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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0448**

State of Minnesota,
Respondent,

vs.

Shaniese Latrice Davis,
Appellant.

**Filed February 8, 2021
Affirmed
Cochran, Judge
Dissenting, Jesson, Judge**

Clay County District Court
File No. 14-CR-18-2779

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

Brian Melton, Clay County Attorney, Pamela L. Foss, Assistant County Attorney,
Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer L. Lauermann, Assistant
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Considered and decided by Cochran, Presiding Judge; Jesson, Judge; and
Slieter, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this direct appeal, appellant challenges the district court's revocation of her probation. Because the district court did not clearly abuse its discretion by revoking appellant's probation, we affirm.

FACTS

In July 2018, respondent State of Minnesota charged appellant Shanieese Latrice Davis with first-degree criminal sexual conduct following a report that she had sexual contact with a twelve-year-old boy. Davis pleaded guilty to second-degree criminal sexual conduct, and she admitted to touching the twelve-year-old boy's penis with sexual intent. Prior to sentencing, Davis completed a sex-offender evaluation and the Department of Corrections prepared a presentence-investigation report.

The psychologist who conducted Davis's sex-offender evaluation recommended that Davis complete sex-offender treatment. The psychologist could not formally assign Davis a risk level with respect to her chance of reoffending because the relevant actuarial risk-assessment tools were calibrated for males only. But the psychologist opined that it was reasonable to rate Davis as low risk to sexually reoffend.

During her presentence investigation, Davis reported severe problems with alcohol. She reported that she began drinking daily to the point of intoxication in 2014, following the birth of a stillborn child. Davis completed a chemical-dependency evaluation close in time to the presentence investigation, and that evaluation recommended that she attend inpatient chemical-dependency treatment.

In February 2019, the district court sentenced Davis to serve 140 months in prison but stayed execution of the sentence and placed Davis on supervised probation for 25 years, in accordance with the parties' plea agreement. Among other probation conditions, the district court required Davis to follow the recommendations of her sex-offender and chemical-dependency evaluations. The district court also prohibited Davis from using alcohol and nonprescribed mood-altering drugs.

In early November 2019, Davis's probation officer filed a probation-violation report alleging that Davis violated the conditions of her probation by (1) failing to abstain from using alcohol and (2) failing to follow the recommendations of her chemical-dependency evaluation. Specifically, the report alleged that Davis started chemical-dependency treatment on June 22, 2019, but was discharged in early July 2019 for nonattendance after she "chose to leave." The report also alleged that Davis did not reenter chemical-dependency treatment despite her probation agent's "directive to get back into treatment due to her chronic alcohol use." The report further alleged that Davis used alcohol while on probation, both before starting treatment and after being discharged. In the comments section of the report, Davis's probation officer concluded that Davis's "continued alcohol use is of concern to this [a]gent because it places [her] in her sexual assault cycle, as she was extremely intoxicated when she committed the sexual assault of the minor child in this file." The report recommended that Davis's probation be revoked.

At the probation hearing, Davis admitted that she violated her probation by failing to abstain from using alcohol and by failing to follow the recommendations of her chemical-dependency assessment. Davis admitted to drinking alcohol several times, both

before and after being discharged from treatment as alleged. Davis also admitted that she was discharged from treatment because she left the treatment facility. She further testified that she failed to get back into treatment since being discharged. She indicated that she understood that she “was supposed to start back, but . . . did not.” Based on Davis’s testimony, the district court found that she “provided admissions to both probation violations.”

The district court then heard from the parties and Davis’s probation officer regarding the appropriate disposition. The state requested that the district court revoke Davis’s probation based on the court’s finding that Davis had violated conditions of her probation. The state noted that Davis used alcohol on a number of occasions while on probation and argued that Davis poses a significant risk to public safety when she is drinking. The state also maintained that Davis is no longer amenable to probation. It emphasized that Davis had been offered a variety of support services, both through her probation officer and social services agencies, but has continued to use alcohol and has not completed treatment.

Davis’s probation officer also expressed concern about Davis’s continued use of alcohol. He emphasized that her use of alcohol “could place her back in her sexual assault cycle.” In addition, her probation officer reported to the district court that police reports reflect that Davis was the victim of multiple domestic assaults while she was on probation and that she was intoxicated at the time of the first assault. Her probation officer worried that Davis might be fearful of reporting incidents of abuse if the abuse occurs while she is intoxicated and on probation.

Davis's attorney requested that Davis be allowed to remain on probation and attend inpatient treatment. Her attorney argued that Davis abided by all of the conditions of her probation except two—abstaining from alcohol use and completing treatment. But, in response to later questioning from the district court, Davis's attorney acknowledged that Davis also had not completed another condition of her probation—sex-offender treatment. He explained that Davis could not start sex-offender treatment until she successfully completed chemical-dependency treatment. Davis's attorney also told the district court that Davis had been unable to attend chemical-dependency treatment for five weeks (from early July until sometime in early to mid-August) because she was in the hospital recovering from injuries sustained as a result of a domestic assault that occurred the day before she was discharged from treatment. Davis's attorney argued that her alcohol dependency could best be addressed in the community and noted that an inpatient treatment bed was available for her.

The district court then heard from Davis. The district court asked Davis to explain why she had not participated in any treatment between July and November 2019—the period between her discharge from treatment and when the probation-violation report was filed. She informed the court that she had “a lot of health problems” and was “in and out of the hospital.” She also explained that she was “homeless and staying with [her] abuser” because she “had nowhere [else] to go.” She further testified that she faced difficulties because of the injuries that she experienced from the abuse. And she told the district court that she was scheduled to reenter treatment on three different occasions, but “just never actually went back.”

After hearing from Davis, the district court stated that it was “faced with a really difficult decision.” The district court judge, who was not the sentencing judge, explained, “I have read anything that I have access to, including the pre-sentence investigation, the sentencing worksheet, the sex offender evaluation . . . , the probation violation [report], and the original [c]omplaint.” While acknowledging that this was Davis’s first probation violation, the district court judge noted that “it is a very, very serious violation . . . because the allegation is consumption of alcohol and the underlying case really stems as a result of being under the influence of . . . a very high amount of alcohol.” The district court judge further stated that “what is most compelling to the Court is that the violations happened back in June and July, and somehow, the ship did not get turned around” in the following months. The district court judge emphasized: “I understand—there were a lot of circumstances going on. But the ship did not get turned around.” The district court judge reasoned that Davis had “a good chunk of time” between July and November to get back into treatment but “[u]nfortunately that did not happen.” As a result, the district court judge told Davis: “The Court has serious public safety concerns about you and having access to alcohol, should you not be incarcerated.”

Ultimately, the district court found that Davis’s probation violations were “intentional and inexcusable, and that the need for confinement outweighs policy favoring probation.” The district court determined that “confinement is necessary to protect the public from further criminal activity and that Ms. Davis is in need of correctional treatment that can best be offered when confined.” The district court then executed Davis’s 140-month sentence. This appeal follows.

DECISION

When a probationer admits violating one or more conditions of probation, a district court may continue the probationer on probation or revoke probation and execute the underlying sentence. Minn. R. Crim. P. 27.04, subd. 3(2)(b)(iv)-(v). Before it revokes probation and executes the underlying sentence, the district court must specifically find: (1) that the probationer violated a specific condition or conditions of his or her probation, (2) that the violation was intentional or inexcusable, and (3) that the need for confinement outweighs the policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). These findings are commonly known as the *Austin* factors. In making these findings, district courts “must seek to convey their substantive reasons for revocation and the evidence relied upon.” *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). The district court’s 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).

District courts have “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.” *Id.* at 249-50. A district court abuses its discretion when its “decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012).

Davis challenges the district court’s findings on all three *Austin* factors. Davis argues that the district court abused its discretion by (1) finding that she violated her

chemical-dependency-treatment condition, (2) finding that her violation of that condition was intentional and inexcusable, and (3) finding that the need for confinement outweighed the policies favoring probation. We address each argument in turn.

I. The district court did not abuse its discretion when it found that Davis violated conditions of probation.

To satisfy the first *Austin* factor, the district court must “designate the specific condition or conditions” that the probationer violated. *Austin*, 295 N.W.2d at 250. At the probation-violation hearing, Davis admitted to violating two conditions of her probation: (1) abstaining from using alcohol and (2) following the recommendations of her chemical-dependency evaluation. Based on her testimony, the district court found that Davis violated both conditions. On appeal, Davis does not challenge the district court’s finding that she violated the first of these two conditions—the condition prohibiting the use of alcohol. Rather, she argues that the district court abused its discretion when it concluded that she violated the condition that she follow the recommendations of her chemical-dependency evaluation. We conclude that the district court’s finding that Davis violated both conditions is supported by the record and meets the requirements of *Austin*.

We first note that the district court’s finding that Davis violated the “no alcohol” condition of her probation is sufficient by itself to satisfy the first *Austin* factor. The district court need only find that one condition of probation was violated to support its decision to revoke probation. *Id.* (requiring the district court to “designate the specific *condition* or conditions that were violated” (emphasis added)). And, regardless, Davis’s arguments as to why she did not violate her chemical-dependency-treatment condition miss the mark.

Davis argues that the district court abused its discretion when it found that she violated this condition because the district court did not impose a specific deadline for complying with the recommendations of her chemical-dependency evaluation and she had over 20 years remaining on probation. As an initial matter, we note that Davis expressly admitted at the probation violation hearing that she violated this condition by failing to complete chemical-dependency treatment. And she specifically acknowledged that she left the treatment facility and “was supposed to start back, but did not start back” after she was discharged. Davis’s testimony supports the district court’s determination that Davis violated this condition.

In support of her argument, Davis cites two unpublished cases in which this court found that the probationers did not violate their conditions of probation by failing to complete a treatment obligation because the probationers had sufficient time remaining in their probationary period to complete treatment. *State v. Bruce*, No. A07-600, 2008 WL 2102893, at *2 (Minn. App. May 13, 2008); *State v. Davisson*, No. C3-98-1064, 1998 WL 747135, at *2 (Minn. App. Oct. 27, 1998). Unpublished cases are not precedential. *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004); *see also* Minn. R. Civ. App. P. 136.01, subd. 1(c) (providing that nonprecedential opinions are not binding but may be cited as persuasive authority). And, in any event, these nonprecedential cases are not persuasive here. In *Davisson*, the probationer was in the process of complying with the requirement that he undergo a psychological evaluation when the state alleged that he had violated his probation. 1998 WL 747135, at *1. And in *Bruce*, the probationer was terminated from one program because he was unable to pay,

but the record reflected that he had contacted three other programs about enrolling in treatment. 2008 WL 2102893, at *2. Neither case persuades us that Davis did not violate her probation because, in this case, Davis was discharged for nonattendance and failed to return.

We have previously upheld a district court's decision to revoke probation because of a probationer's failure to complete treatment, notwithstanding time remaining in the probationary period. *State v. Moot*, 398 N.W.2d 21, 24 (Minn. App. 1986), *review denied* (Minn. Feb. 13, 1987); *see also State v. Hemmings*, 371 N.W.2d 44, 47 (Minn. App. 1985) (upholding revocation of probation for failure to complete sex-offender treatment despite years remaining in the probationary period because the record showed that appellant was unamenable to probation). In *Moot*, the appellant completed five-and-a-half months of a six-month chemical-dependency-treatment program, but then accepted a full-time job that interfered with his treatment and caused the program to terminate him. 398 N.W.2d at 23. The district court found that Moot's actions constituted a refusal to comply with the program and revoked his probation on that basis. *Id.* at 24.

Here, the district court did not explicitly find that Davis was unamenable to probation. But the district court found that the violation was "very serious," noted that Davis had time to reenter treatment but "[u]nfortunately, that did not happen." This caused the district court to have "serious public safety concerns." Davis's failure to reenter treatment during the four months between her discharge and the filing of the probation violation report supports the district court's conclusion that Davis violated the

chemical-dependency-treatment condition of her probation. The district court did not abuse its discretion in its findings on the first *Austin* factor.

II. The district court did not abuse its discretion when it found that Davis’s violations were intentional and inexcusable.

The second *Austin* factor requires a finding that “the violation was intentional or inexcusable.” *Austin*, 295 N.W.2d at 250. The district court found that both of Davis’s probation violations “were intentional and inexcusable.” On appeal, Davis does not dispute the district court’s finding that she intentionally and inexcusably violated her probation by using alcohol. Rather, she argues that the district court abused its discretion when it concluded that she intentionally and inexcusably failed to comply with the requirement that she follow the recommendations of her chemical-dependency evaluation. We do not find her argument to be persuasive.

Davis argues that the district court abused its discretion by finding that her violation of the treatment condition was intentional and inexcusable because the violation stemmed from Davis being the victim of domestic abuse. We acknowledge that the record reflects that Davis was, unfortunately, the victim of domestic abuse in early June and again in early July, around the time that Davis left the treatment facility. And, according to her attorney, the July assault caused her to be hospitalized for five weeks. But Davis was released from the hospital in early to mid-August and did not reenter treatment at any point prior to November 2019, when the probation violation report was filed. Davis cites no case that would support the proposition that a district court abuses its discretion by finding that a

violation was intentional and inexcusable where a probationer failed to return to treatment months after a serious assault.

To support revocation of probation under the second *Austin* factor, the district court need only find that the violation was intentional *or* inexcusable. *Austin*, 295 N.W.2d at 250. In *State v. Losh*, the appellant argued that the district court abused its discretion by revoking Losh's probation because her violation was unintentional. 694 N.W.2d 98, 101 (Minn. App. 2005), *aff'd on other grounds* 721 N.W.2d 886 (Minn. 2006). This court affirmed, finding that the district court acted within its discretion by determining that Losh's excuse was not credible and, thus, Losh's violation was intentional. *Id.* at 102. And this court has repeatedly affirmed district court decisions concluding that probationers have intentionally or inexcusably violated their probation when they are terminated from required treatment programs. *See, e.g., Moot*, 398 N.W.2d at 24; *Hemmings*, 371 N.W.2d at 47.

Here, the district court considered Davis's explanations but concluded that the "violations were intentional and inexcusable." The court acknowledged that "there were a lot of circumstances going on" at the time of the violations in June and July but expressed concern that "somehow, the ship did not get turned around" in the intervening months before the filing of the probation-violation report in November. The district court implicitly found that Davis's excuse for not reentering treatment was not credible because, even if her injuries excused her failure to return to treatment until she was released from the hospital in August, Davis presented no reason why she was unable to return to treatment after she recovered. Because the district court's role is to judge the credibility of witnesses,

we defer to the district court's credibility determination. *Moot*, 398 N.W.2d at 23. The district court's finding that Davis's violation was intentional and inexcusable is thus supported by the facts in the record.

III. The district court acted within its discretion when it concluded that the need for confinement outweighed the policies favoring probation.

Once a district court finds an intentional or inexcusable violation of a specific probationary condition, it must “determine whether the need for confinement outweighs the policies favoring probation.” *Modtland*, 695 N.W.2d at 606. When evaluating whether the need for confinement outweighs the policies favoring probation, the district court must “balance the probationer's interest in freedom and the state's interest in insuring [her] rehabilitation and the public safety.” *Id.* at 606-07 (quotation omitted). In balancing these interests, the district court considers whether “(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 [s]he is confined; or (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Id.* at 607 (quoting *Austin*, 295 N.W.2d at 251). Revocation is justified where the district court finds that even just one subfactor is met. *See id.*; *see also Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008) (explaining that “we normally interpret the conjunction ‘or’ as disjunctive rather than conjunctive”). Here, the district court found that the first two subfactors supported revocation. The record supports this conclusion.

With respect to the first subfactor, the district court concluded that confinement was necessary to protect the public from further criminal activity by Davis. While

acknowledging that “this is a first violation of probation,” the district court stated that the violation was “very serious . . . because the allegation is the consumption of alcohol and the underlying case really stems as a result of being under the influence of alcohol—a very high amount of alcohol.” The district court explained that it had “serious public safety concerns about [Davis] . . . having access to alcohol, should [she] not be incarcerated.” The district court’s concerns for public safety are buttressed by the views of both the psychologist who conducted Davis’s sex-offender evaluation and her probation officer. The psychologist specifically recommended that Davis abstain from alcohol or other drug use because they can disinhibit behavior and because Davis was intoxicated at the time of the offense. Similarly, Davis’s probation officer stated in his report that revocation was justified because Davis’s continued use of alcohol put the community at risk for a reoffense. And, while the psychologist opined that Davis is low risk for reoffending, low risk does not mean no risk. Further, the district court’s public safety concerns are justified given that Davis was convicted of criminal sexual conduct against a young victim and has not completed either chemical-dependency treatment or sex-offender treatment yet continues to use alcohol. The record thus supports the district court’s finding that confinement is necessary to protect the public.

With respect to the second subfactor, the district court concluded that Davis was in need of correctional treatment that could most effectively be provided if she were confined. In reaching this conclusion, the district court found that “given the history of alcohol consumption here, and the chemical dependency, and the failed attempt at treatment, it is apparent to the Court that significant treatment is needed, and it is likely that that kind of

treatment can be offered in a correctional setting.” And, as noted above, Davis has not yet completed sex-offender treatment, another requirement of her probation. Davis must be sober before she can begin sex-offender treatment, and the district court concluded that a correctional setting presents the best chance for her to accomplish both requirements. Thus, the record supports the district court’s finding that Davis is in need of correctional treatment that could most effectively be provided if she were confined.

Davis presents three arguments as to why the district court abused its discretion by finding that her confinement is necessary to protect the public and that she is in need of correctional treatment that can be most effectively provided if she were confined. We address each argument in turn.

First, she argues that the district court revoked her probation as a “reflexive reaction” to technical violations, rather than upon a showing that she could not be counted on to avoid antisocial behavior. She notes that she has remained law-abiding and complied with most of her probation conditions—all except the “no alcohol” condition and the chemical-dependency-treatment condition. Davis further argues that the district court failed to consider an intermediate sanction, such as “jail time, alcohol monitoring, or inpatient chemical dependency treatment.” But a district court does not abuse its discretion just because it declines to allow a probationer to receive additional services. *See State v. Osborne*, 732 N.W.2d 249, 255 (Minn. 2007) (concluding that the district court did not abuse its discretion by revoking the defendant’s probation without giving the defendant an opportunity to seek additional probationary resources). And the close connection between use of alcohol and the underlying offense supports the district court’s conclusion

that Davis presents a risk to the public of sexually reoffending while she remains untreated and continues to use alcohol. The district court's decision was not a "reflexive reaction" to technical violations, but rather reflects careful consideration of the record.

Second, Davis argues that the record does not support the district court's conclusion that her confinement is necessary to protect the public. Davis is correct that the psychologist who conducted the sex-offender evaluation was unable to formally assign her a risk level due to a lack of actuarial risk-assessment tools calibrated for female offenders and instead opined that she posed a low risk of sexually reoffending based on information from the evaluation. But Davis pleaded guilty to second-degree criminal sexual conduct, a serious offense. *See* Minn. Sent. Guidelines 4.B (2017 supp.) (ranking relative severity of sex offenses). And Davis has not shown that the district court's concern that she poses a risk to the public while she has access to alcohol is against logic and the facts in the record, given the severity of her underlying offense and her own admission that she used alcohol "several times" while on probation as an untreated sex offender.

Third, Davis argues that the record does not support the district court's conclusion that she was in need of correctional treatment that could most effectively be provided if she were confined. At the probation-revocation hearing, Davis's attorney informed the district court that Davis underwent a chemical-dependency-needs assessment shortly before the hearing. The needs assessment recommended "chemical dependency partial hospitalization," which Davis's attorney represented was "available to her," stating, "[t]here is a bed available to her whenever she is released from our custody." But simply because the district court had the option to allow Davis to enter treatment again at another

community facility does not mean that it abused its discretion by declining to do so. The district court concluded that treatment options in the community were insufficient based on Davis's decision to leave the community treatment facility where she was receiving treatment and subsequent failure to reenter treatment in the intervening months. Based on the seriousness of the underlying offense and the nexus between that offense and alcohol use, Davis has not shown that the district court abused its discretion by concluding that she was in need of treatment that could most effectively be provided if she were confined. Moreover, the district court's finding in this regard was not necessary because the district court also found that confinement is necessary to protect the public from further criminal activity by Davis. *See Modtland*, 695 N.W.2d at 607 (providing that revocation of probation is appropriate if "confinement is necessary to protect the public from further criminal activity . . . *or* . . . the offender is in need of correctional treatment which can most effectively be provided if [s]he is confined" (emphasis added)). And, as discussed above, that finding is well supported by the record.

In sum, mindful of the deferential standard by which we review a district court's decision to revoke probation, we cannot conclude on the basis of this record that the district court clearly abused its discretion when it revoked Davis's probation.

Affirmed.

JESSON, Judge (dissenting)

I respectfully dissent.

District courts wield wide discretion when determining whether to revoke probation and execute a stayed sentence. But wide is not endless. Boundaries limit discretion. And here, the district court crossed the bound of that discretion by revoking probation and requiring Davis—a victim of domestic violence—to serve a 140-month prison sentence for her first probation violation. Should Davis face sanctions for drinking and not completing treatment between August and November? Certainly. Intermediate sanctions were called for.¹ But an examination of the *Austin* factors demonstrates that probation revocation for this first-time violation defies logic and the facts before us. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (holding that a district court abuses its discretion when its decision is “based on an erroneous view of the law or is against logic and the facts in the record” (quotation omitted)).

While *Austin v. State* requires three explicit findings, the third necessary finding is dispositive here: whether the need for confinement outweighs the policies favoring probation. 295 N.W.2d 246, 250 (Minn. 1980); *see also State v. Modtland*,

¹ An intermediate sanction is a consequence imposed by the district court when it “has determined that the defendant has violated [her] probation but that revocation of the defendant’s probation . . . is not appropriate . . . because rehabilitation is still possible.” *State v. Cottew*, 746 N.W.2d 632, 637 (Minn. 2008). Intermediate sanctions may include, but are not limited to, “incarceration in a local jail . . . home detention, electronic monitoring . . . sentencing to service . . . chemical dependency or mental health treatment . . . restitution, fines, [and] community work service.” Minn. Stat. § 609.135, subd. 1(b) (2018).

695 N.W.2d 602, 608 (Minn. 2005).² As the majority explains, to conclude that the need for confinement outweighs the policies favoring probation, a court must find one of the following: “(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. While the district court found that the first two subfactors were met—and only one must be present—I disagree.

As to the first factor (whether confinement is necessary to protect the public), the district court’s decision to revoke Davis’s probation was justified on the sole basis of the tie between her failure to reenter treatment for three months and the fact that she committed the underlying offense while intoxicated. But the district court did not specify any reason for concluding that execution of her entire sentence was the only way to protect the public from Davis. And the record before the district court reflects no overriding public safety concern. At sentencing, the prosecutor represented that Davis’s sex-offender evaluator opined that Davis was a *low risk* to sexually reoffend. Nothing between sentencing and the revocation hearing altered this assessment. The record is devoid of any indication of criminal behavior or conduct that imperiled the public during Davis’ short probation. Rather, Davis herself was the victim of at least three assaults, events which apparently

² While I question the district court’s decision that Davis’s violations were intentional or inexcusable, I agree with the majority that the district court’s decision on this factor is not an abuse of discretion.

precipitated substance abuse.³ Absent any showing of dangerousness, the district court's conclusion that Davis presented a danger to the public while untreated is against the facts in the record.

As to the second factor (whether the offender needs treatment which can most effectively be provided during confinement), the record again provides no support for the district court's bare conclusion that execution of a 140-month prison sentence—as opposed to an intermediate sanction combined with a new treatment opportunity—was necessary to ensure effective treatment.⁴ I find this particularly troubling because the district court never found that Davis was unamenable to treatment in the community. *Cf. State v. Hemmings*, 371 N.W.2d 44, 47 (Minn. App. 1985) (affirming revocation upon explicit finding that appellant was unamenable to treatment). Nor did the district court address the new treatment option proposed by Davis's counsel: partial hospitalization.⁵

Treatment for substance-use disorder in Minnesota is not a one-size-fits-all model. Rather, a continuum of treatment options and recovery supports are available. *See, e.g.,*

³ At the revocation hearing and in the probation violation report, Davis's probation officer expressed concern that Davis's continued use of alcohol "could place her back in her sexual assault cycle." But the record contains no evidence of any further criminal behavior by Davis. The record involving a "sexual assault cycle" appears to refer to the cycle where Davis herself was the victim of multiple assaults by a domestic partner.

⁴ "Confinement," in this context, refers to "the imprisonment of the defendant following revocation of the defendant's probation and execution of the underlying sentence, not the imposition of confinement as an intermediate sanction." *State v. Cottew*, 746 N.W.2d 632, 637 (Minn. 2008).

⁵ A partial hospitalization program "provides a mix of outpatient individual and group counseling in a setting with medical services." Johns Hopkins Medicine, *Treatment Settings*, Center for Substance Abuse Treatment and Research, https://www.hopkinsmedicine.org/substance_abuse_center/treatment/settings.html#php (last visited Jan. 5, 2021).

Minn. Dep’t of Human Serv., *Drug and Alcohol Abuse in Minnesota a Biennial Report to the Legislature* 23 (2018) [hereinafter *Biennial Report*] (describing the shift in Minnesota’s chemical dependency treatment from an “acute care model to a chronic care model that is comprehensive, integrated and designed to support recovery across the lifespan”). For the court to determine that treatment could only be effective in prison ignores the reality of those options. And it ignores the reality of this case—a relapse while a victim of domestic violence and a failure to enter treatment for three months afterwards. To conclude that revocation was necessary here without articulating why Davis could not be effectively treated in the community defies logic and the facts of this case.

My view of the *Austin* factors is reinforced by guidance from caselaw, as well as the Minnesota Sentencing Guidelines. As the Minnesota Supreme Court has explained, “[t]he purpose of probation is rehabilitation and revocation should be used *only as a last resort when treatment has failed*.” *Austin*, 295 N.W.2d at 250 (emphasis added). Further, “district courts must take care to ensure that the decision to revoke probation is based on sound judgment and not just their will.” *Modtland*, 695 N.W.2d at 607 (quotation omitted). And revocation “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).

Similarly, the Minnesota Sentencing Guidelines explain that revocation of probation is justified when “[t]he offender is convicted of a new felony for which the Guidelines recommend prison; or [t]he offender *continues* to violate conditions of the stay despite the court’s use of *expanded and more onerous conditions*.” Minn. Sent. Guidelines 3.B (2018)

(emphasis added). The first condition cannot be satisfied because Davis had not committed any new offenses, much less a felony for which the presumptive sentence is prison. And Davis cannot be said to have “continued to violate” the conditions of her stay because the court executed her sentence without first imposing “expanded and more onerous conditions.”⁶

In sum, there is little in the record to support the district court’s conclusion that revocation was necessary beyond a three month lapse in seeking treatment while drinking and what was known at the time Davis was sentenced.⁷ The district court did not revoke probation as “a last resort”—it failed to examine the new treatment alternative that Davis proposed. To treat a single relapse, absent a clear threat to public safety, as a sign that a

⁶ The sentencing guidelines go on to say that:

The decision to revoke an offender’s stayed sentence should not be undertaken lightly. Great restraint should be exercised in imprisoning offenders who were originally convicted of low severity level offenses or who have short prior criminal histories. For these offenders, the Commission urges continuance of the stay and use of more restrictive and onerous conditions, such as periods of local confinement. Less judicial tolerance is urged for offenders who were convicted of a more severe offense or who had a longer criminal history. For both groups of offenders, however, the court should not reflexively order imprisonment for non-criminal violations of probationary conditions.

Minn. Sent. Guidelines 3.B (emphasis added). While Davis is in the category of offenders for whom “less judicial tolerance is urged,” it is beyond question that the violations alleged here are non-criminal in nature.

⁷ The district court acknowledged that it was Davis’s failure to reenter treatment—and not her initial departure, which appears to have been precipitated by domestic abuse—that justified its decision to revoke probation.

person is incapable of receiving treatment in the community contravenes Minnesota's policy of recognizing substance use disorder as a chronic condition.⁸ More critically here, it contravenes the state policy which favors probation. *Austin*, 295 N.W.2d at 250. These bare facts do not demonstrate a need for confinement which outweighs our policy favoring probation. I would reverse and remand.

⁸ *Biennial Report*, *supra*, at 23.