

*This opinion is nonprecedential except as provided by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
A21-1388**

State of Minnesota,
Respondent,

vs.

James Donald Callender,
Appellant.

**Filed May 9, 2022
Affirmed
Worke, Judge**

Brown County District Court
File No. 08-CR-20-407

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

Charles W. Hanson, Brown County Attorney, Daniel D. Kalk, Assistant County Attorney,
New Ulm, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant argues that the district court (1) abused its discretion by determining that the need to confine him outweighed the policies favoring probation, and (2) erred by failing to make the requisite findings before revoking his probation. We affirm.

FACTS

In June 2020, respondent State of Minnesota charged appellant James Donald Callender with one count of felony theft in violation of Minn. Stat. § 609.52, subd. 2(a)(1) (2018). Callender entered an *Alford* guilty plea, which the district court accepted.¹ In September 2020, the district court imposed a 19-month sentence but stayed the sentence and placed Callender on probation for five years. Callender's probation conditions included maintaining contact with probation daily if he remained homeless and completing a chemical-use assessment.

Callender's probation agent filed a probation-violation report in December 2020, alleging that Callender violated his probation conditions by failing to maintain contact with her. She recommended revoking Callender's probation. Callender admitted the violation at a probation-violation hearing, and the district court imposed an intermediate sanction of 42 days in jail.

In May 2021, Callender's probation agent filed a second probation-violation report alleging that Callender violated his probation conditions by failing to maintain contact,

¹ The district court may accept a defendant's guilty plea even though the defendant maintains his innocence. *North Carolina v. Alford*, 400 U.S. 25, 38 (1970).

remain law abiding, and complete a chemical-use assessment. The agent reported that Callender completed one virtual Zoom visit but failed to show up for another virtual visit. She sent text messages to his phone number that were returned as undelivered. She emailed him, but he did not respond for almost three weeks. She tried to transfer his probation supervision to Ramsey County, where Callender was then living, but the Ramsey County probation agent also could not contact him. The agent also reported that Callender had five new criminal charges pending in several counties and that he had provided no information indicating that he participated in a chemical-use assessment. The agent recommended executing Callender's sentence.

At a probation-violation hearing, Callender admitted that he failed to maintain contact with his probation agent and failed to complete a chemical-use assessment. But he explained that he lost his phone and his car, the place at which he was supposed to be living was "a scam," people kept stealing from him, and he tried to go to the library but it was closed. He said he "gave up." And he said that he was currently trying to get a chemical-use assessment while in jail. The district court nevertheless found that Callender's probation violations were intentional and inexcusable, that it would unduly depreciate the seriousness of Callender's violations if probation were not revoked, and that Callender would be able to get treatment while in custody. The district court revoked Callender's probation and executed his 19-month sentence. This appeal followed.

DECISION

We review a district court's probation-revocation decision for an abuse of discretion. *State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015), *aff'd on other*

grounds, 883 N.W.2d 790 (Minn. 2016). “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.” *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted). Before a district court may revoke an offender’s probation, it must: (1) identify the condition that was violated; (2) “find that the violation was intentional or inexcusable; and (3) find that need for confinement outweighs the policies favoring probation” (the *Austin* factors). *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980).

Callender first argues that the record does not support the district court’s determination that the third *Austin* factor—that the need for his confinement outweighs the policies favoring probation—was satisfied. We disagree.

In assessing the third *Austin* factor, the district court should consider the *Modtland* subfactors: whether (1) “confinement is necessary to protect the public from further criminal activity,” (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 251; *State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005). The district court must make adequate fact-specific findings to enable review, and it may not rely on a general recitation of the *Austin* factors. *Modtland*, 695 N.W.2d at 608.

Here, the district court made findings on the second and third *Modtland* subfactors. With regard to the second *Modtland* subfactor, the district court found that, although “community resources haven’t been exhausted,” Callender did nothing to obtain chemical-dependency treatment while on probation, and that he would be able to get

treatment while in custody. This finding is supported in the record, and it supports revocation. Callender points to no caselaw requiring that the district court find that an offender has exhausted community treatment options before it can find that treatment would be most effectively provided in custody. And it was not unreasonable for the district court to have concluded that treatment in custody is the best option when Callender struggled to maintain a residence, failed to maintain contact with his agent, and failed to independently take any steps towards treatment.

With regard to the third *Modtland* subfactor, the district court found that Callender had previously been reinstated on probation after failing to maintain contact with his agent. The district court noted that Callender's pending charges in multiple counties demonstrated his ability to "get around," and it therefore questioned his inability to find a phone to contact probation. And the district court found that Callender failed to complete a chemical-dependency assessment. The district court therefore found that it would unduly depreciate the seriousness of Callender's violations if probation were not revoked.

These findings are also supported in the record. Although the district court could have been more explicit as to why the violations were serious enough to warrant revocation, the record shows that Callender repeated the same violation and made little to no effort to comply with his probation conditions. That Callender disagrees with the seriousness the district court attributes to his violations does not mean that the district court abused its discretion by revoking probation on this basis. In sum, the district court did not abuse its discretion by determining that two of the *Modtland* factors were satisfied.

Callender also contends that the district court should have imposed intermediate sanctions. But the district court has discretion in whether to impose intermediate sanctions or revoke probation. *See State v. Cottew*, 746 N.W.2d 632, 639 (Minn. 2008) (stating that district court may impose intermediate sanctions). Here, the district court previously imposed an intermediate sanction for a similar violation and Callender’s probation violations nevertheless continued. The district court’s decision to execute Callender’s sentence instead of imposing an intermediate sanction was not unreasonable.

Callender next argues that the district court erred by failing to explicitly find that the need for confinement outweighed the policies favoring probation. He asserts that the district court failed to adequately weigh the policies favoring probation versus those favoring confinement. We are not persuaded.

We review *de novo* whether a district court made the required *Austin* factual findings. *Modtland*, 695 N.W.2d at 605. In *Modtland*, the supreme court stated that mere recitation of the *Austin* factors is insufficient. *Id.* 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 did not use the precise language of the third *Austin* factor. But we are aware of no caselaw requiring the district court to recite the precise language of the third *Austin* factor. Instead, caselaw indicates that the district court sufficiently addresses the third *Austin* by considering the *Modtland* subfactors, and here the district court made findings of fact on two *Modtland* subfactors. *Id.* at 607. In doing so, it

conveyed its substantive reasons for revocation and thereby satisfied its duty to address the third *Austin* factor.

Appellant's reliance on *State v. Hill*, No. A19-0313, 2019 WL 5107465 (Minn. App. Oct. 14, 2019) is unavailing. 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]ase law 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).

We distinguished *Hill* in *State v. Bryant*, No. A20-0900, 2021 WL 772630, at *4 (Minn. App. Mar. 1, 2021), *rev. denied* (Minn. May 26, 2021).² Neither of the district courts in *Hill* and *Bryant* explicitly recited the language of the third *Austin* factor or explicitly weighed the need for confinement against policies favoring probation. *See Hill*, 2019 WL 5107465, at *5; *Bryant*, 2021 WL 772630, at *4. But in *Hill*, the district court's findings on all three *Austin* factors amounted to just four sentences, and this court reversed. *Hill*, 2019 WL 5107465, at *5. In contrast, in *Bryant*, the district court's findings on the *Austin* factors and *Modtland* subfactors spanned ten transcript pages, and this court affirmed. *Bryant*, 2021 WL 772630, at *4. Further, in *Bryant*, we noted that the *Modtland* subfactors are considerations under the third *Austin* factor. *Id.* at *3. We concluded that, by addressing the *Modtland* subfactors, the *Bryant* district court adequately addressed *Austin*. *Id.*; *see also Modtland*, 695 N.W.2d at 605.

² We rely on these two nonprecedential opinions because of their persuasive value and because both directly address the same issue we address in this matter. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) (stating that nonprecedential opinions may be cited for persuasive value).

This case is more similar to *Bryant* than *Hill*. The district court's analysis here goes beyond merely reciting the language of *Modtland* or *Austin*. Instead, its findings span two transcript pages and expand on two of the *Modtland* subfactors. The district court sufficiently conveyed its substantive reasons for revocation and satisfied its duty to address the third *Austin* factor. We therefore conclude that *Hill* is distinguishable and that the district court did not err by failing to explicitly weigh the need for confinement against policies favoring probation or explicitly recite the language of *Austin*.

Affirmed.