

*This opinion is nonprecedential except as provided by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
A20-0900**

State of Minnesota,
Respondent,

vs.

David Devon Bryant,
Appellant.

**Filed March 1, 2021
Affirmed
Reyes, Judge**

Steele County District Court
File No. 74-CR-18-1619

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

Daniel A. McIntosh, Steele County Attorney, Julia A. Forbes, Assistant County Attorney,
Owatonna, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant State
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Reyes, Judge; and Jesson,
Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this appeal from an order revoking his probation, appellant argues that the district
court (1) abused its discretion by finding that failing to revoke appellant's probation would

unduly depreciate the seriousness of his violations and (2) erred by failing to explicitly find that the need for confinement outweighs the policies favoring probation. We affirm.

FACTS

During a disagreement with S.W. at S.W.'s house, appellant David Devon Bryant pushed S.W. up against a garage and held a box cutter to S.W.'s neck. While at S.W.'s house, appellant also violated a harassment restraining order (HRO) by coming into contact with his ex-girlfriend M.B. and being near her home. Respondent State of Minnesota charged appellant with second-degree assault with a dangerous weapon under Minn. Stat. § 609.222, subd. 1 (2018), and felony violation of an HRO under Minn. Stat. § 609.748, subd. 6(d)(1) (2018).

Appellant pleaded guilty to fifth-degree assault under Minn. Stat. § 609.224, subd. 4(b) (2018), and the HRO-violation charge. Consistent with the plea agreement, appellant sought a downward dispositional departure to probation while the state sought a bottom-of-the-box sentence on each charge at the sentencing hearing. The district court granted the downward dispositional departure by sentencing appellant to five years of probation and staying execution of concurrent 28-month and 32-month sentences on the two charges. The conditions of probation relevant to this case include that appellant must (1) maintain contact with his probation officer as directed; (2) complete the Park Avenue Center chemical-health aftercare program, where he had already completed inpatient and outpatient treatment programs; (3) enter a dialectical behavioral therapy (DBT) program; and (4) sign information releases for each treatment provider to allow probation access to records.

On October 14, 2019, appellant's probation officer filed a probation-violation report indicating that appellant failed to (1) maintain contact with probation; (2) complete the Park Avenue aftercare program; (3) enter a DBT program; and (4) sign information releases. The district court issued a warrant for appellant's arrest. Appellant tried to negotiate dismissing the warrant with his probation officer, but she told him to turn himself in. Instead, appellant went to Iowa and stopped contacting his probation officer. In Iowa, appellant was arrested for public intoxication. Appellant signed a waiver of extradition and returned to Minnesota around February 17, 2020.

At the initial probation-violation hearing, appellant proceeded pro se and entered a denial. At the contested-revocation hearing, appellant's probation officer testified that, although appellant made some phone contact with her, he missed all in-person appointments, and failed to contact her at all from October 2019 to February 2020. She also testified that Park Avenue discharged him because of absences and that she never received evidence of appellant entering a DBT program. Appellant argued that he missed appointments because of mental-health and physical-health issues and timing conflicts with employment, other appointments, and transportation.

The district court found that (1) appellant violated the terms of his probation by failing to maintain contact with his probation officer, complete the Park Avenue aftercare program, begin a DBT program, and sign information releases; (2) the violations were intentional and inexcusable; and (3) it would unduly depreciate the seriousness of appellant's violations if probation were not revoked. It therefore revoked appellant's

probation and executed his concurrent 28-month and 32-month sentences. This appeal follows.

DECISION

“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). But we review de novo whether a district court made the requisite findings to revoke probation. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). We review the district court’s findings of fact for clear error. *Erickson v. State*, 702 N.W.2d 892, 895 (Minn. App. 2005).

Before 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 need for confinement outweighs the policies favoring probation” (the *Austin* factors). *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 rather must show that the “offender’s behavior demonstrates that he . . . cannot be counted on to avoid antisocial activity.” *Austin*, 295 N.W.2d at 251 (quoting *United States v. Reed*, 573 F.2d 1020, 1024 (8th Cir. 1978)).

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” (the *Modtland*

subfactors). *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. The district court may also consider a prior "grant of a downward dispositional departure when deciding whether to revoke probation." *State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015) (citing Minn. Sent. Guidelines 3.B (2012) (stating that the district court may give "[l]ess judicial tolerance" for offenders convicted of more severe offenses)) (other citation omitted), *aff'd*, 883 N.W.2d 790 (Minn. 2016).

I. The district court did not abuse its discretion by revoking appellant's probation.

Appellant argues that the district court implicitly found that appellant did not meet the second *Modtland* subfactor and that the evidence does not support the district court's finding that he met the third *Modtland* subfactor. We disagree.

We need not decide whether the district court implicitly found that appellant did not meet the second *Modtland* subfactor because we conclude that the district court did not abuse its discretion by finding that he met the third *Modtland* subfactor. In so finding, the district court emphasized that appellant obtained a downward dispositional departure despite a serious original offense. It noted that appellant required oversight through probation, which he avoided, and left Minnesota after learning of the warrant for his arrest. The district court expressed concern that appellant would exhibit similar disregard for his probation conditions if it reinstated probation.

Appellant argues that these were his first probation violations, that he maintained phone contact with his probation officer, and that he attended eight of 12 meetings for his aftercare program. And throughout probation, he struggled with mental-health and physical-health issues, homelessness, lack of transportation, employment demands, and the deaths of four friends and family members.

While appellant's arguments are sympathetic, and it is true that this is his first probation violation, the record also shows that he failed to attend a single in-person meeting with his probation officer and did not provide notice or reason for his absence on at least three occasions. Park Avenue discharged him from the aftercare program because of absences, and the record reveals no evidence of appellant's participation in other therapy or a DBT program. Finally, when he learned of the warrant, appellant fled Minnesota and did not contact his probation officer for approximately four months. These violations were serious, and given the district court's concern that appellant would repeat this behavior if again placed on probation, it did not err by finding that appellant met the third *Modtland* subfactor.

Appellant argues that the district court could have imposed intermediate sanctions, such as ordering additional jail time or mental-health programming. He cites *State v. Cottew*, in which the supreme court noted that intermediate sanctions are appropriate when a defendant violates probation but rehabilitation is still possible. 746 N.W.2d 632, 637 (Minn. 2008).

Here, after discharging appellant in June 2019 because of absences, Park Avenue allowed him a second opportunity to participate in its aftercare program. But it again

discharged him because of absences in October 2019. He also had a therapist but failed to provide releases of information so that probation could track compliance. He repeatedly missed appointments without excuse and absconded from probation. This case is similar to *Austin*, in which the supreme court noted that “appellant has been offered treatment but has failed to take advantage of the opportunity or to show a commitment to rehabilitation.” *Austin*, 295 N.W.2d at 251. We conclude that the district court did not abuse its discretion by revoking appellant’s probation.

II. The district court did not err by failing to explicitly state that the need for confinement outweighs the policies favoring probation.

Appellant argues that the district court committed reversible error by failing to explicitly find that he met the third *Austin* factor. Appellant’s argument is misguided.

In *Modtland*, the supreme court stated that mere recitation of the *Austin* factors is insufficient. 695 N.W.2d at 608. Instead, the district court must make factual findings to ensure that it “create[s] [a] thorough, fact-specific record[]” and “convey[s] [its] substantive reasons for revocation.” *Id.* Here, the district court made extensive findings of fact specifically on the *Modtland* subfactors, which are considerations under the third *Austin* factor. In doing so, it conveyed its substantive reasons for revocation and therefore satisfied its duty to address the third *Austin* factor.

Appellant relies on *State v. Hill* for his argument. No. A19-0313, 2019 WL 5107465 (Minn. App. Oct. 14, 2019). In *Hill*, we reversed the district court’s order revoking probation because its findings did “not adequately address the third [*Austin*] factor” and

because “[c]aselaw is clear that district courts must *explicitly* make the three required findings before revoking probation.” *Id.* at *5 (citing *Modtland*, 695 N.W.2d at 608).

Appellant’s reliance on *Hill* is misguided for three reasons. First, *Hill* is only persuasive because it is a nonprecedential decision of this court. Minn. R. Civ. App. P. 136.01, subd. 1(c). Second, as discussed above, the district court conveyed its substantive reasons for revoking probation. *Modtland*, 695 N.W.2d at 608. Third, *Hill* is distinguishable. In *Hill*, the district court’s findings on all three *Austin* factors amounted to just four sentences. *Hill*, 2019 WL 5107565, at *5. In contrast, here, following an extensive discussion of the evidence spanning approximately six transcript pages, the district court explicitly found that the first and second *Austin* factors were met. And following approximately four pages of discussion on the *Modtland* subfactors that relate to the third *Austin* factor, the district court found that appellant met the third *Modtland* subfactor. We therefore conclude that the district court did not err by failing to recite explicitly the language of the third *Austin* factor in finding that factor met.

Affirmed.