

*This opinion is nonprecedential except as provided by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
A21-1641**

State of Minnesota,
Respondent,

vs.

Antone David Davis,
Appellant.

**Filed August 22, 2022
Affirmed
Bratvold, Judge**

St. Louis County District Court
File No. 69DU-CR-20-3324

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

Kimberly J. Maki, St. Louis County Attorney, Nichole J. Carter, Assistant County Attorney, Duluth, Minnesota (for respondent)

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

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Kirk,
Judge.*

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

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant challenges a probation-revocation decision, contending that the district court abused its discretion because (1) the record does not support the district court's findings, and (2) the district court relied on evidence not in the record when it revoked appellant's probation. After a careful review of the record, we affirm.

FACTS

The facts summarize the record, including transcripts of the plea and probation-revocation hearings.

As part of the Lake Superior Drug and Violent Crime Task Force's investigation into a drug-trafficking network, law enforcement executed a search warrant on appellant Antone David Davis's home in August 2020. According to the complaint, law enforcement recovered "thirteen bindles of heroin," "each arranged for individual sale." Respondent State of Minnesota charged Davis with six counts of controlled-substance crimes under Minn. Stat. § 152.021 (2018).

At the February 2021 plea hearing, the parties informed the district court that they reached a plea agreement. Davis agreed to plead guilty to one count of first-degree sale of a controlled substance in violation of Minn. Stat. § 152.021, subd. 1(3). Davis also agreed to testify for the state in its prosecution of a leader of the drug-trafficking network. The state promised to dismiss the other five counts, to withdraw "any motions seeking sentencing enhancement," and *not* to refer Davis's case for federal prosecution. The state also agreed to recommend the following terms favorable to Davis: a downward

dispositional departure if Davis received “a top-of-the-box sentence”; “[t]he sentence [would be] stayed for a period of five years’ probation with no provision for early discharge”; and Davis “would serve one year at either jail” or the Northeast Regional Correction Center (NERCC).

At the March 2021 sentencing hearing, the district court granted a downward dispositional departure based on evidence of “Davis’s specific . . . amenability to treatment” and sentenced him to 138 months in prison, stayed for five years, and one year in local confinement to be served at NERCC. Davis’s probation conditions included that he would “follow all institution/program rules.”

About six months later, probation filed a violation report alleging Davis failed to follow institution or program rules. At a contested revocation hearing in October 2021, Davis admitted that he violated rules at NERCC and that his violations of NERCC rules meant he violated the conditions of his probation. The parties also stipulated to place certain facts “in the record in lieu of formal testimony,” which facts Davis agreed were correct.

The stipulated facts included the following:

- On July 31, 2021, Davis “received a major rule violation for harassment . . . and disruptive behavior” for saying, “[F]--k you,” to a bunk mate, who also received a major rule violation for instigating and disruptive behavior (July incident). Davis believed “that the instigator made derogatory, race-based comments during the incident.”
- On September 1, 2021, Davis “received a major rule violation for physical assault, harassment, theft, disobeying staff directives, instigating, and disruptive behavior” (September incident). The other individual involved also received a major rule violation for this incident, in part for instigating. Davis believed this incident was also race-based.

- Davis was involved in four other incidents at NERCC. None of the four incidents resulted “in disciplinary action against . . . Davis,” “NERCC records establish that on those occasions, the instigator was either the other person or not determined,” and Davis was not found to be the instigator.
- NERCC did not discharge Davis because of either major rule violation.
- North Star Behavioral Treatment in the Twin Cities accepted Davis, and “several family members were willing to provide transportation, either a ride or a bus ticket for . . . Davis.”
- Davis completed many objectives while at NERCC, including obtaining various identification documents, participating in programming to find post-release housing, attending therapy, submitting a federal-housing-assistance application, starting and leading an AA/NA group, completing a parenting class, completing “decision points,” graduating from mental-health recovery, “meet[ing] with SOAR,”¹ and engaging in peer recovery.

During the probation-revocation hearing, Davis’s probation officer expanded upon some of the information in the stipulated facts. He stated that, according to the NERCC reports, “there was no mention of any kind of racial comment that staff heard or that witnesses stated [they] heard during the [July] incident.” The probation officer highlighted that, while at NERCC, Davis was in a controlled environment, underwent programming to help address his volatility, and still “didn’t practice what he learned.”

The probation officer questioned how Davis would act in the community if similar situations arose. The September incident was “the most concerning,” according to the probation officer, because Davis “got physical with another inmate” by “clobber[ing] and chok[ing]” him, and NERCC staff had to pepper-spray Davis to gain control. While NERCC did not discharge Davis, the probation officer noted that NERCC would not permit Davis back at the facility “because of his volatility.”

¹ SOAR is a re-entry program that provides services like mentoring, case management, and employment services to help people successfully transition after incarceration.

Davis addressed the district court and explained that he suffered “blow after blow” while at NERCC, including the deaths of four family members and his own “health issues.” Still, Davis said his time at NERCC helped him “tremendously.” Davis acknowledged that he made mistakes but also stated that he “us[ed] a lot of the tools [he] gained at NERCC” to identify how his thoughts and attitudes impacted his behavior. Despite some setbacks, Davis said he was “reaching for still more opportunities to better [himself] at North Star Behavior.”

The district court accepted Davis’s admission of his probation violations and determined that Davis’s violations were intentional and inexcusable and “that the need for [Davis’s] confinement outweighs the policies favoring probation.” After an off-the-record discussion with the attorneys, the district court vacated Davis’s 138-month sentence and instead imposed and executed a bottom-of-the-box 98-month sentence.

Davis appeals.

DECISION

Davis contends that the district court abused its discretion by revoking his probation for two reasons: (1) the record does not support the district court’s findings, and (2) the district court “relied on evidence that was not in the record.” We consider each argument in turn.

I. The district court did not abuse its discretion by revoking Davis’s probation, and the record supports the district court’s factual findings.

A district court may revoke probation if the probationer violates any condition of probation. Minn. Stat. § 609.14, subd. 1(a) (2020). “The [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. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). “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. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017).

District courts must consider three factors before revoking probation and make specific findings about each factor. *Austin*, 295 N.W.2d at 250. The “*Austin* factors” require a district court to (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.” *Id.* Whether a district court has made the required findings for each *Austin* factor is a question of law that this court reviews de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). In making its findings, the district court must provide substantive reasons and describe the evidence on which it relied. *Id.* at 608.

Davis contends that the record does not support the district court’s findings on the second and third *Austin* factors. We discuss each of these two *Austin* factors in turn.

A. The violations were intentional or inexcusable.

Under the second *Austin* factor, to justify revocation, the district court must find the violations were intentional or inexcusable. *Austin*, 295 N.W.2d at 250. “A violation is mitigated where it was unintentional or excusable.” *State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008); *see also Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983) (stating that where a violation is committed “through no fault of [the defendant’s] own,” the court

should “consider[] whether adequate alternative methods of punishing the defendant are available” before revoking the defendant’s probation).

Davis contends “the record does not support a finding that” his violations were intentional or inexcusable because he was provoked by “race-based derogatory comments from his peers,” and because of his completion of so many programs and overall progress while at NERCC.

The district court considered this evidence, stating it was “difficult to hear that these [incidents] were racially motivated.” The district court also commended Davis, stating that he “clearly [did] some good work at NERCC.” Even so, the district court rejected Davis’s claim and determined Davis’s conduct was “inexcusable, particularly in a controlled environment and after a lengthy period of programming.” The district court found Davis’s “violations were both intentional and inexcusable.”

The record supports the district court’s findings. As the probation officer stated during the contested hearing, the NERCC reports made “no mention” of racial comments or provocation. Also, during the July incident, Davis “displayed aggression toward another inmate that required NERCC staff to intervene.” During the September incident, Davis “got physical” by “clobber[ing] and chok[ing] another inmate” severely enough that NERCC staff believed the situation was life-threatening, and Davis could not be subdued until he was pepper-sprayed. The record also shows Davis committed these violations after receiving over six months’ worth of therapy, peer recovery, and programming for anger management and volatility.

The district court's comments show it considered Davis's claim of racial provocation and his accomplishments while at NERCC but found neither persuasive on this issue. *See State v. Xiong*, 638 N.W.2d 499, 503 (Minn. App. 2002) (determining the district court did not err by finding Xiong's violation intentional and inexcusable where Xiong provided his explanation and argument on the matter to the district court, and the district court listened to the argument and explanation "but did not find it persuasive"), *rev. denied* (Minn. Apr. 16, 2002). It is "the district court's role" to hear testimony, "judge the credibility of the witnesses," and weigh evidence, so we defer to the district court's findings when based on the record. *State v. Losh*, 694 N.W.2d 98, 102 (Minn. App. 2005), *aff'd*, 721 N.W.2d 886 (Minn. 2006).

Thus, the district court did not abuse its discretion when it considered the stipulated facts and the probation officer's statements during the hearing and found Davis's violations to be intentional and inexcusable.

B. The need for confinement outweighed the policies favoring probation.

In assessing the third *Austin* factor, a district court "must balance the probationer's interest in freedom and the state's interest in insuring probationer's rehabilitation and the public safety." *Modtland*, 695 N.W.2d at 606-07 (quotation omitted). The decision to revoke probation "cannot be a reflexive reaction to an accumulation of technical violations," but this concern is alleviated when the evidence shows "the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *State v. Fleming*, 869 N.W.2d 319, 330 (Minn. App. 2015), *aff'd*, 883 N.W.2d 790 (Minn. 2016). To make a finding on the third *Austin* factor, a district court weighs the three

“*Modtland* factors”: 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 the offender is confined,” or (3) “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Modtland*, 695 N.W.2d at 607 (quotation omitted). Only one *Modtland* factor is necessary to support revocation. 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”).

Davis contends that the district court abused its discretion on the third *Austin* factor because “the court had intermediate sanctions such as inpatient treatment available” (the first *Modtland* factor), the district court did not find that incarceration was necessary to protect the public or that treatment could most effectively be provided in custody (the second *Modtland* factor), and the record does not support a finding that continuing probation would unduly depreciate the seriousness of his violation because other intermediate sanctions were available (the third *Modtland* factor).

The state contends that the record shows that Davis cannot avoid antisocial activity and that the district court properly considered Davis’s downward dispositional departure, his seven other felony convictions, his “need [for] additional rehabilitative programming in a controlled environment,” and that NERCC was no longer an option for him. Based on these considerations, the state contends the district court “properly concluded” the need for confinement outweighed the policies favoring probation.

The district court stated that “the decision to revoke an offender’s stayed sentence should not be undertaken lightly,” and “great restraint should be used” in making that determination. The district court also expressly considered alternatives to executing Davis’s sentence, reasoning that “continuance of the stay and use of more restrictive and onerous conditions such as periods of local confinement” are urged for “offenders who were originally convicted of low severity level offenses or who have short prior criminal histories.” The district court explained that “[l]ess judicial tolerance is urged for offenders who are convicted of a more severe offense or who had a longer criminal history,” and “the Court should not reflexively order imprisonment for noncriminal violations of probationary conditions.” *See* Minn. Sent. Guidelines 3.B (Supp. 2019).

The district court determined, however, that Davis’s violations were “not a technical violation” and “that the need for [Davis’s] confinement outweighs the policies favoring probation.” The district court explained that Davis’s “behavior occurred in a controlled environment, which is no longer an option for [Davis]” as NERCC considered him a security risk, and that, during the September incident, Davis “clobbered this guy and choked him.” The district court highlighted that Davis’s violations occurred recently, after Davis received “significant programming.” The district court also found Davis had “seven prior felonies” and received a “downward dispositional departure on a very serious offense” based on his “particular amenability to probation.” These findings support the district court’s determination that the need for confinement outweighed the policies favoring probation.

Though the district court did not explicitly discuss the *Modtland* factors, explicit reference is not required. *See Losh*, 694 N.W.2d at 102 (finding the third *Austin* factor adequately supported where the district court did not expressly reference the third *Austin* factor or any *Modtland* factor but made findings that showed the appellant's drug use was a danger to public interest). Yet, the district court's findings implicitly address each of the three *Modtland* factors, even though findings on only one *Modtland* factor are required. The district court's analysis implies any sanction other than revocation would unduly depreciate the seriousness of Davis's violation. Thus, the district court did not abuse its discretion by determining the need for confinement outweighed the policies favoring probation.

II. The district court did not rely on evidence outside the record to revoke Davis's probation.

The Minnesota Rules of Evidence, aside from rules on privileges, do not apply to proceedings revoking probation. Minn. R. Evid. 1101(b)(3); *State v. Johnson*, 679 N.W.2d 169, 174 (Minn. App. 2004). Even so, a probation revocation may lead to the deprivation of freedom, so due process is required. U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7.

The process due at a revocation hearing is the opportunity for a hearing where the probationer has "an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest" revocation is not warranted. *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972). The minimum due-process requirements provide probationers the right to (1) an attorney; (2) a revocation hearing to

determine whether clear and convincing evidence supports the violation; (3) disclosure of all evidence used to support revocation and the official records relevant to revocation; (4) present evidence and subpoena, cross-examine, and call witnesses; and (5) present mitigating evidence. Minn. R. Crim. P. 27.04, subd. 2(1)(c); *Morrissey*, 408 U.S. at 489.

Davis cites minimum due-process requirements and argues the district court improperly relied on evidence outside the record, specifically, a video recording from NERCC, the violation report, and the probation officer's statements describing the video recording. Without citing legal authority, Davis contends the district court should have limited the record to the stipulated facts. Davis also contends that he protested the district court's use of the video evidence at the hearing, but his protests "went unacknowledged by the court."

Davis's claim that the district court relied on a video recording is unsupported. To be clear, no video recording was shown during the revocation hearing, nor was a video recording filed with the district court. The district court commented on the probation officer's statements—made during the hearing—about a video recording. Thus, the district court relied on the probation officer's statements and the violation report, both of which were in the record.

Davis's claim that his objections during the hearing went unaddressed is also unsupported. After the district court heard all the evidence, it began to make *Austin*-factor findings on the record. The district court noted there was a video recording showing Davis "clobbered and choked" another inmate. Davis's attorney interrupted and claimed that this "was not evidence that was put on the record. Those were statements that were simply

made by probation, so that's not actually evidence before the court." Davis's attorney then argued that if the district court planned to consider the video recording, it should also find that others instigated Davis's response. The district court acknowledged this point and stated that both the violation report and the probation officer's statements "[were] placed on the record and in the record." Thus, the district court responded to Davis's concern about the record.

In his brief to this court, Davis acknowledges that the video recording was referenced in the violation report. Importantly, David had access to the violation report before his revocation hearing. Thus, Davis had notice of the video recording before the revocation hearing and had the opportunity to present evidence, subpoena witnesses, and question the probation officer during the hearing. In fact, Davis also presented mitigating evidence during the hearing. *See* Minn. R. Crim. P. 27.04, subd. 2(1)(c) (describing the due-process rights afforded at probation-revocation hearings). We conclude Davis received the due process afforded probationers at his revocation hearing.

Affirmed.