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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1517**

State of Minnesota,
Respondent,

vs.

Keith Melvin Baerg,
Appellant.

**Filed August 22, 2022
Affirmed in part, reversed in part, and remanded
Wheelock, Judge**

Watonwan County District Court
File No. 83-CR-18-31

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(for appellant)

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

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

In this appeal from the district court's order revoking probation, appellant Keith
Melvin Baerg argues that the district court (1) violated his due-process rights, (2) failed to

make adequate findings to support the revocation of his probation, and (3) abused its discretion because alternative treatment programs are available to him in the community. Because Baerg had adequate notice of his probation conditions in accordance with due process, we affirm in part, but because the district court's findings on the third *Austin* factor were inadequate to support the revocation of his probation, we reverse on that issue and remand for further findings. Thus, we do not reach Baerg's third argument.

FACTS

In January 2018, respondent State of Minnesota charged Baerg with first- and third-degree criminal sexual conduct in violation of Minn. Stat. §§ 609.342, subd. 1(e)(i), .344, subd. 1(c) (2016). Baerg entered a *Norgaard* plea, pleading guilty to third-degree criminal sexual conduct.¹ The district court granted Baerg a dispositional departure from the 117-month presumptive prison sentence and stayed execution of that sentence for 15 years. The district court then placed Baerg on probation and imposed several conditions, including that he complete sex-offender treatment and abstain from alcohol.

In 2019, Baerg's probation officer submitted a probation-violation report alleging that Baerg used alcohol and failed to submit to alcohol testing. After a probation-violation hearing, the district court found that Baerg had violated his probation. It reinstated his probation, ordered him to serve 180 days in local custody, and imposed new probation conditions.

¹ A defendant enters a *Norgaard* plea if they are unable to admit facts due to memory loss but agree that there is sufficient evidence for a conviction. *State v. Ecker*, 524 N.W.2d 712, 716-17 (Minn. 1994) (citing *State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 871 (Minn. 1961)) (other citation omitted).

In July 2020, Baerg's probation officer referred him to CORE Professional Services, a sex-offender treatment program. One month later, Baerg began treatment there. As part of his treatment intake, Baerg signed a treatment-agreement form that included CORE's polygraph policy. Under the agreement, if Baerg denied the offense for which he was ordered to complete treatment, he had to take a specific-issue polygraph test within 30 days of beginning treatment. If he failed the polygraph test and continued to deny the underlying offense, CORE would terminate his participation in the program.

Baerg denied his offense and submitted to a polygraph test in September 2020. The test revealed signs of deception. Even so, Baerg continued to deny the underlying offense throughout his treatment sessions. In late October 2020, CORE terminated Baerg's participation in the program for nonpayment of his treatment bill. He then paid his bill and was readmitted in January 2021.

As part of CORE's treatment program, Baerg's therapist required him to purchase a workbook and come to each session with completed assignments. Notwithstanding that he had started the program in August 2020, Baerg did not purchase a workbook until January 2021, and he did not complete most of his assignments. On April 15, 2021, Baerg's therapist informed him that he was at risk of termination from the program for his lack of progress and for being late on payment again. On May 6, 2021, CORE terminated Baerg's participation in the program "for failure to make adequate progress . . . based on his unwillingness to acknowledge his sexual offense and his failure to consistently complete the treatment assignments."

Baerg's probation officer filed a probation-violation report alleging that Baerg had failed to complete sex-offender treatment, and the district court held a contested probation-violation hearing in October 2021. Baerg's probation officer and therapist testified. His therapist testified that Baerg consistently resisted treatment. She testified that Baerg was argumentative, had rigid thinking, struggled with denial, and made minimal progress in treatment. She explained that the decision to terminate Baerg from treatment was based on inadequate progress in the program, shown by his failure to complete assignments or to acknowledge his offense.

The district court held a separate dispositional hearing on Baerg's probation violation. Baerg's counsel argued that it would not be appropriate to revoke his probation because Baerg was enrolled in a different sex-offender treatment program, demonstrating his intent to complete treatment. He argued that Baerg could succeed in the new program because unlike CORE, it did not require Baerg to admit he committed the underlying offense. Baerg's counsel further argued that Baerg did not "get a shot at the [treatment] program" because he was discharged less than a year into a program that takes participants roughly 27 months to complete, and he was discharged for only two incomplete homework assignments. He also highlighted that Baerg had not reoffended, that Baerg had completed his chemical-dependency program, that Baerg communicated regularly with his probation officer, and that intermediate sanctions were available.

The county attorney argued that the district court should revoke Baerg's probation for failing to complete sex-offender treatment, which is a significant violation for a criminal-sexual-conduct offense.

The district court observed that it had given Baerg a chance to continue with probation after his previous violation by reinstating, rather than revoking, probation; thus, Baerg knew “what [was] at stake.” The district court found that the record showed Baerg’s “lack of intent to complete treatment.” In support of this finding, the district court pointed out that Baerg sought no other treatment after he was terminated from CORE until one week before the probation-revocation proceeding, which the court characterized as “five months of doing nothing.” The district court stated that if Baerg did not think CORE was effective, he should have asked his probation officer to look into different treatment programs. The district court found that (1) Baerg violated his probation conditions by failing to complete sex-offender treatment, (2) the violation was intentional and inexcusable, and (3) the need for confinement outweighed the policies favoring probation because confinement was necessary to protect the public, and it would unduly depreciate the seriousness of the violation if probation were not revoked. The district court then revoked Baerg’s probation and executed his 117-month sentence.

Baerg appeals.

DECISION

Baerg challenges the district court’s order revoking his probation in three ways. He argues first that the district court violated his due-process rights because the conditions of his probation were unconstitutionally vague. Second, he argues that the district court abused its discretion by revoking his probation without making sufficient findings on the necessary *Austin* factors. Finally, he argues that the district court abused its discretion by

revoking his probation because at the time of the probation-violation hearing, he was enrolled in an alternative treatment program. We address his challenges in turn.

I. Baerg had adequate notice of his probation conditions.

Baerg first contends that the district court violated his due-process rights by failing to inform him adequately of all the conditions of his probation. He asserts that the condition set forth in the district court’s sentencing order that he must “[c]omplete treatment Adult Sex Offender Treatment as directed by [his] agent” is unconstitutionally vague because there is no way he could have known “what he would do to properly ‘complete’ treatment.” We disagree.

The district court at sentencing must “[s]tate precisely the terms of the sentence.” Minn. R. Crim. P. 27.03, subd. 4(A). “[B]efore a probation violation can occur, the condition alleged to have been violated must have been a condition actually imposed by the court.” *State v. Ornelas*, 675 N.W.2d 74, 80 (Minn. 2004). And a probationer must have a “fair warning” of which acts are prohibited by the probation conditions. *Id.* It is best practice that a probationer be given “a written copy of the conditions of his probation.” *State v. Austin*, 295 N.W.2d 246, 251 (Minn. 1980). When there is a plea agreement, it is also best practice that the specific conditions intended to be imposed as part of the resulting sentence be clearly identified. *Id.* at 250-51.

Baerg offers no legal support for the proposition that the probation condition requiring a probationer to “complete treatment” lacks fair warning. To “complete treatment” implies that the probationer meets the treatment program’s expectations and complies with its policies. And here, we are particularly persuaded by the fact that this

was Baerg’s precise understanding of his probation terms. The record reflects that Baerg knew he needed to engage with and complete the sex-offender treatment program in order to comply with his probation. After failing the specific-issue polygraph test, Baerg stated that he would nonetheless “go with [treatment]” because he knew that if he failed to cooperate with CORE, he would be terminated from its program and go to prison. We therefore conclude that not only is “complete treatment” a fair warning of what was expected of Baerg, but the record establishes that Baerg accurately understood its meaning.²

Baerg also argues that the district court impermissibly delegated authority to CORE to determine whether he violated his probation conditions. *See Ornelas*, 675 N.W.2d at 80 (“The imposition of sentences, including determining conditions of probation is exclusively a judicial function that cannot be delegated to executive agencies.” (quotation omitted)). We again disagree. CORE determined whether Baerg complied with its treatment program and policies, and the district court reviewed CORE’s termination decision to determine whether Baerg violated his probation. It is possible that CORE could terminate Baerg’s participation in its program, and the district court could still find that

² We are not persuaded otherwise by the caselaw Baerg cites because it is distinguishable. In *State v. Burnett*, 231 A.3d 163, 169 (Vt. 2020), for example, the Vermont Supreme Court held that the condition that the defendant must “participate fully” in a sex-offender treatment program did not give him notice that the conduct triggering his treatment-program complaint (picking a locked door) violated his probation. Unlike the defendant in *Burnett*, Baerg was not discharged from CORE for a minor policy infraction. He was instead discharged for failing to complete sex-offender treatment. Baerg knew that failure to engage in the program could result in his termination from it, which in turn could result in his probation being revoked.

Baerg did not violate his probation conditions if, for example, Baerg enrolled in another treatment program, or the district court determined CORE's termination decision was unreasonable. The district court has discretion to deviate from CORE's determination when finding whether Baerg violated his probation conditions. The district court did not delegate authority to CORE to determine whether Baerg violated his probation conditions.

We conclude that Baerg had adequate notice of the conduct that could result in the district court revoking his probation, and the district court therefore did not violate Baerg's due-process rights.

II. The district court erred by failing to make adequate factual findings supporting the third *Austin* factor.

Baerg argues next that the district court erred when it failed to make adequate findings on the factors required to support revocation of his probation. In *Austin*, the supreme court held that the district court must make three findings before revoking probation: “1) designate the specific condition or conditions that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that need for confinement outweighs the policies favoring probation.” 295 N.W.2d at 250. These findings are commonly known as the *Austin* factors.

In *State v. Modtland*, the supreme court reaffirmed its “core” holding in *Austin* regarding the findings necessary for probation revocation. 695 N.W.2d 602, 606 (Minn. 2005). It also held that when making findings on the three *Austin* factors, district courts “must seek to convey their substantive reasons for revocation and the evidence relied upon.” *Id.* at 608. In other words, district courts do not satisfy *Austin*'s requirements by

merely reciting the three factors or by offering only general, nonspecific reasons for revocation. *Id.*

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.” *Austin*, 295 N.W.2d at 249-50. But whether the district court made the findings required for probation revocation is a question of law, which we review de novo. *Modtland*, 695 N.W.2d at 605.

Baerg contends that the district court’s findings on all three *Austin* factors are inadequate. We agree only that the district court’s findings on the third factor are inadequate.

Baerg first argues that the district court’s finding that he “was required to successfully complete adult sex offender treatment as a condition of probation” is clearly erroneous because there was no requirement that Baerg be “successful and there is no showing that Baerg was not completing the program as set out by his probation officer.”

We are not persuaded by Baerg’s argument for two reasons. First, although the district court did not include the word “successful” in the probation condition, the requirement that Baerg “complete treatment” necessitates that he complete treatment successfully. It is not clear, nor does Baerg explain, how a probationer could complete treatment unsuccessfully.

Second, there is ample record evidence that Baerg was not satisfactorily completing the treatment program and lacked the intent to complete it. For example, the therapist testified that Baerg did not attend sessions regularly with completed treatment assignments,

did not put any effort into the program, consistently denied the underlying offense, and denied any issues with alcohol. The therapist explained that she needs to review a program participant's treatment assignments to assess their progress. She testified that Baerg understood that he needed to bring completed assignments to every session to progress in the program and that he often failed to do so.

The evidence reflects that Baerg violated the condition because the terms of his probation required that he complete his treatment program, and he was not engaged in completing the program and did not show an intent to complete the program. The district court's finding on the first *Austin* factor as set forth in its order is supported adequately by the record, and the district court conveyed its specific reasoning.

Baerg next argues that the district court's finding on the second factor is not supported by the record. The district court found that Baerg's "discharge from CORE was both intentional and inexcusable." In its order, the district court explained that Baerg knew that "homework needed to be completed and progress needed to be made in order to be successful in the CORE program," and Baerg "chos[e] not to be fully invested in the program." The district court conveyed the substantive reasons for its determination that Baerg's violation was intentional and without legal excuse. *See Modtland*, 695 N.W.2d at 608. The finding is supported by the information the state provided to the district court. Baerg's therapist testified that Baerg understood the importance of completing sex-offender treatment yet repeatedly failed to follow program rules, both before his initial termination in October 2020 and after returning to the treatment program in January 2021. The therapist's testimony provides a sufficient basis for the district court's finding that

Baerg's failure to comply with the treatment requirement of his probation was intentional and without legal justification or excuse.³

Baerg argues finally that the district court failed to make the necessary finding on the third factor. We agree. In addressing the third *Austin* factor, a district court must balance the probationer's interest in freedom against the state's interests in ensuring public safety and the probationer's rehabilitation. *Modtland*, 695 N.W.2d at 606-07. In making that determination, district courts consider 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 [the offender] is confined; or (iii) [not revoking probation] would unduly depreciate the seriousness of the violation." *Id.* at 607 (quotation omitted). These are the "*Modtland*" factors, and the district court

³ Baerg also argues that the district court violated his constitutional rights by directing him to complete a treatment program that required him to admit guilt. Baerg contends that his right to remain silent was violated and that the district court should not have relied on an inadmissible polygraph test. Baerg did not raise these arguments to the district court, and they are therefore forfeited. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *see also State v. Vasko*, 889 N.W.2d 551, 559 n.6 (Minn. 2017) (applying this rule to constitutional questions). Even if we addressed these arguments, they would fail.

Baerg entered a *Norgaard* plea, and he did not appeal his conviction directly or through postconviction proceedings. The time to do so has now run, and his conviction is final. Minn. R. Crim. P. 28.02, subd. 4(3)(a), (c) (providing that an appeal must be filed within 90 days after final judgment, or in postconviction-relief cases, within 60 days after entry of the order). There is therefore no risk of self-incrimination or perjury, and his Fifth Amendment rights were not violated.

And the district court did not rely on inadmissible evidence. Baerg's failed polygraph test was not introduced as evidence of his probation violation, but as a reason underlying his termination from the treatment program. His *probation violation* was based on not completing treatment. Because the district court relied on the program's termination letter and the therapist's testimony to find that Baerg violated his probation conditions by not completing treatment, it did not rely on inadmissible evidence and thus did not abuse its discretion.

needs to find only one of these factors to satisfy the third *Austin* factor. See *Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008) (stating that courts “normally interpret the conjunction ‘or’ as disjunctive rather than conjunctive.”). District courts must base their decisions “on sound judgment and not just their will.” *Id.* at 606-07 (quotation omitted). A district court’s findings are adequate when it provides “substantive reasons for revocation.” *Id.* at 608.

The district court did not make any findings on the record as to the substantive reasons and evidence upon which it relied in determining that the policies favoring probation were outweighed by the need for confinement in Baerg’s case. Instead, it stated, “[C]onfinement outweighs the policies favoring probation because confinement is necessary to protect the public from further activity and c, [sic] it would unduly depreciate the seriousness of the violation if probation were not revoked.” The district court did not make specific findings about the need to confine Baerg, nor did it explicitly consider any of the three *Modtland* subfactors. The district court did not weigh the need for confinement against the policies that favor probation. Instead, it offered a blanket recitation of the third *Austin* factor. Therefore, the district court failed to address the third *Austin* factor adequately.

In sum, the district court failed to convey the “substantive reasons for revocation and the evidence relied upon” as required by *Modtland*. *Id.* Although this court could look through the transcript and record and identify reasons why the policies favoring probation might be outweighed by the need for confinement, that is not the role of this court in determining whether the district court met the requirements of *Austin*. *Id.* (“[I]t is not the

role of appellate courts to scour the record to determine if sufficient evidence exists to support the district court's revocation."").

Because the district court did not make adequate findings on the third *Austin* factor, we reverse and remand for further findings based on the existing record. As a result, we need not address Baerg's remaining challenge.

Affirmed in part, reversed in part, and remanded.