

*This opinion is nonprecedential except as provided by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
A22-0043**

State of Minnesota,
Respondent,

vs.

Trevor Stenner Shelley,
Appellant.

**Filed July 18, 2022
Affirmed
Kirk, Judge***

Blue Earth County District Court
File No. 07-CR-14-1702

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

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, 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NONPRECEDENTIAL OPINION

KIRK, Judge

Appellant Trevor Stenner Shelley appeals the district court's revocation of his probation. Because he did have notice of his probation violations and the district court did not abuse its discretion when it found that his violations were intentional and inexcusable and the need for confinement outweighed the policies favoring probation, we affirm.

FACTS

In May 2014, Shelley pleaded guilty to first-degree assault stemming from an incident where he intentionally punched another person, causing a severe brain injury. The district court stayed imposition of sentence and ordered conditions of probation.

Shelley violated the terms of his probation three times between 2016 and 2018. In August 2018, after his third violation, the district court issued a warrant for his arrest. Shelley did not have any contact with the district court until April 2021—nearly a three-year period—when his attorney contacted the district court and asked for it to quash the warrant. The district court denied this request. Shelley surrendered and appeared in district court in June. The district court held a revocation hearing in October, revoked Shelley's probation, and sentenced him to 86 months in prison. Shelley appeals.

DECISION

Shelley violated his probation three times in three years and then was out of contact with probation entirely for nearly three more years. We hold that he was on notice of his probation violations and that the district court did not abuse its discretion when it found

that his violations were intentional and inexcusable and that the need for confinement outweighed the policies favoring probation.

I. The district court did not violate Shelley’s due-process rights because notice of his probation violation was included in the first addendum to the probation-violation report.

Probation revocation “deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special [probation] restrictions.” *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). A probationer is entitled to procedural due process before the revocation of probation. *State v. Beaulieu*, 859 N.W.2d 275, 280 (Minn. 2015). The process due requires that a defendant have notice of the alleged violations, an opportunity to contest those violations, and an opportunity to show that even if a condition of probation were violated, mitigating circumstances exist such that the violation does not warrant revocation. *See* Minn. Stat. § 609.14, subd. 2 (2018) (codifying requirements that probationers be notified in writing of the alleged violations and that probationers are entitled to a hearing on any alleged violations); Minn. R. Crim. P. 27.04 subds. 1-2 (requiring written notice of the allegations, the factual statements in support of the allegations, the rights to appointed counsel, a contested hearing, and appeal, among others); *see also, e.g., Pearson v. State*, 241 N.W.2d 490, 492 (Minn. 1976) (noting procedural requirements for probation violation hearings). A probationer must be “given written notice of the alleged grounds for revocation,” but the notice need only be “adequate to warn the appellant of the issues that could come up at the hearing.” *State v. Austin*, 295 N.W.2d 246, 252 n.1 (Minn. 1980). “When constitutional issues involving due process are raised, this court reviews the

[district] court’s legal conclusions de novo.” *State v. Heath*, 685 N.W.2d 48, 55 (Minn. App. 2004), *rev. denied* (Minn. Nov. 16, 2004).

Shelley claims that he was denied due process because he did not receive adequate notice that the alleged violation of failure to contact his probation officer included the nearly three-year period when he was out of contact with probation between August 2018 and June 2021. Shelley’s probation revocation stems from an initial probation-violation report filed in August 2018 and two addenda to the report added in April 2021 and October 2021. The August 2018 probation-violation report contains four alleged violations. The first addendum to the probation-violation report states that there were no new violations, but it stated that “Mr. Shelley has been without any kind of community supervision for over two years on a Felony-1st Degree assault file.” The second addendum to the probation-violation report alleges a new violation for a positive alcohol test and a diluted drug test, both in September 2021.

Shelley argues that the violation report and addenda did not give him notice that his time without contact with probation would be included in his revocation hearing, but this argument is unpersuasive. First, he raised no due-process argument before the district court, so he forfeits his right to raise it on appeal unless it meets the plain-error test. *See Beaulieu*, 859 N.W.2d at 278-79 (applying the forfeiture doctrine to claimed due-process rights violation in probation revocation raised for first time on appeal). Under the plain-error test, an appellant is not entitled to appellate relief on an issue to which no objection was made at the district court level unless (1) there is an error, (2) the error is plain, and (3) the error affects the appellant’s substantial rights. *Id.* at 279 (citing *State v. Griller*, 583

N.W.2d 736, 740 (Minn. 1998)). If we conclude that any requirement of the plain-error test is not satisfied, we need not consider the other requirements. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

Shelley fails to establish the first prong of the plain-error test because there was no error in the notice of the condition that he allegedly violated. Probation-revocation proceedings “must be initiated by a summons or warrant based on a written report” and include “a description of . . . the probationary terms allegedly violated.” Minn. R. Crim. P. 27.04, subd. 1(1)(a), (2)(b). The first probation-violation addendum report states that Shelley violated his probation by failing to contact probation for nearly three years. This is written notice of a probation violation, so there is no error.

Second, even if this issue were before the court, Shelley had ample notice that the more than two-year period where he was out of contact with probation was part of his probation violation. The first violation report addendum highlighted that period multiple times. This is sufficient “written notice of the alleged grounds for revocation” because it was “adequate to warn the appellant of the issues that could come up at the hearing.” *Austin*, 295 N.W.2d at 252 n.1.

Shelley cites no case where a district court is limited to considering only the facts in the “alleged violation” section of the probation-violation report or addenda. But there are two nonprecedential cases from this court finding that a district court *can* consider facts outside of that section. *State v. Heggs*, No. A19-1523, 2020 WL 3172828, at *4 (Minn. App. June 15, 2020); *State v. Ramat*, No. A19-0895, 2020 WL 994757, at *4 (Minn. App. Mar. 2, 2020), *rev. denied* (Minn. May 19, 2020). The only case argued by Shelley for this

premise involved the state orally amending its alleged probation violations at trial. *State v. Moore*, No. A17-0569, 2017 WL 5661581, at *6 (Minn. App. Nov. 27, 2017). But *Moore* is distinguishable because there was no written notice of the probation violation before the hearing, whereas here there was written notice before the hearing in the first addendum to the probation-violation report. As such, this argument fails as well.

Third, the district court revoked Shelley's probation based on several violations, not just the nearly three-year period without contact with probation, and Shelley admitted to each of those violations. Accordingly, even if Shelley lacked notice that the nearly three-year period that he was out of contact with probation would be used to revoke his probation, he had notice of the other violations that the court relied on to revoke his probation, and he admitted to each violation at the revocation hearing. Shelley argues that "the district court would not have revoked Shelley's probation based on the five noticed violations," but Shelley cites no law to suggest that a district court can only revoke probation if the basis for revocation is every single violation. For these reasons, the district court did not violate Shelley's due-process rights when it considered his failure to contact probation as one of the reasons for revoking his probation.

II. The district court acted within its discretion when it held that Shelley's probation violations were intentional and inexcusable.

"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." *Austin*, 295 N.W.2d at 249-50. But whether the district court made the

findings required to revoke probation is a question of law, which this court reviews de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

In *Austin*, the supreme court set forth three factors, known as the *Austin* factors, that a district court must consider and make specific findings on before revoking probation. *Austin*, 295 N.W.2d at 250. A 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.” *Id.* And in making the three *Austin* findings, district courts “must seek to convey their substantive reasons for revocation and the evidence relied upon.” *Modtland*, 695 N.W.2d at 608. It is not sufficient for a district court to merely recite the factors or to give “general, non-specific reasons for revocation.” *Id.*

Shelley challenges the district court’s findings on the second *Austin* factor—that the violation was intentional or inexcusable—as unsupported by the record. While the district court acknowledged that failing to contact probation for nearly three years “is the most significant violation,” it included all violations in its analysis of the second *Austin* factor. At the revocation hearing, the district court stated: “This isn’t about missing a couple of appointments over three years ago. It’s about being out of contact with probation and not amenable to supervision for about three years. This is a serious and inexcusable violation of probation.” This language shows that the district court considered Shelley’s excuses and determined that Shelley’s violation was inexcusable. Because the court did make specific findings on the *Austin* factors, we review its conclusion that the violations were inexcusable for an abuse of discretion, and we discern no abuse of discretion here.

III. The district court acted within its discretion when it found that the policies favoring probation were outweighed by the need for confinement.

The third *Austin* factor states that the court must find that need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250. In assessing the third *Austin* factor, the district court should consider whether: (1) “confinement is necessary to protect the public from further criminal activity,” (2) the offender needs correctional treatment that can most effectively be provided in prison, *or* (3) reinstating probation would “unduly depreciate the seriousness of the violation.” *Modtland*, 695 N.W.2d at 607 (quotation omitted) (emphasis added). The supreme court has stated the district court “must balance the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *Id.* at 606-07 (quotation omitted). A district court should explain its “substantive reasons for revocation and the evidence relied upon” in reaching that determination. *Id.* at 608. The district court’s findings are adequate when it provides “fact-specific reasons explaining its finding” that the *Austin* factors have been met. *State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015), *aff’d*, 833 N.W.2d 790 (Minn. 2016). We review findings under the third *Austin* factor under an abuse-of-discretion standard. *Modtland*, 695 N.W.2d at 605.

Shelley argues that the need for confinement does not outweigh the policies favoring probation because confinement is unnecessary to protect the public from further criminal activity and there is no allegation that treatment could be most effectively provided if Shelley were confined. But, because the three *Modtland* subfactors are disjunctive, a court need only find that one of the *Modtland* subfactors warrants revoking probation to satisfy

the third *Austin* factor. *Modtland*, 695 N.W.2d at 607; *see also Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008) (stating that Minnesota courts interpret “or” as disjunctive rather than conjunctive).

Shelley was convicted of a crime that the legislature has determined should lead to a prison sentence, Minn. Sent. Guidelines 4.A (2014), but the district court dispositionally departed to place Shelley on probation. This type of disposition implies that the district court expected Shelley to take his probation conditions seriously, which he did not—violating three times in three years and then not contacting probation at all for an additional three years. *See e.g., State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983) (stating that when a trial court dispositionally departs, they can focus on whether the presumptive sentence would be best for the defendant and society). Anything less than execution of the sentence would have depreciated the seriousness of his repeated probation violations.

Affirmed.