

*This opinion is nonprecedential except as provided by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
A21-1699**

State of Minnesota,
Respondent,

vs.

Bobby James Smitty,
Appellant.

**Filed August 15, 2022
Affirmed
Smith, Tracy M., Judge**

Steele County District Court
File Nos. 74-CR-18-1603, 74-CR-19-18

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and
Larkin, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Bobby James Smitty argues that the district court abused its discretion when it revoked his probation and executed his stayed sentences because the evidence did not establish that the need for confinement outweighed the policies favoring probation. Because the evidence supports the district court's finding on this factor, we affirm.

FACTS

In late 2019, Smitty pleaded guilty to and was convicted of three offenses across two different case files—third-degree drug sale, third-degree drug possession, and driving while impaired. The district court imposed concurrent prison sentences of 33 months and 39 months but stayed both sentences for five years, subject to probationary conditions. Conditions on both files included no alcohol or controlled substance use, random chemical testing, successful completion of the Steele/Waseca County Drug Court Program, and following the recommendations of a chemical-dependency evaluation.

On September 17, 2021, Steele County Community Corrections filed nearly identical probation-violation reports in both case files. Both reports alleged that Smitty had committed three violations: failure to successfully complete the drug court program after he was terminated from drug court, failure to follow recommendations of his chemical-dependency evaluation after he was unsuccessfully discharged from outpatient treatment, and use of alcohol and THC. Both reports summarized 38 instances of Smitty's noncompliance with probation. These reports cited positive tests for THC, methamphetamine, amphetamine, and alcohol; missed chemical testing; missed drug court appearances; lack of communication with the drug court; lack of honest communication; failure to attend treatment; failure to report to jail as ordered; and lack of communication with the drug court in the month preceding Smitty's termination from drug court on September 15, 2021. Smitty spent several days in local jail during his probation.

At a probation-revocation hearing on September 20, 2021, Smitty admitted to the three probation violations alleged in the reports and, through his counsel, requested that he

be continued on probation so he could pursue chemical-dependency and mental-health treatment. The district court revoked Smitty's probation and executed his stayed prison sentences.

Smitty appeals.

DECISION

District courts have broad discretion in determining whether there is sufficient evidence to revoke probation and execute a sentence 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). The state must prove probation violations by clear and convincing evidence. Minn. R. Crim. P. 27.04, subds. 2(1)(c)(b), 3(1). To revoke probation and execute a stayed sentence, the district court must “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.” *Austin*, 295 N.W.2d at 250. The district court “must make specific findings on all three *Austin* factors before revoking probation.” *State v. Cottew*, 746 N.W.2d 632, 636-37 (Minn. 2008).

Smitty argues that the district court abused its discretion when it revoked his probation because the evidence did not establish the third *Austin* factor—that the need for confinement outweighs the policies favoring probation.

When considering the third *Austin* factor, the district court should balance “the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *Austin*, 295 N.W.2d at 250. The district court’s decision to revoke cannot be “a reflexive reaction to an accumulation of technical violations but requires a showing

that the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Id.* at 251 (quotations omitted). To help with this balancing, district courts should consider alternatives to probation revocation and should not revoke probation unless (1) confinement is necessary for public safety, (2) the offender needs "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.* (quotation omitted). "The purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Id.* at 250.

Smitty contends that the third *Austin* factor was not satisfied because his violations were the result of poor decision-making due to his addiction and that additional outpatient treatment, coupled with mental-health treatment, could help him overcome his addiction. He also notes that the district court could also order other consequences, including local jail time and any other appropriate programming.

At the probation-violation hearing, the district court found as follows:

As I look back over the nature of the violations here what really strikes me is that gap between your mental understanding and the actions that you choose to take. So mental health is a hard thing to recover and to hang on to, but it's virtually impossible to do that when people continue to use the controlled substances. So it looks like you have really tried for way too long to keep one foot in the using world and one foot in the recovery world. And so it's not surprising at all that the intensity has just resulted in the situation that you are in now. You have to be all in or all out to be successful. So you certainly continue to be in need of treatment, that can most effectively be offered to you now within the Department of Corrections. To not send you given your history on these files would unduly depreciate the seriousness of these violations. It's regrettable but it is just what the law requires at this point in time.

The third *Austin* factor is satisfied by the district court's findings. Smitty admitted to three serious violations—failure to complete drug court, failure to follow chemical-dependency treatment recommendations, and alcohol/THC use. These are not merely “technical violations.” *Id.* at 251 (quotation omitted). The district court found that Smitty would most effectively complete treatment in prison. Thus, the district court determined that, based on Smitty's violations, “treatment has failed,” and it used revocation as a “last resort.” *Id.* at 250. The district court additionally found that it would unduly depreciate the seriousness of Smitty's violation not to revoke his probation.

These findings are supported by the record. Repeated instances of noncompliance leading up to the revocation are detailed in probation-violation reports, sanctions orders from drug court, and drug court hearings. Smitty's noncompliance and lack of success in treatment outside of confinement are reflected in positive chemical tests, missed chemical tests, missed drug court appearances, lack of communication, failure to attend treatment, failure to report to jail as ordered, and termination from the drug court on September 15, 2021. Moreover, the fact that Smitty had already spent several days in local jail as sanctions for his noncompliance during his probation supports the district court's decision not to consider alternatives to revocation, particularly local jail time.

In sum, the district court did not abuse its discretion when it revoked Smitty's probation and executed his stayed sentences.

Affirmed.