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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1320**

State of Minnesota,
Respondent,

vs.

Brian Edward Harper,
Appellant.

**Filed May 4, 2020
Reversed and remanded
Cochran, Judge**

Ramsey County District Court
File No. 62-CR-17-690

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Ross, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

In this appeal from the district court's order revoking probation, appellant Brian
Edward Harper argues that the district court failed to make adequate findings to support

the revocation of his probation. Because the district court's findings are inadequate, we reverse and remand for further findings.

FACTS

In January 2017, the state charged Harper with two counts of burglary. Harper pleaded guilty to first-degree burglary of an occupied dwelling. He moved for a downward dispositional departure, which the district court granted. The district court sentenced Harper to 45 months in prison, stayed execution of the sentence for five years, placed Harper on probation, and ordered Harper to serve 180 days in local custody.

In September 2018, following a conviction of misdemeanor assault, Harper admitted to violating his probation. At that time, the district court added additional conditions to his probation and gave him credit for 58 days served.

In March 2019, a second probation-violation report was filed. The report alleged that: (1) Harper used cocaine, marijuana, and alcohol; (2) Harper failed to comply with random drug testing on five occasions; (3) Harper failed to comply with a chemical-health assessment and complete treatment programming; (4) Harper failed to attend two support group meetings; and (5) Harper failed to report for two scheduled appointments with his probation officer.¹

At the probation-revocation hearing, Harper admitted to the five probation violations. The county attorney, the probation officer, and Harper's attorney presented

¹ After the probation-violation report was filed and before the probation-revocation hearing, Harper was arrested for driving while intoxicated and gross misdemeanor criminal damage to property. However, these were not bases for his probation-revocation hearing.

arguments. At the end of the hearing, the district court judge orally revoked Harper's probation and executed his sentence. This district court explained: "I am finding, sir, that the policies favoring probation in the community are outweighed by the need for confinement in your case." The district court did not issue any written findings to supplement its ruling at the hearing.

Harper appeals.

DECISION

Harper argues that the district court erred when it failed to make adequate findings on the factors needed to support revocation of his probation. In *State v. Austin*, the supreme court held that the district court must make three findings before revoking probation: "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." 295 N.W.2d 246, 250 (Minn. 1980). These findings are commonly known as the *Austin* factors.

In *State v. Modtland*, the supreme court reaffirmed its "core" holding in *Austin* regarding the findings necessary for probation revocation. 695 N.W.2d 602, 606 (Minn. 2005). The court further held that when making the findings on the three *Austin* factors, district courts "must seek to convey their substantive reasons for revocation and the evidence relied upon." *Id.* at 608. In other words, the requirements of *Austin* are not satisfied by mere recitation of the three factors or by offering only general, nonspecific reasons for revocation. *Id.*

Harper contends that the district court’s findings on the second and third *Austin* factors are inadequate. A district 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. But whether the district court made the findings required for revocation of probation is a question of law, which we review de novo. *Modtland*, 695 N.W.2d at 605.

Harper first argues that the district court failed to address the second *Austin* factor because it did not use the words “intentional or inexcusable” when it concluded that Harper violated the conditions of his probations. Although it is preferable for the district court to explicitly use these words, leaving them out does not automatically invalidate a probation revocation. See, e.g., *State v. Wolhart*, No. A17-0629, 2017 WL 5077565, at *2 (Minn. App. Nov. 6, 2017), review denied (Minn. Jan. 16, 2018) (noting that “it is preferable that the district courts make explicit findings for each *Austin–Modtland* factor” but upholding the district court’s revocation of probation where the record revealed that the findings made by the district court “appropriately addressed the requirements of *Austin–Modtland*”).² But, if the district court does not expressly use the words “intentional or inexcusable,” the district court must still make specific findings indicating that one or more probation violations were intentional or inexcusable. See *Austin*, 295 N.W.2d at 249-50; *Modtland*, 695 N.W.2d at 606.

² Unpublished opinions are cited only for their persuasive value.

At the probation-revocation hearing, Harper admitted all five probation violations. The district court, however, only inquired into one of the violations: missing random drug-testing dates. And with regard to that violation, the district court's inquiry was very limited. The district court only asked Harper if he was incarcerated on the drug-testing dates, and Harper replied "No." The district court did not inquire further about Harper's reasons for missing those test dates to determine if this violation was intentional or inexcusable. And, the district court did not inquire about the reasons for his other four violations: the positive drug tests, termination from substance abuse programming, not attending the support group, and missing two appointments with his probation officer. Nor did the district court make any oral or written findings regarding whether the probation violations were intentional or inexcusable.

The district court's analysis into the intentionality and inexcusability of Harper's probation violations began and ended with asking Harper if he was incarcerated when he missed his random drug testing dates. Not only did the district court not use the specific words intentional or inexcusable, but it did not make any findings regarding whether the violations were intentional or inexcusable. Therefore, the district court failed to make the necessary findings on the second *Austin* factor.

Harper next argues that the district court only briefly mentioned the third *Austin* factor, and that this was "wholly insufficient" to support the revocation of his probation. When analyzing the third *Austin* factor, a district court must consider that the purpose of probation is rehabilitation, and revocation should be a last resort. *Modtland*, 695 N.W.2d

at 606. The need for confinement outweighs the policies favoring probation if at least one of three subfactors is met:

- (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.

Austin, 295 N.W.2d at 251 (quotation omitted).

The district court did not make any findings on the record as to the reasons why it felt that the policies favoring probation were outweighed by the need for confinement in Harper's case. Instead it simply stated, "I am finding, sir, that the policies favoring probation in the community are outweighed by the need for confinement in your case." The district court did not make specific findings regarding the need to confine Harper, nor did it explicitly consider any of the three subfactors. The district court did not weigh the need for confinement against the policies that favor probation. Instead it made a blanket recitation of the third *Austin* factor. Therefore, the district court failed to adequately address the third *Austin* factor.

In sum, the district court failed to convey the "substantive reasons for revocation and the evidence relied upon" as required by *Modtland*. 695 N.W.2d at 608. This court could certainly look through the transcript and record and pick out reasoning why Harper's actions were intentional or inexcusable and why the policies favoring probation might be outweighed by the need for confinement. But that is not the role of this court in determining whether the district court met the requirements of *Austin*. *Modtland*, 695 N.W.2d at 608

(“[I]t is not the role of appellate courts to scour the record to determine if sufficient evidence exists to support the district court’s revocation.”).

Because the district court failed to make adequate findings on the second and third *Austin* factors, we reverse and remand for further findings.

Reversed and remanded.