

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0671**

State of Minnesota,
Respondent,

vs.

Jeremy Ryan Potter,
Appellant.

**Filed January 11, 2021
Affirmed
Reyes, Judge**

Redwood County District Court
File No. 64-CR-14-708

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

Jenna M. Peterson, Redwood County Attorney, Travis J. Smith, Special Assistant County Attorney, William C. Lundy (certified student attorney), Smith & Johnson, Slayton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Gäitas, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this appeal from an order revoking his probation, appellant argues that the record does not support the district court's finding that the need for confinement outweighed the policies favoring probation. We affirm.

FACTS

Between February 2012 and January 2014, appellant Jeremy Ryan Potter engaged in sex with a minor female four times. Respondent State of Minnesota charged appellant with four counts of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(b) (2010). Appellant pleaded guilty to one count. Consistent with the plea agreement, the district court dismissed the other counts, stayed imposition of the 48-month presumptive sentence, ordered 120 days of jail time, and placed appellant on probation for five years beginning February 5, 2015. Among the specific terms of probation were that appellant must (1) complete a psychosexual assessment and follow its recommendations; (2) complete a sex-offender-treatment program; (3) not access or possess pornography; (4) not have contact with minor females; and (5) abstain from mood-altering chemicals.

Appellant violated the terms of his probation three times. First, in August 2015, his probation agent filed a probation-violation report stating that appellant failed to abstain from mood-altering chemicals. At the probation-revocation hearing, appellant admitted that he used marijuana twice per week. The district court reinstated probation under the original terms, but added that appellant must complete an updated chemical-dependency assessment. Second, in November 2019, appellant admitted to his probation agent that he

drove his girlfriend and her 15-year-old daughter from Walker, Minnesota, to Bemidji, Minnesota, despite knowing he could not have contact with minor girls. The district court again reinstated probation under the original terms, but also imposed 20 days in jail.

Third, appellant accessed pornography on his cellphone, computer, and gaming system beginning approximately three hours after his release from jail on January 2, 2020. Appellant's probation officer received a report from the monitoring software on appellant's computer showing that appellant accessed more than 100 pornographic images between January 2 and January 9. The sex-offender-treatment program appellant had attended for about two years discharged him because of his pornography use and lack of progress. At the probation-violation hearing, appellant admitted that he viewed pornography, that he knew viewing pornography violated his probation terms, and that his treatment program discharged him.

The district court found that (1) appellant violated the terms of his probation by accessing pornography and failing to complete sex-offender treatment; (2) the violations were intentional and inexcusable; and (3) the need for confinement outweighed the policies favoring probation. The district court therefore revoked appellant's probation and executed the remainder of his 48-month sentence. This appeal follows.

DECISION

Appellant argues that the record does not support the district court's determination that the need for confinement outweighs policies favoring probation because the district court merely recited facts showing that he is likely to reoffend. We disagree.

The district court has broad discretion in determining if there is sufficient evidence to revoke probation, and we will reverse only if there is a clear abuse of that discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). When revoking probation, the district court must “1) designate the specific condition or conditions that were violated; 2) find 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. The district court’s decision to revoke probation cannot be a “reflexive reaction to an accumulation of technical violations,” but must show that the probationer’s behavior demonstrates “that he . . . cannot be counted on to avoid antisocial activity.” *Id.* at 251. The district court cannot merely “recit[e] the three [*Austin*] factors and offer[] general, non-specific reasons for revocation.” *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). Rather, it must create a “thorough, fact-specific record[]” and “convey [its] substantive reasons for revocation and the evidence relied upon.” *Id.*

Appellant challenges only the third *Austin* factor. In analyzing this factor, the district court “should refer to” 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 he is confined; or (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Modtland*, 695 N.W.2d at 607. The district court may consider the probationer’s original offense and intervening conduct in analyzing the *Modtland* subfactors. *Austin*, 295 N.W.2d at 251. That the record supports one *Modtland* subfactor may allow the district court to revoke probation. *Id.*

In considering the *Modtland* subfactors, the district court here emphasized the nature and increasing frequency of appellant's violations. It also emphasized that, despite being on probation for five years and in treatment for two of those years, appellant failed to gain insight into the nature of his offense. The district court also noted that appellant accessed pornography within hours of being released from jail on the second violation, and that in doing so, appellant used search terms such as "daughter," "real step-daughter," and "young teen." In light of these facts, the district court found that (1) confinement is necessary to protect the public from further criminal activity by appellant and (2) not revoking probation would unduly depreciate the seriousness of appellant's violations.

The record supports the district court's findings on both the first and third *Modtland* subfactors. We recognize that appellant made progress during probation: he obtained stable housing and employment and participated in sex-offender treatment. However, despite treatment, he failed to avoid the second and third probation violations. He committed those two violations, both of which shared characteristics with his original offense, in close succession. These violations escalated in seriousness, evidenced by the search terms appellant used to access pornography and those terms' relatedness to his original offense. Appellant also used "incognito mode" and denied using his gaming system to access pornography in an effort to hide his pornography use. Significantly, appellant admitted that drug use, being around teenagers, feeling lonely and depressed, and accessing pornography would increase the likelihood of reoffense. His first violation involved drug use. His second involved being around a teenager. And his third involved

him accessing pornography while lonely and depressed. The record supports the district court's decision to revoke probation based on the first *Modtland* subfactor.

The state argues that appellant waived his argument on the third *Modtland* subfactor. But the evidence and arguments for both the first and third *Modtland* subfactors are intertwined, so we also address the third subfactor here. The record shows that appellant's violations were serious. Appellant did not attend treatment for the first three years of probation and failed to progress in treatment during the remaining two years. Given the escalating seriousness of appellant's violations and the apparent inefficacy of probation, the record supports the district court's finding that not revoking probation would unduly depreciate the seriousness of appellant's violations. Because the record supports the district court's findings on the first and third *Modtland* subfactors, we conclude that it did not abuse its discretion by revoking appellant's probation.

Affirmed.