

*This opinion is nonprecedential except as provided by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
A21-0817**

State of Minnesota,
Respondent,

vs.

Jacob Aaron Burk,
Appellant.

**Filed December 27, 2021
Affirmed
Cochran, Judge**

Dakota County District Court
File No. 19HA-CR-16-3003

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

Kathryn M. Keena, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Segal, Presiding Chief Judge; Cochran, Judge; and
Klaphake, Judge.*

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

NONPRECEDENTIAL OPINION

COCHRAN, Judge

Appellant challenges the district court's order revoking his probation and executing his sentence. He argues that the district court abused its discretion by finding that the need for confinement outweighed the policies favoring probation. Because the evidence in the record supports the district court's finding and the district court did not abuse its discretion in revoking probation, we affirm.

FACTS

In August 2016, respondent State of Minnesota charged appellant Jacob Burk with first-degree assault causing great bodily harm, in violation of Minn. Stat. § 609.221, subd. 1 (2016). The complaint alleged that Burk had punched a friend in the face multiple times, causing skull fractures and a traumatic brain injury. Burk later admitted to the assault during a pre-plea investigation. He stated that he had used methamphetamine and Xanax on the day he committed the assault and that the mixture had caused "some type of drug psychosis."

In January 2017, Burk pleaded guilty. While awaiting sentencing, he was released from jail to a chemical-dependency treatment program called Minnesota Adult and Teen Challenge. After completing that program, Burk entered an extension of the program called Teen Challenge Leadership Institute.

In March 2018, the district court sentenced Burk to 98 months in prison but stayed that sentence and placed Burk on probation for 20 years. As conditions of his probation, the district court ordered Burk to remain law abiding, refrain from using or possessing

alcohol or illegal drugs, submit to chemical-use testing, and continue in the leadership program. The district court granted the downward dispositional departure based on its finding that Burk was amenable to probation and chemical-dependency treatment, as demonstrated by his completion of the difficult Teen Challenge program.

Burk subsequently violated the terms of his probation multiple times before the district court ultimately revoked his probation in April 2021. The probation violations resulted from Burk struggling to stay sober, having challenges with mental health, and engaging in further criminal activity.

In March 2020, Burk's probation officer filed an initial probation-violation report alleging that Burk violated the terms of his probation by using alcohol and failing to remain law abiding. According to the report, Burk relapsed with alcohol and was charged with two gross-misdemeanor driving-while-impaired (DWI) offenses. The report also indicated that Burk was charged with obstruction of legal process. In June 2020, Burk's probation officer filed an addendum to the report alleging that Burk had used methamphetamine and marijuana while enrolled in a mental-health program. In August 2020, another addendum alleged that Burk had been using methamphetamine, heroin, marijuana, and alcohol over a period of several weeks. A month later Burk's probation officer filed a third addendum providing an update that Burk had made significant improvements and was "taking his recovery very seriously."

In September 2020, Burk appeared before the district court and admitted to the violations alleged in the March report and the June and August addendums. The state sought execution of Burk's stayed prison sentence. The district court ultimately continued

Burk on probation and imposed an additional probation condition of 60 days of electronic home monitoring.

In December 2020, Burk's probation officer filed a second probation-violation report alleging that Burk had violated the terms of his probation by consuming alcohol on his sober housing program's campus. At a January 2021 hearing, Burk admitted to possessing and using alcohol the day after he completed the 60 days of electronic home monitoring. The state again sought execution of Burk's stayed prison sentence. The district court imposed a one-day jail sanction so as to not interfere with Burk's mental-health medication regimen.

In March 2021, Burk's probation officer filed a third probation-violation report. The report alleged that Burk had used alcohol and methamphetamine, which led to his discharge from his sober housing program. The report further alleged that Burk had lied about his alcohol and drug use to the district court and his probation officer at his most recent review hearing. The probation report stated that Burk was no longer amenable to probation and recommended that the district court execute Burk's sentence.

At an April 2021 hearing, Burk admitted the violations and asked to return to an inpatient chemical-dependency treatment program. The state again sought execution of Burk's stayed sentence.

The district court granted the state's request, revoked Burk's probation, and executed his sentence. The district court found that Burk's violations were intentional and inexcusable, noting that Burk had been given "not just one" but "many, many opportunities" to address his chemical-dependency issues through treatment. The district

court also found that the need for confinement outweighed the policies favoring probation “specifically to protect the public.”

Burk now appeals.

DECISION

Burk argues that the district court abused its discretion when it revoked his stay of execution because the record does not support the district court’s finding that the need for confinement outweighed the policies favoring probation. We disagree.

“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.” *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005) (quotation omitted). A district court “abuses its discretion when it acts arbitrarily, without justification, or in contravention of the law.” *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *rev. denied* (Minn. Aug. 20, 2002).

If an offender with a stay of execution admits a probation violation, a district court may either continue the offender on probation or revoke probation and execute the sentence. Minn. R. Crim. P. 27.04, subd. 3(2)(b)(iv)-(v). Before a district court can revoke an individual’s probation, it must make three specific findings: (1) that the probationer violated a specific condition of 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). In making these findings, commonly known as the *Austin* factors, “courts must seek to convey their substantive reasons for revocation and the evidence relied upon.” *Modtland*, 695 N.W.2d at 608.

Whether a district court made the required *Austin* findings is a question of law that we review de novo. *Id.* at 605.

Here, the district court considered each of the three *Austin* factors. Burk challenges only the district court's finding on the third *Austin* factor—that the need for his confinement outweighed the policies favoring probation. When assessing this third factor, a district court should balance whether: (1) “confinement is necessary to protect the public from further criminal activity by the offender”; (2) “the offender is in need of correctional treatment which can most effectively be provided if he is confined”; or (3) “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Id.* at 607 (quotation omitted). A district court is not required to find that all three considerations weigh in favor of confinement in order for the third *Austin* factor to be met. *See Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008) (stating that “we normally interpret the conjunction ‘or’ as disjunctive rather than conjunctive”). In balancing these considerations, a district court may take into account the probationer's original offense and intervening conduct, as well as a prior grant of a downward dispositional departure. *Austin*, 295 N.W.2d at 251; *State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015), *aff'd*, 883 N.W.2d 790 (Minn. 2016).

In assessing the third *Austin* factor, the district court found that the need for confinement outweighed the policy favoring probation, “specifically to protect the public.” The district court then explained its concern about public safety: “You haven’t reacted in anger because your [drug] use has not been able to escalate to where . . . that anger would

not be controlled.” The district court went on to say, “You’re out of treatment at this point; that hasn’t worked out. And so at this time, this is the only option.”

Burk argues that the district court’s findings regarding the third *Austin* factor are not supported by the record. Specifically, he contends that nothing in the record suggests that his most recent probation violation of failing to abstain from drugs or alcohol put the public at risk. He notes that the record does not establish that he used drugs or alcohol in public or that he drove a motor vehicle after using drugs or alcohol. And he argues that “if anything, subjecting [him] to non-rehabilitative imprisonment only harmed public safety by preventing [him] from reducing his risk of re-offending through treatment.” The state counters that the record supports the district court’s finding that confinement is necessary to protect the public from further criminal activity by Burk. We agree.

As a preliminary matter, the first *Modtland* subfactor does not require that the violation leading to revocation involve physical danger to another person; confinement need only be necessary to protect the public from *further criminal activity* by the offender, which could include Burk’s drug use alone. *Modtland*, 695 N.W.2d at 607. Further, in assessing the third *Austin* factor, the district court could properly consider Burk’s original offense and his intervening conduct in addition to his most recent probation violation. *See Austin*, 295 N.W.2d at 251.

Second, the record fully supports the district court’s finding that Burk’s confinement is necessary to protect the public from further criminal activity. The record reflects that this was Burk’s third probation violation. All of Burk’s violations involved his use of alcohol or illicit drugs. And Burk repeatedly engaged in criminal activity—namely,

driving while impaired, obstructing legal process, and using illicit drugs—while on probation. Given the inherent danger to the public posed by this criminal activity and Burk’s history of engaging in aggressive behavior while using drugs—as demonstrated by the severity of his original offense—it was not unreasonable for the district court to conclude that Burk’s unconfined behavior created a public safety concern. The fact that probation was originally a downward dispositional departure further supports revocation because “[l]ess judicial tolerance is urged for offenders who were convicted of a more severe offense,” as Burk was here. Minn. Sent. Guidelines 3.B (2020).

Burk also argues that the district court erred by not explicitly considering or making findings on the other two *Modtland* subfactors. This argument fails because a district court may find the third *Austin* factor met based on just one of the *Modtland* subfactors. *Modtland*, 695 N.W.2d at 606-07. Here, the district court made sufficient findings as to the third *Austin* factor because it addressed the first *Modtland* subfactor.

The district court has broad discretion in weighing the need for confinement against the policies favoring probation, and the court revoked Burk’s probation as a last resort. The record supports the district court’s determination that the need for confinement outweighed the policies favoring probation. Therefore, we conclude that the district court did not abuse its discretion by revoking Burk’s probation and executing his sentence.

Affirmed.