**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A22-0917**

State of Minnesota,
Respondent,

vs.

Hector Vivas Buezo,
Appellant.

**Filed January 30, 2023**
**Reversed and remanded**
**Reyes, Judge**

Watonwan County District Court
File No. 83-CR-17-569

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

Stephen J. Lindee, Watonwan County Attorney, St. James, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Eva F. Wailes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Reyes, Judge; and Frisch, Judge.

**NONPRECEDENTIAL OPINION**

**REYES**, Judge

In this appeal from the district court's probation-revocation decision, appellant argues that the district court violated Minn. R. Crim. P. 27.04 by failing to give a rights

advisory at his first-hearing appearance and abused its discretion by revoking his probation without making sufficient findings on the third *Austin*[1] factor. We reverse and remand.

**FACTS**

On November 12, 2017, the St. James Police Department received a report of a possible criminal sexual offense involving a victim under the age of 13. The victim claimed that appellant Hector Vivas-Buezo had sexually assaulted her repeatedly since she was about five or six years old, from 2011 to 2017. Respondent State of Minnesota charged appellant with three counts of second-degree criminal sexual conduct. The parties entered into a plea agreement in which appellant would plead guilty to one of the charges on an *Alford*[2] basis, and the state would dismiss the remaining two charges and release him to the custody of United States Immigration and Customs Enforcement Unit (ICE) at sentencing. The district court accepted the *Alford* plea and convicted appellant of one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2010).

The district court sentenced appellant to 36 months in prison but stayed execution and placed him on supervised probation for 30 years. The probation contains several conditions, two of which require appellant to follow all state and federal criminal laws, and to contact his probation agent immediately if released from ICE custody in the U.S. or upon

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[1] *State v. Austin*, 295 N.W.2d 246 (Minn. 1980).

[2] Under *North Carolina v. Alford*, a court may constitutionally accept a defendant's guilty plea in which the defendant maintains his innocence but admits that the prosecutor's evidence, if brought to trial, would likely result in a guilty verdict. 400 U.S. 25 (1970); *see also State v. Theis*, 742 N.W.2d 643 (Minn. 2007).

returning to the U.S. after being deported before his sentence expires. On or around April 20, 2018, appellant was deported to Honduras.

On April 13, 2021, the United States Border Patrol found appellant unlawfully present in Cameron County, Texas, and arrested him. Pursuant to a guilty plea, the United States District Court for the Southern District of Texas convicted appellant of illegal re-entry in violation of 8 U.S.C. §§ 1326(a), (b)(1), and sentenced him to ten months in prison. Appellant remained in federal custody until he was moved to Watonwan County Jail on March 16, 2022.

The Minnesota Department of Corrections (DOC) issued a probation-violation report on May 11, 2021, alleging that appellant violated the probation condition of failing to contact his probation agent immediately upon his return to the U.S. after being deported. Because appellant had been convicted of illegal re-entry into the U.S., which is a federal felony, the DOC filed an addendum to add that appellant violated the probation condition of failing to abide by state and federal criminal laws.

On March 17, 2022, appellant attended a remote hearing without counsel. The district court asked, "Okay. Now, you have rights that you signed a statement of right sheet, and do you understand the rights that you have in regard to this probation violation?" Appellant answered, "Yes." The district court then explained that appellant had the right to an attorney and a public defender would be appointed to represent him before the next hearing.

On March 22, 2022, the district court held a admit/deny hearing which appellant attended with an attorney. Appellant admitted to violating the probation conditions

requiring him to contact the probation agent upon re-entry to the U.S. and to abide by state and federal criminal laws. The district court accepted his admission and found both probation violations intentional and inexcusable. At the dispositional hearing, the district court determined that the need for incarceration outweighed public policy considerations for probation, that confinement was necessary to protect the public from further criminal activity, and that if probation were not revoked, it would unduly depreciate the seriousness of the violation. The district court revoked appellant's probation and executed the previously stayed sentence of 36 months. This appeal follows.

**DECISION**

Appellant argues that the district court erred by failing to provide him with a required rights advisory upon his first appearance at the probation-violation hearing and abused its discretion by failing to make sufficient findings on the third *Austin* factor before revoking probation. We agree as to the third *Austin* factor findings.

*Probation-Violation Rights Advisory*

Because appellant did not challenge the district court's failure to provide the rights advisory required by Minn. R. Crim. P. 27.04 at trial, and because "it is the type of nonstructural error that the district court could have corrected had it been brought to the court's attention," we may review this issue for plain error. *State v. Beaulieu*, 859 N.W.2d 275, 281 (Minn. 2015). Under this standard, appellant must establish (1) an error (2) that is plain and (3) affects his substantial rights. *Id.* at 279. Once appellant satisfies the first three prongs of the plain-error test, we "may correct the error only if it seriously affects the fairness, integrity or public reputation of the judicial proceedings." *Id.* (quotation omitted).

In *Beaulieu*, our supreme court held that a district court's "failure to provide appellant with the rights advisory set forth in Minn. R. Crim. P. 27.04 did not affect his substantial rights." 859 N.W.2d at 276. Appellant thus cannot satisfy the third prong under the plain-error review, and we need not address the other prongs.

*Austin Factors*

"A 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. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005) (quoting *Austin*, 295 N.W.2d at 249-50). Before revoking probation, 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 the need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d at 250. A district court must make the three *Austin* findings on the record before revoking probation. *Modtland*, 695 N.W.2d at 606. The *Austin* framework requires courts not only to recite the three factors but to "seek to convey their substantive reasons for revocation and the evidence relied upon." *Id.* at 608. "This process prevents courts from reflexively revoking probation when it is established that a defendant has violated a condition of probation." *Id.* We review whether a district court has made the *Austin* findings de novo. *Id.* at 605.

As an initial matter, appellant does not dispute that the district court satisfied the first two *Austin* factors. The issue before us is whether the district court made sufficient findings on the third *Austin* factor. A district court may find the third *Austin* factor satisfied if it finds that any of the three sub-factors is present: (1) that "confinement is necessary to

protect the public from further criminal activity by the offender," (2) that "the offender is in need of correctional treatment which can most effectively be provided if he is confined," or (3) that a further stay of the sentence "would unduly depreciate the seriousness of the violation." *Austin*, 295 N.W.2d at 251 (quotation omitted).

The record shows that the district court did not make the requisite findings on the third *Austin* factor. Instead, it recited the subfactors almost verbatim without providing any substantive reason for revocation or the evidence that it relied on. This is the kind of "general, non-specific reasons for revocation" that our supreme court concluded did not satisfy *Austin*. *Modtland*, 695 N.W.2d at 608.

We therefore reverse and remand for the district court to make substantive findings on the third *Austin* factor. To the extent that the district court inquired into appellant's immigration status at the dispositional hearing, we caution the district court not to consider it as part of its probation-revocation analysis. *State v. Mendoza*, 638 N.W.2d 480, 481 (Minn. App. 2002), *rev. denied* (Minn. Apr. 16, 2002) (holding that possible deportation because of immigration status is not proper consideration in criminal sentencing).

**Reversed and remanded.**