances that affect his judgment and place the community at risk. . . . At the time of sentencing, [Langston] requested the downward depart based on a "renewed commitment to sobriety." Further, "is prepared to work closely with probation for a lengthy period of time." He has done neither. . . . [Langston] has not utilized probation as a resource, but a cat and mouse game. . . . [B]ased on [Langston's] prior criminal activity and involvement with chemical health issues, [Langston] is in need of treatment.

The probation officer noted that the seriousness of Langston's violation would be unduly depreciated if probation were not revoked. The probation violation report was supplemented by a letter from the probation officer stating that, in February 2010, Langston had been placed on a heightened level of testing because of a suspicion of "partying behavior" and also because the probation officer suspected that Langston had tampered with his urine samples. The state agreed with the recommendations in the probation violation report. In September 2010, the district court revoked Langston's probation and executed 134 months of his prison sentence.

Langston appealed, arguing that the district court did not make adequate findings of fact, as required by *State v. Austin*, 295 N.W.2d 246 (Minn. 1980), and *State v. Modtland*, 695 N.W.2d 602 (Minn. 2005). This court reversed and remanded for

additional findings. *State v. Langston*, No. A10-2260, 2011 WL 2750727, at *3 (Minn. App. July 18, 2011).

On remand, the district court held another dispositional hearing in November 2011. The probation officer stated to the district court that Langston was "using the same drug [that] put [him] into this . . . situation in the first place" and that he "was unable to utilize the resources offered to him while on probation." The district court reaffirmed its earlier decision to execute 134 months of the sentence. The district court made the following new findings:

> 1. The Defendant is in need of correctional treatment which can most effectively be provided if he is confined.
>
> 2. It would unduly depreciate the seriousness of the violation which occurred in this matter if probation were not revoked.
>
> 3. The Defendant is not amenable to probation.
>
> 4. Based upon all the Findings previously made in this matter and those incorporated in this Order, the need for confinement outweighs the policies favoring probation regarding this offender, Tyrell Langston.

In addition, the district court added the following explanation in its supporting memorandum:

> The probation officer in this matter made it clear in September of 2010 and reiterated that position at the recent hearing that Mr. Langston is not amenable to probation. Mr. Langston needs treatment for his cocaine usage and that treatment can be provided within the confines of the Department of Corrections.

The district court further stated, "[I]t would unduly depreciate the seriousness of the violation [if] probation were not revoked. This was the position of the prosecution and probation at the time the original violation hearing was held and was adopted by this Court." The district court explained that "[a]lthough Mr. Langston claims that he is a different person now and would absolutely follow any and all probation conditions were he to be reinstated in that status, his claims are not deemed credible by the Probation Department, County Attorney or this Court."

Langston appeals.

D E C I S I O N

Langston argues that the district court erred in revoking his probation. In this appeal, Langston does *not* argue that the district court erred by not making adequate findings of fact. Rather, he argues that the district court erred because the evidence does not support the district court's finding that the need for confinement outweighs the policies favoring probation.

The supreme court has prescribed a three-step analysis for deciding whether to revoke probation. A revocation is proper only if a district court (1) designates the specific condition of probation that has been violated, (2) finds that the violation was intentional or inexcusable, and (3) finds that the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250; *see also Modtland*, 695 N.W.2d at 606. A district court must make findings in writing or make oral findings on the record. *Id.* at 608 n.4. "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." *Austin*, 295 N.W.2d at 249-50.

This appeal focuses on the third *Austin* factor. Three sub-factors are relevant to the third *Austin* factor: a district court should consider whether (1) confinement is needed to "'protect the public from further criminal activity by the offender,'" (2) confinement is necessary to provide treatment, or (3) a further stay of the sentence "'would unduly depreciate the seriousness of the violation.'" *Id.* at 251 (quoting A.B.A. Standards for Criminal Justice, Probation § 5.1(a) (Approved Draft 1970)). On remand, the district court relied on the second and third sub-factors as the bases for determining that the need for confinement outweighs the policies favoring probation.

The record supports the district court's findings concerning the second sub-factor. Langston's probation officer reported that Langston had not followed through with his treatment programs and had failed to remain sober. The probation officer's visit to Langston's home in February 2010 revealed numerous alcohol containers. The probation officer also was concerned that Langston was tampering with his urine samples. The probation officer determined that Langston "needs treatment for his cocaine usage and that treatment can be provided within the confines of the Department of Corrections." Although Langston contends that he can make progress on his sobriety outside of prison, the district court found that "his claims are not deemed credible by the Probation Department, County Attorney or this Court." *Id.*

The record also supports the district court's findings concerning the third sub-factor. Langston used cocaine while he was on probation for selling cocaine. The district

court reasonably determined that the continuation of Langston's probation would unduly depreciate the seriousness of the violation.

In sum, the evidence in the record supports the district court's findings on the third *Austin* factor. Thus, the district court did not abuse its discretion when it revoked Langston's probation.

Affirmed.