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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0519**

State of Minnesota,
Respondent,

vs.

Patrick Alfonso Terrell, Jr.,
Appellant.

**Filed November 28, 2022
Affirmed
Segal, Chief Judge**

Olmsted County District Court
File No. 55-CR-19-7631

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Assistant County Attorney,
Megan C. Lindsey (certified student attorney), Rochester, Minnesota (for respondent)

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

Considered and decided by Frisch, Presiding Judge; Segal, Chief Judge; and
Connolly, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges the revocation of his probation, arguing that the district court
(1) denied him due process by precluding him from testifying about whether he

intentionally or inexcusably violated his probation, and (2) abused its discretion in revoking probation because the district court failed to make required findings on whether the need for confinement outweighed the policies favoring probation and instead based its decision on his homelessness. We affirm.

FACTS

Respondent State of Minnesota charged appellant Patrick Alfonso Terrell, Jr. with one count of attempted third-degree criminal sexual conduct and one count of fourth-degree criminal sexual conduct. Pursuant to a plea agreement, Terrell pleaded guilty to fourth-degree criminal sexual conduct and the state dismissed the charge of attempted third-degree criminal sexual conduct. At Terrell's sentencing in March 2020, the district court ordered a stay of imposition, placed Terrell on probation for ten years, and sentenced Terrell to 180 days in Olmsted County Jail. The jail time was deemed satisfied by credit for 138 days already served. The conditions of his probation prohibited Terrell from possessing pornographic material, using alcohol or drugs, or possessing an unmonitored internet-capable device. Terrell was also ordered to complete sex-offender treatment.

In the 16 months after his sentencing, Terrell was brought before the district court four times for violating his probation conditions, including two instances that resulted in probation sanctions conferences and two that resulted in a determination that Terrell had violated the conditions of his probation.

With regard to the probation sanctions conferences, Terrell admitted at the first conference that he violated probation by possessing an unmonitored internet-connected device and alcohol or drugs. The court ordered the intermediate sanction that Terrell reside

at Damascus Way Residential Facility, the residence approved by his probation officer, and follow all rules and requirements there. At the second conference, Terrell admitted that he used alcohol and other drugs and accessed sexually explicit materials online. As an intermediate sanction for these violations, the district court ordered Terrell to complete additional outpatient treatment.

As to the two probation-violation determinations, Terrell admitted that he violated the conditions of his probation because he used drugs, was discharged from Damascus Way for failing to follow its rules and requirements, possessed an unmonitored internet-connected device and used it to access pornographic materials, and was discharged from sex-offender treatment after engaging in inappropriate behavior toward staff at the program. The district court allowed Terrell to remain on probation, but imposed intermediate sanctions of 40 and 180 days in custody, respectively, and required Terrell to complete chemical-dependency treatment.

In January 2022, Terrell's probation officer filed another probation-violation report, marking Terrell's fifth time violating probation conditions. The report alleged that, because Damascus Way had discharged Terrell from its program a second time for "repeated behavior and non-compliance and failing to abide by facility rules," Terrell violated his probation condition that he reside at Damascus Way and follow its rules. The district court set a hearing on the alleged violation.

At the outset of the hearing, Terrell's counsel said that Terrell had decided to admit the violation. When questioned by his counsel, Terrell admitted that he had violated probation by failing to reside at Damascus Way as required. But after being asked by the

prosecutor whether he thought his discharge from Damascus Way was his fault, Terrell appeared to dispute that question. The following exchange then took place between the district court and Terrell:

COURT: And then just to be clear, Mr. Terrell, [this violation was] within your control, correct? It looks like you had violated some rules maybe of the facility and that they had talked to you about that prior to them kicking you out, correct?

TERRELL: Yeah, but everything, everything was good. I mean, I would do what I was supposed to do. I was going to work and I was coming back and, like, you know, I messed up. I violated the rule. I broke a lot of rules since I been there, honestly. So eventually it was going to happen anyway.

COURT: So it sounds like it was kind of a culmination of they tried to work with you after you violated some rules, but is it just kind of fair to say that after meeting with you, you still didn't comply with all of the rules?

TERRELL: I was complying to the best of my ability, to be honest.

COURT: Okay.

TERRELL: I was doing what was asked of me. And I really—I actually wasn't doing any wrong I had stopped, I stopped drinking I was making progress and I was actually improving. And I actually wasn't doing any wrong in there or in the community

. . . .

COURT: Like, one of the things it sounds like you did was that you falsely signed out of Damascus Way was one of the things, correct?

TERRELL: I didn't—I didn't falsely sign that. I went to work. I was at work, you know, you can verify, you can go to my job. You can go to my job and get the paper and you can see that I was at work.

COURT: Okay. And then what about that they found a cellphone that you had and in your Google history you had been viewing some pornography?

TERRELL: That's not true.

After this exchange, the parties and district court agreed to convert the proceeding to a contested hearing. The state called Terrell's probation officer as a witness. After the close of the probation officer's testimony, the district court stated on the record that it was finding that Terrell violated his probation, and that the violation was intentional or inexcusable. The district court then inquired if the state had more testimony regarding whether Terrell's probation should be revoked. The prosecutor replied, "I will have argument. I don't know if the defense was going to call Mr. Terrell to testify first." The district court then asked Terrell if he wanted to testify, to which Terrell responded, "I'll testify."

Defense counsel began direct examination, asking Terrell if he wanted to dispute his probation officer's report. Terrell said he would dispute his probation officer's report regarding what time he was at work, stating, "I would say where [did] he get his information from? But at the same time, it's just so not reliable. I can't—." The district court then interjected, "Well, and I think at this point, Mr. Terrell, I already found the probation violation. So the things you might want to consider talking about or testifying to me is why you think I shouldn't send you to prison."

After Terrell's testimony and the state's rebuttal, the district court revoked Terrell's probation and ordered him to serve a 24-month executed sentence.

DECISION

Terrell challenges the district court's decision to revoke his probation on two grounds. He argues, first, that the district court violated his right to due process because he was denied the right to testify about whether he intentionally or inexcusably violated his probation. Second, Terrell argues that the district court erred in deciding to revoke probation because the court failed to make adequate findings that the need for confinement outweighed the policies favoring probation and instead based its decision on Terrell's homelessness.

In deciding whether to revoke probation, the Minnesota Supreme Court has identified three factors, known as the *Austin* factors, that a district court must consider and make specific findings on before revoking probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). 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.* The third factor requires a district court to 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 he is confined; or
- (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Id. at 251 (quotation omitted). In making these findings, district courts “must seek to convey their substantive reasons for revocation and the evidence relied upon.” *State v.*

Modtland, 695 N.W.2d 602, 608 (Minn. 2005). It is not sufficient for a district court to merely recite the factors or to give “general, non-specific reasons for revocation.” *Id.*

“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 we review de novo. *Modtland*, 695 N.W.2d at 605.

I. The district court did not commit reversible error by limiting Terrell’s testimony about whether he intentionally or inexcusably violated probation.

Terrell contends that the district court denied his right to be heard because the court made a finding on the record, right after the probation officer’s testimony, that Terrell’s violation was intentional or inexcusable. He argues that the district court restricted his subsequent testimony to the third *Austin* factor—whether the need for confinement outweighs the policies favoring probation.

Under the United States and Minnesota Constitutions, U.S. Const. amend. XIV, § 1 and Minn. Const. art. 1, § 7, criminal defendants have a due-process right “to be heard in person and to present witnesses and documentary evidence” at a probation-revocation hearing. *State v. Beaulieu*, 859 N.W.2d 275, 280 (Minn. 2015) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)); *see also* Minn. R. Crim. P. 27.04, subds. 2(1)(c)d-e, 3(1) (providing probationers the right to present evidence, including mitigating evidence, at revocation hearings).

The parties dispute which standard of review we should apply to Terrell's claim that the district court violated his right to testify. Harmless-error review generally applies to an error that implicates a constitutional right, with the burden of proof on the state to prove that the error, if any, was harmless beyond a reasonable doubt. *State v. Conklin*, 444 N.W.2d 268, 275 (Minn. 1989) ("When constitutional errors are involved, the state has the burden to show that the errors are harmless beyond a reasonable doubt by showing that the error did not contribute to the verdict obtained."). The state argues, however, that the standard of review should be plain error because Terrell never raised this issue before the district court. *See State v. Kuhlmann*, 806 N.W.2d 844, 852 (Minn. 2011) (noting that appellate courts may consider an unobjected-to error that affects a criminal defendant's substantial rights under plain-error analysis). Plain error is a tougher standard for a defendant-appellant to satisfy. The plain-error standard of review requires us to "determine whether there was error, that was plain, and that affected the defendant's substantial rights. If each of these prongs is met, we will address the error only if it seriously affects the fairness and integrity of the judicial proceedings." *Id.* at 852-53 (citation omitted).

Terrell responds that he asserted his due-process right to testify before the district court when he stated at the hearing, "I'll testify." He maintains that he thereby preserved this issue for appeal and is thus entitled to the harmless-error standard of review. Because we determine that the alleged error was harmless under these facts, we need not resolve whether Terrell's statement, "I'll testify," qualifies as an objection sufficient to establish that he raised the issue in the district court.

Applying the harmless-error standard, we conclude that the district court erred by failing to allow Terrell to present testimony on the second *Austin* factor before the district court ruled on that factor. We are persuaded, however, based on the record presented here, that the state has satisfied its burden of establishing that this error was harmless beyond a reasonable doubt.

First, Terrell did have an opportunity, as set out in the colloquy above, to provide testimony contesting the violation and whether it was intentional or inexcusable. Terrell offered testimony on why he believed his discharge from Damascus Way was not his fault, stating that he had “stopped drinking,” was “making progress,” and was “actually improving.” He also contested in his testimony one of the grounds cited by Damascus Way as a basis for his discharge—that he had falsely stated when signing out from the residence that he was going to work. Terrell testified that he was at work and that this could be verified by paperwork at his job. In addition, Terrell testified that the probation officer’s allegation, that Terrell had an unauthorized cellphone and had used it to view pornography, was false.

Second, while Terrell denied some of the probation-violation allegations, he admitted that he “messed up” and “broke a lot of rules” at Damascus Way, “[s]o eventually [the discharge] was going to happen.” Terrell was thus able to offer testimony on whether the violations were intentional or inexcusable and, at least with regard to his discharge from Damascus Way, the district court’s findings are supported by Terrell’s own testimony.

Finally, Terrell has not identified any additional testimony or evidence that he would have presented, but for the district court’s error. The district court thus heard Terrell’s

explanation but apparently rejected it, crediting instead the probation officer’s testimony and the assessment of Damascus Way. We are therefore persuaded that any error in preventing Terrell from providing additional testimony as to whether his violation was intentional or inexcusable is harmless because it did not contribute to the revocation of his probation.¹

II. The district court did not abuse its discretion in revoking Terrell’s probation.

We next consider Terrell’s challenge to the district court’s decision to revoke his probation. Terrell argues that the district court failed to make sufficient findings on the third *Austin* factor and that the district court improperly revoked his probation based on homelessness.

A. The district court made the required findings under *Austin*.

Terrell argues that the district court failed to consider or cite the subfactors that courts are to use in evaluating the third *Austin* factor—whether the “need for confinement outweighs the policies favoring probation.” *Austin*, 295 N.W.2d at 250. Terrell also argues that the district court abused its discretion because it should have imposed an intermediate sanction, instead of revocation. We are not persuaded.

¹ Terrell also argues that, even if the error was harmless, he was denied his right to testify and that this constitutes a structural error requiring automatic reversal. We disagree for reasons similar to those which convince us that the district court’s alleged error is harmless. “Structural error consists of defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards because the entire conduct of the trial from beginning to end is obviously affected.” *State v. Dalbec*, 800 N.W.2d 624, 627 (Minn. 2011). As we explain above, the district court may have erred when it ruled, right after the probation officer’s testimony, that Terrell’s violation was intentional or inexcusable. But we conclude nevertheless that the error did not affect “the entire conduct of the trial from begging to end” because Terrell did, in fact, provide testimony at the hearing on this issue.

Regarding the third *Austin* factor, the district court stated that it was “making a finding that the need for incarceration is outweighed by the factors favoring continued probation.” The court explained its findings as follows:

Well, Mr. Terrell, it’s not an easy case. Obviously I don’t want to send somebody to prison just because they’re homeless. On the other hand, I have to make a decision of whether the need for incarceration is outweighed by the factors favoring continued probation.

And if [Terrell’s probation officer] is telling me that you’ve exhausted all of your opportunities for safe housing here in Rochester, that obviously is going to impact your probation and whether or not you can successfully comply.

Looking over your violation report, you’ve had the two prior violations, you’ve had the two sanctions, and it just doesn’t seem like you’ve kind of taken those—I mean, there’s some positive things about it. It looks like you haven’t had any positive UAs in a while, although there’s this admitted—or Damascus thought that you had been using marijuana. . . .

I don’t see that I can continue you on probation supervision when . . . Community Corrections is telling me they’ve exhausted all their resources for you and that they don’t think there’s anything available for you left in this community

While the district court did not use the exact language of the subfactors, the court did “seek to convey [its] substantive reasons for revocation and the evidence relied upon.” *Modtland*, 695 N.W.2d at 608. For example, the district court’s comment about being unable to keep Terrell in the community when Terrell had “exhausted all of [his] opportunities for safe housing” relates to the subfactor that “confinement is necessary to protect the public from further criminal activity by the offender.” *Austin*, 295 N.W.2d at 251 (quotation omitted). The district court further noted that the fact that Terrell had

“exhausted” the available supervised housing “is going to impact [Terrell’s] probation and whether or not [he] can successfully comply.” This supports the subfactor that Terrell “is in need of correctional treatment which can most effectively be provided if he is confined.” *Id.* (quotation omitted). Finally, the district court cited Terrell’s two prior violations and two prior sanctions, implicating the third subfactor, that “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Id.* (quotation omitted). We thus conclude that, while brief, these findings were legally sufficient to allow for meaningful appellate review.

As to Terrell’s argument that the district court abused its discretion because the court should have only imposed an intermediate sanction, not revocation, the decision to revoke was well within the broad discretion accorded to the district court. By the time the probation officer filed the violation report at issue, Terrell had already violated the conditions of his probation four times within 16 months of sentencing and had received multiple intermediate sanctions. Terrell’s probation officer also testified at the revocation hearing that Terrell was a particular risk to the community without significant supervision because he had perpetrated his sexual crimes against strangers. And, as the district court emphasized, Terrell had “exhausted” the available community-based safe-housing options. The district court’s revocation decision was based on the facts in the record and was not an abuse of discretion.

B. The district court did not base its revocation decision on poverty-induced homelessness.

Terrell's last argument is that the district court abused its discretion because it revoked probation based on Terrell's homelessness. In support of this argument, Terrell points to the district court's statement that Terrell had "exhausted all of [his] opportunities for safe housing here in Rochester" and his probation officer's testimony that "[i]f there was someplace for [Terrell] to go, I would have had him in and out of there already, and he'd be there." Terrell asserts that because his "homelessness is an incident of his poverty," the revocation of his probation violates *Bearden v. Georgia*, 461 U.S. 660, 671 (1983), where the United States Supreme Court held that revoking probation based on inability to pay a fine amounted to unconstitutional punishment based on poverty.

The district court here, however, did not revoke Terrell's probation because he could not afford housing. Terrell's probation was revoked because, due to his own misconduct and rule violations, he had been discharged for the second time from his supervised housing and had "exhausted all of [his] opportunities for safe housing" in the community. Moreover, at the revocation hearing, Terrell testified that he works and could pay for a private apartment. Homelessness due to poverty was thus not the reason his probation was revoked.

Affirmed.