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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0479**

State of Minnesota,  
Respondent,

vs.

Garrett Alexander Vanderbilt,  
Appellant.

**Filed January 7, 2013  
Affirmed  
Collins, Judge\***

Sherburne County District Court  
File No. 71-CR-09-1303

David W. Merchant, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Kathleen Heaney, Sherburne County Attorney, Elk River, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Worke, 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## **UNPUBLISHED OPINION**

**COLLINS**, Judge

Appellant Garrett Vanderbilt challenges the district court's revocation of his probation, arguing that the evidence does not establish that the need for confinement outweighs the policies favoring probation. We affirm.

### **FACTS**

Garrett Vanderbilt pleaded guilty to third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(b) (2008), and on May 4, 2011, he received a presumptive stayed sentence of 48-months' imprisonment and 15-years' probation. Conditions of probation required Vanderbilt to obtain a psychosexual evaluation "as soon as possible" and maintain contact with probation as directed. The district court emphasized the importance of the psychosexual evaluation, telling Vanderbilt that "if you don't . . . get this done, one of the options I have is to put you in jail so that I can have you evaluated . . . I want to warn you how serious I am about this."

In June, Vanderbilt was informed how to schedule the psychosexual evaluation and apply for financial assistance to cover the cost. Five times thereafter, Vanderbilt scheduled and canceled appointments for his evaluation. Vanderbilt claimed inability to afford the evaluation. In October, Vanderbilt requested and received additional information on how to obtain the evaluation. By November, Vanderbilt still had not complied and obtained the evaluation. On November 4, Vanderbilt was directed to contact his probation officer, and as of November 18 he had not done so.

On December 6, acting on the November 18 probation report that Vanderbilt had not obtained the psychosexual evaluation and was an “untreated sex offender who is now refusing to maintain contact with [probation],” the district court ordered Vanderbilt’s arrest. At the revocation hearing on December 16, 2011, Vanderbilt admitted the violations, acknowledged that he “could have tried harder,” and admitted that financial inability was not a true reason for his failure to obtain the evaluation. The state argued for execution of the sentence, citing Vanderbilt’s “stalling technique[s]” in spite of the district court’s warning that obtaining the psychosexual evaluation was mandatory. Likewise, in light of the district court’s previous emphasis on the importance of the evaluation and the nature of the violations, probation recommended execution of the prison sentence. Vanderbilt requested more time to obtain the evaluation, and argued that execution of the prison sentence was only appropriate if he again failed to comply. Describing Vanderbilt as an untreated sex offender who had “evaded, defied, [and] failed to follow through” on the requirements of probation, the district court revoked probation and ordered execution of the 48-month sentence. This appeal followed.

## **DECISION**

Before revoking probation, a district court must apply the three-factor analysis set forth in *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). *See also State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). The 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 the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250. Whether a district court has made the required findings is a

question of law reviewed de novo. *Modtland*, 695 N.W.2d at 605. A district court has broad discretion to determine whether sufficient evidence exists to revoke probation and reversal is appropriate only if there has been a clear abuse of discretion. *Austin*, 295 N.W.2d at 249-50. Vanderbilt challenges only the finding required by the third *Austin* factor.

Revocation is a last resort utilized when treatment has failed, and “policy considerations may require that probation not be revoked even though the facts may allow it.” *Id.* at 250. When applying an *Austin* analysis, a district court cannot simply state general reasons for revocation. *Modtland*, 695 N.W.2d at 608. Rather, it must convey substantive reasons for revocation based on the evidence, sufficient to create a fact-specific record. *Id.* Revocation cannot be “a reflexive reaction” to technical violations but must be reserved to when an offender’s behavior demonstrates that he or she cannot be counted on to avoid antisocial activity.<sup>1</sup> *Austin*, 295 N.W.2d at 251.

Vanderbilt contends that in revoking his probation the district court failed to properly weigh the need for confinement against the policy preference for probation. *See id.* at 250. In *Austin*, the supreme court referenced three elements to be considered in determining when confinement is warranted:

- (i) [C]onfinement 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

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<sup>1</sup> Written findings are not required. *Modtland*, 695 N.W.2d at 608 n. 4. A district court may state its findings on the record so long as the transcript is sufficient to permit review. *Id.*

(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

*Id.* at 251. Consideration of these elements promotes the district court's exercise of "sound judgment" and ensures that "both the probationer's and the public's needs are served." *Id.* The third *Austin* requirement is satisfied if any of the three elements applies. *Id.*

Vanderbilt argues that the policies favoring probation outweigh the need for his confinement. We disagree. The district court found two of the three elements warranting confinement to apply. First, the district court noted Vanderbilt's continued defiance of the requirement that he obtain the psychosexual evaluation. Completing the evaluation was a primary concern of the district court when it granted Vanderbilt a stayed sentence and probation. At the revocation hearing, the district court stated, "There is nothing that you are telling me . . . at this point in time which indicates to me that you are willing to participate in treatment." On that basis, the district court concluded that Vanderbilt was a "danger to public safety" as an "untreated sex offender who has been totally unwilling to meaningfully pursue and participate in treatment." Second, the district court determined that not revoking probation would "undervalue the nature of [the] violation."

Thus, amply supported by the record, the district court found two elements warranting confinement while only one was required. The district court's findings reflect sound judgment, and the revocation of Vanderbilt's probation, leading to the execution of his sentence, was not a reflexive response to technical violations. Vanderbilt's persistent unwillingness to obtain the required psychosexual evaluation, and instead remain

untreated, demonstrates that he could not be counted on to avoid antisocial activity. We conclude that the district court properly determined that the need for Vanderbilt's confinement outweighs the policies favoring probation.

**Affirmed.**