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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0976**

Christine Joy Engen, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 6, 2013
Reversed and remanded
Klaphake, Judge***

Scott County District Court
File No. 70-CR-07-28625

David W. Merchant, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Kirk, Judge; and Klaphake, Judge.

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Christine Joy Engen challenges the district court's denial of her postconviction motion to be reinstated on probation. Appellant argues that the district court revoked her probation without making the findings required by *State v. Austin*, 295 N.W.2d 246 (Minn. 1980). Because the district court failed to make the requisite *Austin* finding that the policies favoring continued probation are outweighed by the need for confinement, we reverse and remand.

DECISION

The district court has broad discretion to revoke probation, and we only reverse if there is a clear abuse of that discretion. *Austin*, 295 N.W.2d at 249-50. Whether the district court made the required findings is a question of law, which we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

When a defendant violates the conditions of probation on a stayed sentence, the district court may revoke probation and execute a previously stayed sentence. Minn. Stat. § 609.14, subds. 1, 3 (2010). But before revoking a defendant's probation and executing 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." *Austin*, 295 N.W.2d at 250. This three-factor analysis is not a formality and "courts must seek to convey their substantive reasons for revocation and the evidence relied upon." *Modtland*, 695 N.W.2d at 608. Revocation of probation cannot be "a reflexive reaction" to an

accumulation of probation 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). Revocation is only as a last resort after treatment or intermediate sanctions have failed. *Id.* at 250.

Here, appellant was placed on probation with a stayed 110-month sentence on December 16, 2008, after pleading guilty to first-degree sale of a controlled substance. Appellant’s first probation violation hearing was held on June 9, 2011. The district court reinstated appellant on probation, but warned that “[t]his will be one of zero tolerance” and that after the next probation violation “we’ll execute the sentence. . . .”

At her second probation revocation hearing on August 26, 2011, appellant admitted that she missed a random drug test, claiming she did not receive notice of it due to a broken phone. She also admitted missing another random drug test when she was prohibited from taking the test because she was late after her ride was tardy. Finally, appellant admitted that she had missed a rule 25 assessment because she had overslept. The district court accepted appellant’s admissions but not her explanations, revoked the stayed sentence, and ordered her 110-month prison sentence executed.

Appellant argues only that the district court failed to make the required findings under the third *Austin* factor that the policies favoring probation were outweighed by the need for confinement. We agree. The third *Austin* 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 251 (quotation omitted). Here, the district court made no clear finding as to any of the three *Austin* subfactors.

First, the district court made no finding that confinement was necessary to protect the public from further criminal activity. *See id.* From the record before us, it seems unlikely that such a finding could have been made, because public safety is not involved in appellant's failure to take the drug tests or the rule 25 evaluation.

Second, the district court made no finding that appellant is in need of correctional treatment which can most effectively be provided if she is confined. *See id.* The closest finding the district court made was the following: “[p]erhaps when we get you into incarceration treatment programs that are offered [they] will be sufficient to provide you with the necessary assistance that you need for your chemical problem . . .” This *Austin* subfactor requires the court to specifically consider whether the offender is in need of correctional treatment which can *most effectively* be provided if she is confined. *Id.* It is not enough to find, as the district court did, that treatment in confinement is “perhaps” sufficient.

Finally, the district court failed to properly consider if continued probation would unduly depreciate the seriousness of the violations. *See id.* The district court never considered whether a failure to incarcerate would depreciate the seriousness of the *probation violations*. Instead, the district court stated that “if I don’t follow-through on

this it just does away with the seriousness of the *offense* and does away with the entire integrity of the system.” (Emphasis added.) The district court must specifically find, and the evidence must support, that a failure to incarcerate would depreciate the seriousness of the *probation violation*, rather than the seriousness of the offense. *Id.* Considering only the seriousness of the original offense, as the district court did here, is not enough to satisfy *Austin*. Instead, the district court is required to consider and explain why further probation would depreciate the appellant’s specific violations of her probation before revoking probation.

While it appears that the district court was understandably frustrated with appellant’s lack of progress while on probation, *Austin* does not allow the revocation of her probation and execution of her sentence unless each of its three factors are considered and met. Here, the district court abused its discretion, requiring reversal and remand.

Reversed and remanded.