

*This opinion is nonprecedential except as provided by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
A22-0551**

State of Minnesota,
Respondent,

vs.

Davonte Michael Robinson,
Appellant.

**Filed January 3, 2023
Affirmed in part, reversed in part, and remanded
Larson, Judge**

Hennepin County District Court
File Nos. 27-CR-18-29637; 27-CR-19-15455

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

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Considered and decided by Bratvold, Presiding Judge; Gaïtas, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

This is an appeal from the district court's probation-revocation decision in two cases. Appellant Davonte Michael Robinson argues the district court: (1) abused its discretion when it decided that the need for confinement outweighed the policies favoring

probation; (2) must resentence Robinson pursuant to the amelioration doctrine for his first-degree-assault conviction because his criminal-history score erroneously included an extra custody-status point; and (3) must correct the warrant of commitment to vacate the third-degree-assault conviction because it is a lesser-included offense of first-degree assault. Because the district court must resentence Robinson pursuant to the amelioration doctrine and correct the warrant of commitment, but the district court did not abuse its discretion when it revoked Robinson's probation, we affirm in part, reverse in part, and remand.

FACTS

On or about November 1, 2018, Robinson punched a man in the head, resulting in the victim falling backwards and hitting his head on the pavement. Robinson admitted his conduct caused the victim serious brain damage. About a month later, on or about December 2, 2018, Robinson committed an unrelated carjacking.

On December 26, 2018, respondent State of Minnesota filed an amended complaint charging Robinson with one-count of first-degree assault and one-count of third-degree assault for the November 2018 incident. Robinson entered a straight plea¹ on June 27, 2018 (the assault conviction). Before sentencing on the assault conviction, the state charged Robinson with one-count of first-degree aggravated robbery for the December 2018 carjacking.

The district court sentenced Robinson for the assault conviction on October 16, 2019. The district court calculated Robinson's presumptive sentence for the assault

¹ A straight plea occurs when a defendant pleads guilty without entering a plea agreement with the state. *See State v. Ellis-Strong*, 899 N.W.2d 531, 534 (Minn. App. 2017).

conviction under the 2018 Minnesota Sentencing Guidelines, assigning him one custody-status point because the assault occurred within the original probationary term of a 2016 offense.² The district court sentenced Robinson to 122 months in prison, a presumptive sentence for a severity-level-nine offense with a criminal-history score of three.³ Minn. Sent’g Guidelines 4.A (2018). The district court then imposed a downward-dispositional departure, staying execution of Robinson’s sentence and placing him on probation for five years. To support its decision, the district court acknowledged the significant harm the victim suffered and the pending first-degree robbery charge, but chose to, in the district court’s words, “take a huge chance” on Robinson. The district court found Robinson particularly amenable to probation because he: participated in presentencing rehabilitative programs; had a supportive community; took responsibility for his actions; and consistently expressed remorse. Robinson’s probation conditions prohibited Robinson from possessing firearms or ammunition and required him to follow all state and federal criminal laws.

On June 30, 2021, Robinson entered a plea agreement with the state and pleaded guilty to aiding and abetting aggravated robbery for the December 2018 carjacking (robbery conviction). On August 19, 2021, upon the parties’ agreement and in recognition that Robinson had complied with the terms of probation for the assault conviction, the district court imposed another downward-dispositional departure and sentenced Robinson

² The 2016 offense is not otherwise at issue in this appeal.

³ Although the district court accepted only Robinson’s plea to first-degree assault and sentenced him for that offense alone, the warrant of commitment reflects convictions for both first- and third-degree assault. We address this *infra* at Part III.

to an 88-month stayed prison term, with five years of probation and no additional time to serve for the robbery conviction.⁴

Robinson's probation officer filed a violation report on November 3, 2021, stating that Minneapolis police arrested Robinson after monitoring his social media. According to the report, Robinson posted three videos depicting Robinson holding a semi-automatic handgun. The videos showed Robinson possessing a handgun equipped with an extended magazine and one video showed Robinson brandishing a handgun toward the camera. The report also stated that police took Robinson into custody at a traffic stop and that Robinson admitted he had a handgun at his residence. Police found a handgun in Robinson's residence when they executed a search warrant.

The district court held a contested revocation hearing pursuant to Minn. R. Crim. P. 27.04, subd. 3, on December 9, 2021. At the revocation hearing's conclusion, the district court declined to rule from the bench to avoid "react[ing] out of . . . disappointment." On January 20, 2022, the district court held a hearing to decide the disposition. There, the district court revoked Robinson's probation, finding the state had proven Robinson's probation violations at the contested revocation hearing and that the severity of the underlying offenses together with the probation violations indicated that Robinson posed a risk to public safety, and that there were no appropriate alternatives to confinement.

The district court issued a written revocation order reflecting its reasoning on March 21, 2022. This order revoked Robinson's probation for both the assault and robbery

⁴ The district court did not revoke probation because the carjacking took place prior to sentencing for the assault conviction.

convictions, executed the 122-month sentence for the assault, and executed the 88-month sentence for the robbery to be served concurrently with the assault sentence, and credited him 266 days for time served. The district court found that: (1) Robinson violated the probation conditions prohibiting him from possessing firearms and ammunition and requiring him to comply with all state and federal criminal laws; (2) Robinson's violations were intentional and inexcusable; and (3) public policy favored confinement rather than probation.

Regarding the district court's findings related to policies favoring probation, the district court noted Robinson's probation successes, family and support network, and his probation agent's surprise when she learned of his probation violations. The district court also acknowledged Robinson's defense that he was not, in fact, a dangerous person but simply trying to outwardly project "an image others expected of him." Nevertheless, the district court found public policy favored revocation. The district court found that Robinson had been convicted for violent crimes, one for "the most serious assault in Minnesota law." The district court noted that Robinson's offenses and the parole violation—possession of a gun and ammunition—all carry prison commitment as their presumptive disposition. The district court concluded that Robinson's "desire to portray himself as a man who has access to and parties with a gun with an extended magazine shows he is a danger to public safety." The district court concluded its public-safety analysis by citing the sentencing guidelines for the proposition that "less judicial tolerance is urged for offenders who were convicted of a more severe offense." Minn. Sent'g Guidelines 3.B (2018).

Robinson appeals.

DECISION

Robinson argues the district court: (1) abused its discretion when it decided that the need for confinement outweighed the policies favoring probation; (2) must resentence Robinson pursuant to the amelioration doctrine for his first-degree-assault conviction because his criminal-history score erroneously included an extra custody-status point; and (3) must correct his warrant of commitment to vacate the third-degree-assault conviction because it is a lesser-included offense of first-degree assault. We address each argument in turn.

I.

Robinson first argues that the district court abused its discretion when it revoked his probation. “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 discretion.” *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). However, we review whether the district court made the required findings to revoke probation de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

A district court analyzes three factors before it revokes probation (*Austin* factors). *Id.* at 606. The district court should: (1) “designate the specific [probation] condition or conditions that were violated”; (2) “find that the violation was intentional or inexcusable”; and (3) “find that the need for confinement outweighs the policies favoring probation.” *Austin*, 295 N.W.2d at 250. “[I]n making . . . *Austin* findings, courts are not charged with merely conforming to procedural requirements; rather, courts must seek to convey their

substantive reasons for revocation and the evidence relied upon.” *Modtland*, 695 N.W.2d at 608. Robinson only challenges the district court’s application of the third *Austin* factor.

Under the third *Austin* factor, the district court should consider three subfactors (*Modtland* subfactors). The district court should evaluate whether: (1) confinement is needed to “protect the public from further criminal activity”; (2) the offender needs correctional treatment “which can most effectively be provided” during confinement; and (3) “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Id.* at 607 (quotation omitted). Robinson argues the district court abused its discretion in its application of the first and second *Modtland* subfactors.

Regarding the first *Modtland* subfactor, Robinson challenges the district court’s public-safety finding, highlighting his successes on probation and the lack of evidence that Robinson is dangerous. Robinson argues the district court misapplied the law when it relied on the sentencing guidelines to weigh the downward-dispositional departures he received for his crimes. *See* Minn. Sent’g Guidelines 3.B.⁵ Robinson claims the district court relied on the sentencing guidelines for the proposition that they “urge revocation for probationers who violate their terms of supervision after receiving a [dispositional] departure.”

The record belies Robinson’s arguments. The district court appropriately considered that the sentencing guidelines urge judicial restraint in revoking probation when

⁵ Robinson acknowledges that the district court was free to consider his downward-dispositional departures as a factor in deciding whether to revoke probation, *e.g.*, *State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015), but contests the way the district court weighed the evidence.

an offender committed a “low severity level offense[,]” but that “[l]ess judicial tolerance is urged for offenders who were convicted of a more severe offense.” Minn. Sent’g Guidelines 3.B. Robinson’s convictions were for serious felonies. The district court made this specific finding at the hearing and in its written order. The district court did not err when it followed the sentencing guidelines and weighed the severity of Robinson’s offenses when evaluating the first *Modtland* subfactor. *See State v. Osborne*, 732 N.W.2d 249, 254 (Minn. 2007) (concluding a defendant is entitled to “less judicial forbearance” for “severe” offenses).

Further, the district court articulated its substantive reasons and the evidence it relied on for its evaluation of the first *Modtland* subfactor. The district court found that Robinson’s convictions were for serious, violent offenses. This, coupled with the nature of the probation violation, indicated that Robinson posed a risk to public safety. Furthermore, the revocation hearing transcript shows the district court considered other public-safety risks Robinson’s conduct posed, such as concern for the safety of his child.⁶ The district court did not abuse its discretion when it weighed the first *Modtland* subfactor.

Turning to the second *Modtland* subfactor, Robinson contends the district court had several alternatives to revocation and argues that the district court’s finding that there was no appropriate alternative sanction was against logic and the facts in the record. We disagree with Robinson’s description of the record. Consistent with the testimony of

⁶ In describing how Robinson “violated important conditions of[his] probation” the district court said, “I hear you that it’s your girlfriend’s gun, but she was there when I told you you can never have guns twice, and so there shouldn’t have been a gun in the bottom drawer where your toddler can get to in your closet”

Robinson's parole officer, the district court found that "there is no treatment response available to address the issues underlying [Robinson's] behavior. [Robinson] has completed multiple treatments and knows how to comply with probation and the laws. He chose not to obey the laws related to firearms." In short, the record shows that Robinson participated in multiple successful treatment programs and still violated the terms of probation. The district court did not abuse its discretion in weighing the second *Modtland* subfactor.

The district court carefully considered the *Modtland* subfactors and we discern no abuse of discretion in its analysis. We, therefore, affirm the district court's decision to revoke Robinson's probation.

II.

The parties agree that the district court must resentence Robinson for his first-degree-assault conviction pursuant to *State v. Robinette*, 964 N.W.2d 143, 151 (Minn. 2021). We review the application of the sentencing guidelines de novo. *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018).

A sentence based on an incorrect criminal-history score is an illegal sentence that may be corrected at any time under Minn. R. Crim. P. 27.03, subd. 9. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). For this reason, defendants do not forfeit review of an incorrect criminal-history score, *id.* at 148, including when a district court stays a sentence and the defendant challenges the sentence for the first time after revocation. *State v. Fields*, 416 N.W.2d 734, 736 (Minn. 1987). When a district court errs in calculating a defendant's criminal-history score, we reverse and remand for resentencing, even if the

original sentence imposed was within the same range. *State v. Stewart*, 923 N.W.2d 668, 679 (Minn. App. 2019) (reversing and remanding for resentencing with instructions to use a criminal-history score of one), *rev. denied* (Minn. Apr. 16, 2019).

The 2018 sentencing guidelines assigned one custody-status point to a criminal-history score if the “offender [was] discharged from probation but commit[ed] an offense within the initial period of probation pronounced by the court.” Minn. Sent’g Guidelines 2.B.2.a(4) (2018). The 2019 sentencing guidelines removed this provision. Minn. Sent’g Guidelines 2.B.2.a (Supp. 2019); *Robinette*, 964 N.W.2d at 145. In *Robinette*, the supreme court held that the amelioration doctrine applied to this modification and that the 2019 sentencing guidelines, effective August 1, 2019, determine the criminal-history score in cases for which final judgment was not entered when the modification took effect. *Robinette*, 964 N.W.2d at 145, 151.

Robinson committed the assault in November 2018, but the district court sentenced Robinson in October 2019—after August 1, 2019. Despite this, the district court applied the 2018 sentencing guidelines and included one custody-status point because Robinson committed the assault within the original probationary term for a 2016 offense. Using this custody-status point, the district court sentenced Robinson to 122 months in prison, a sentence within the presumptive range for a severity-level-nine offense with a criminal-history score of three. Minn. Sent’g Guidelines 4.A (2018) (providing a presumptive range of 104 to 146 months on a criminal-history score of three for a severity-level-nine offense). Had the district court applied the 2019 sentencing guidelines, this custody-status point would have been omitted, changing the sentencing-guideline calculation to a severity-

level-nine offense and a criminal-history score of two, for a presumptive range of 94 to 132 months in prison. Minn. Sent’g Guidelines 4.A (2019).

Accordingly, we reverse and remand with instructions for the district court to resentence Robinson for his first-degree-assault conviction with the correct criminal-history score of two. *Stewart*, 923 N.W.2d at 680.

III.

The parties agree the district court must correct the warrant of commitment because it erroneously includes a conviction for third-degree assault, which is a lesser-included offense of first-degree assault. Minnesota law prohibits multiple convictions for lesser-included offenses, defined as a “lesser degree of the same crime” or “a crime necessarily proved if the crime charged were proved.” Minn. Stat. § 609.04, subd. 1 (2018). Whether the entry of multiple convictions violates section 609.04 is a question of law that we review de novo. *State v. Bonkowske*, 957 N.W.2d 437, 443 (Minn. App. 2021).

The proper procedure for district courts “when the defendant is convicted on more than one charge for the same act is for the [district] court to adjudicate formally and impose sentence *on one count only*,” retaining the guilty verdicts on remaining charges, but not formally adjudicating them. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (emphasis added). “When [the] official judgment order states that a party has been convicted of or sentenced for more than one included offense,” we reverse and remand with instructions to vacate the erroneous conviction. *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999); *State v. Crockson*, 854 N.W.2d 244, 248 (Minn. App. 2014), *rev. denied* (Minn. Dec. 16, 2014).

The record demonstrates that the district court followed the proper *LaTourelle* procedure. Although Robinson entered a straight plea to both first-degree and third-degree assault, the district court accepted only Robinson's plea for the first-degree-assault count and sentenced him for the same. Nevertheless, the disposition set forth on the warrant of commitment reflects convictions for both first- and third-degree assault.

We reverse and remand for the district court to vacate the conviction for third-degree assault and to issue a new warrant of commitment consistent with this opinion. *Pflepsen*, 590 N.W.2d at 767. Consistent with *LaTourelle*, we instruct the district court to preserve the underlying guilty plea. *E.g.*, *State v. Walker*, 913 N.W.2d 463, 469 (Minn. App. 2018).

Affirmed in part, reversed in part, and remanded.