

*This opinion is nonprecedential except as provided by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
A22-0999**

State of Minnesota,
Respondent,

vs.

Merwin Andrew Coleman,
Appellant.

**Filed March 6, 2023
Affirmed
Cochran, Judge**

Olmsted County District Court
File No. 55-CR-18-3931

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

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

Considered and decided by Cochran, Presiding Judge; Larson, Judge; and
Kirk, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this direct appeal, appellant challenges the district court's revocation of his probation. Because the district court did not abuse its discretion by revoking appellant's probation, we affirm.

FACTS

In June 2018, respondent State of Minnesota charged appellant Merwin Andrew Coleman with first-degree burglary and third-degree criminal sexual conduct in violation of Minn. Stat. §§ 609.582, subd. 1(a), .344, subd. 1(c) (2016). The charges stemmed from allegations that Coleman broke into a woman's home, raped her, and stole her phone.

Following a jury trial in January 2019, Coleman was convicted of both charges. A postconviction court reversed Coleman's convictions after finding that he had received ineffective assistance of trial counsel. In lieu of another trial, Coleman entered into a plea agreement with the state.

On October 7, 2021, Coleman appeared in district court and pleaded guilty to first-degree burglary and third-degree criminal sexual conduct by entering an *Alford* plea for both charges.¹ In exchange for his guilty pleas, the state recommended that Coleman receive a 153-month prison sentence with a 15-year stay of execution. This

¹ An *Alford* plea allows a criminal defendant to plead guilty while maintaining their innocence as long as (1) the state demonstrates "a strong factual basis for the plea" and (2) the defendant clearly expresses a desire to plead guilty based on their belief that the state has sufficient evidence to convict them. *State v. Theis*, 742 N.W.2d 643, 647 (Minn. 2007) (quoting *North Carolina v. Alford*, 400 U.S. 25, 38 (1970)).

recommendation represented a downward dispositional departure from Coleman's presumptive executed sentence. The plea agreement also provided that Coleman would receive a psychosexual evaluation and cooperate with a presentence investigation (PSI). After Coleman entered his guilty pleas, the district court heard from counsel regarding the basis for the proposed dispositional departure and set the matter for sentencing in December.

Prior to sentencing, a licensed psychologist performed a psychosexual evaluation of Coleman and the county community corrections system completed a PSI report. The psychologist's evaluation noted that Coleman lacked remorse for his sex offense and that Coleman was at high risk for reoffense. The psychologist's evaluation also recommended that any treatment occur in a secure setting. The PSI report reflected similar concerns. The PSI report stated that Coleman "was not an appropriate candidate [for probation] due to his high risk, lack of offense ownership, and the seriousness of the offense." But the PSI report provided probation recommendations in recognition of the plea agreement.

Sentencing

On December 16, 2021, the district court sentenced Coleman to concurrent sentences of 88 months in prison for first-degree burglary and 117 months in prison for third-degree criminal sexual conduct.² In accordance with the plea agreement, the district court stayed Coleman's sentences and placed him on probation for 15 years.

² Coleman's presumptive sentence for third-degree criminal sexual conduct was reduced from 153 months to 117 months following a favorable recalculation of his criminal-history score.

The district court imposed several conditions of probation. In relevant part, these conditions required Coleman to: (1) notify his probation officer within 72 hours of any changes to his address, employment, or telephone number; (2) cooperate with the search of his person, residence, and property, as directed by his probation officer; (3) attend a sex-offender treatment program; (4) refrain from possessing alcohol; and (5) refrain from accessing or using the internet without approval and from “own[ing] or operat[ing] any device that allows for internet capabilities or access to the internet.”

Probation Violations

Two months later, on February 16, 2022, Coleman’s probation officer filed a violation report alleging that Coleman had violated his probation by failing to report a change of address and a change of employment within 72 hours. Between mid-February and mid-March, Coleman’s probation officer filed three addenda, each of which alleged new probation violations. In total, Coleman’s probation officer alleged that Coleman had violated his probation six times by (1) failing to inform his probation officer within 72 hours of a change to his address and employment; (2) possessing alcohol; (3) accessing the internet without approval or owning or operating a device with internet capabilities; (4) failing to cooperate with a search of his property; (5) failing to inform his probation officer of another change to his address; and (6) failing to attend sex-offender treatment within 72 hours.

Probation-Revocation Hearing

On April 18, 2022, the parties appeared for a contested probation-revocation hearing. Coleman’s probation officer testified about the circumstances surrounding

Coleman's alleged probation violations. Coleman's probation officer began by explaining that, on the day that Coleman was sentenced, Coleman stated that he would be residing at an address on 8 1/2 Street in Rochester. In the coming weeks, the probation officer visited that address several times but did not find Coleman there on any occasion.

Next, the probation officer encountered problems trying to schedule a meeting with Coleman. When the probation officer suggested that they meet on February 11, 2022, Coleman responded that he could not meet on that date because he was scheduled to work. Coleman's probation officer later learned that Coleman had been released from his job on February 7, 2022, but Coleman did not inform him of this change in employment.

Around this time, Coleman's probation officer became concerned that Coleman was not residing at his reported address on 8 1/2 Street. The probation officer learned through the monitoring software on Coleman's phone that Coleman had ordered groceries to an address on 16th Avenue. Coleman's probation officer went to this address and confirmed with the property manager that Coleman was leasing an apartment in the building. One week later, Coleman's probation officer visited the 16th Avenue apartment accompanied by another probation officer and Rochester police. After knocking repeatedly, the officers let themselves into the apartment using a key that the landlord had provided. As they entered, Coleman came out of a back bedroom and spoke with the officers. A woman also came out of the bedroom.

During their search of the apartment, the officers found a bottle of Schnapps on the kitchen counter, several cans of malt liquor in the refrigerator, and a bottle of rum in the freezer, as well as a cell phone in the kitchen, two other cell phones in the back bedroom,

and a computer “tablet.” Upon request, Coleman provided a password for the tablet but not the cell phones. Coleman was arrested that night and transported to jail.

While Coleman was in jail, Coleman’s probation officer monitored Coleman’s phone calls from jail. During some of these calls, the officer heard Coleman describe another apartment and learned that Coleman had a set of keys to that apartment. The officer investigated further and discovered that the keys were for an apartment located at “Mile Manor” in Rochester. The officer also learned from the property manager at Mile Manor that Coleman had sub-leased the apartment in December 2021 and that the lease was up at the end of February 2022. The officer visited the Mile Manor apartment and found several items with Coleman’s name including inmate property sheets and mail.

Lastly, Coleman’s probation officer testified that Coleman was “terminated as unsuccessful” from the outpatient sex-offender treatment program that he attended after his arrest. Coleman’s probation officer recommended that Coleman’s sentences be executed to protect the public from further criminal activity and to ensure that Coleman received the sex-offender treatment he needed. Coleman chose not to testify at the probation-violation hearing.

District Court Findings and Conclusions

On April 25, 2022, the district court issued a written order revoking Coleman’s probation. Crediting the testimony of Coleman’s probation officer, the district court found that the state had proven by clear and convincing evidence that Coleman intentionally violated the following conditions of his probation: (1) the condition requiring Coleman to notify his probation officer within 72 hours of any changes to his address or employment;

(2) the condition prohibiting Coleman from possessing alcohol; and (3) the condition prohibiting Coleman from accessing or using the internet without approval and from owning or operating an internet-capable device.³

In its order, the district court also discussed the legal standard for probation revocation. The district court concluded that the standard was met because Coleman had intentionally violated several conditions of his probation and “the need for confinement outweigh[ed] the policies favoring probation.” In reaching this decision, the district court concluded that confinement was necessary to protect the public and to ensure that Coleman received sex-offender treatment. Accordingly, the district court revoked Coleman’s probation and executed his sentences.

Coleman appeals.

DECISION

When a district court finds that a probation violation has occurred, the district court has the discretion to continue the probationer on probation or revoke probation and execute the underlying sentence. Minn. R. Crim. P. 27.04, subd. 3(2)(b)(v). But, before revoking probation and executing the underlying sentence, the district court must find that: (1) the probationer violated at least one specific condition of their probation, (2) “the violation was intentional or inexcusable,” and (3) the “need for confinement outweighs the policies favoring probation.” *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). These findings are commonly known as the *Austin* factors. In making findings on the *Austin* factors, a

³ The district court also found that the state *did not* prove by clear and convincing evidence the two remaining alleged violations. Those alleged violations are not at issue on appeal.

district court “must seek to convey [its] substantive reasons for revocation and the evidence relied upon.” *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). The district court’s decision to revoke probation “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.” *Austin*, 295 N.W.2d at 251 (quotation omitted).

District courts have “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.”⁴ *Id.* at 249-50. A district court “abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted).

Coleman challenges the district court’s findings on the first and third *Austin* factors, but not the second. We address his arguments on each factor in turn.

⁴ Additionally, when a district court is considering whether to revoke a stayed sentence, the Minnesota Sentencing Guidelines urge “[l]ess judicial tolerance . . . for offenders who were convicted of a more severe offense.” Minn. Sent’g Guidelines 3.B (Supp. 2017). This is especially true when, as is the case here, an offender’s sentence represents a downward dispositional departure. *See State v. Moot*, 398 N.W.2d 21, 24 (Minn. App. 1986) (affirming a district court’s decision to revoke probation where “the presumptive sentence was commitment to prison and the downward departure was *solely* to permit one last attempt to succeed at treatment”), *rev. denied* (Minn. Feb. 13, 1987); *cf. State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015) (providing that a district court may consider a “grant of a downward dispositional departure when deciding whether to revoke probation”).

I. The district court did not abuse its discretion by finding that the first *Austin* factor was met.

To satisfy the first *Austin* factor, the district court must “designate the specific condition or conditions” that the probationer violated. 295 N.W.2d at 250. Here, the district court found that Coleman intentionally violated three conditions of his probation: (1) the condition requiring Coleman to notify his probation officer within 72 hours of any changes to his address or employment; (2) the condition prohibiting Coleman from possessing alcohol; and (3) the condition prohibiting Coleman from accessing or using the internet without approval and from owning or operating an internet-capable device. The district court found that Coleman violated the first of these conditions by failing to report his 16th Avenue apartment, failing to report his layoff from his employer, and failing to report his Mile Manor apartment.

On appeal, Coleman does not challenge the district court’s finding that he violated the first of these conditions. Nor does he dispute the district court’s finding that he violated this condition multiple times. Instead, Coleman argues that the district court abused its discretion by finding that he violated two other conditions of his probation—namely, the conditions prohibiting him from possessing alcohol and from accessing the internet without approval or owning or operating an internet-capable device.

We begin our analysis by noting that the district court’s finding that Coleman violated the first of these three conditions is sufficient to satisfy the first *Austin* factor. A district court need only find that one condition of probation was violated to support its decision to revoke probation. *Id.* (requiring the district court to “designate the specific

condition or conditions that were violated” (emphasis added)). Thus, even if the district court had abused its discretion with regard to its findings on the other two probation conditions, any such abuse of discretion would not require reversal. *See id.* Regardless, as discussed below, the record demonstrates that the district court did not abuse its discretion by finding that Coleman also violated two other conditions of probation by (1) possessing alcohol and (2) owning or operating an internet-capable device.

A. The record supports the district court’s finding that Coleman constructively possessed alcohol.

Coleman contends that the district court abused its discretion when it found that he possessed alcohol in violation of his probation conditions because the evidence presented by the state at the revocation hearing was insufficient to prove that he possessed alcohol. We are not persuaded.

The state bears the burden of proving a probation violation by clear and convincing evidence. Minn. R. Crim. P. 27.04, subds. 2(1)(c)(b), 3(3); *State v. Losh*, 694 N.W.2d 98, 101 (Minn. App. 2005), *aff’d*, 721 N.W.2d 886 (Minn. 2006). The clear-and-convincing standard “requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt” required for a criminal conviction. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (quotation omitted). This “standard is met when the truth of the facts sought to be admitted is highly probable.” *Id.* (quotation omitted). As the factfinder in probation-revocation hearings, a district court assesses witness credibility, and this court defers to district court credibility determinations. *Losh*, 694 N.W.2d at 102.

The state may prove possession through evidence of actual or constructive possession. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). To prove constructive possession of a substance, the state must demonstrate that either (1) “police found the substance in a place under defendant’s exclusive control to which other people did not normally have access, or” (2) “there is a strong probability (inferable from other evidence) that defendant was . . . consciously exercising dominion and control over” the substance, even though others had access to the place where it was found. *State v. Onyelobi*, 879 N.W.2d 334, 343 (Minn. 2016) (quoting *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975)). “Proximity is an important consideration in assessing constructive possession,” and constructive possession may be shared. *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *rev. denied* (Minn. Jan. 16, 2001). We consider the totality of the circumstances in determining whether the state has proved constructive possession. *State v. Denison*, 607 N.W.2d 796, 800 (Minn. App. 2000), *rev. denied* (Minn. June 13, 2000). Thus, the question before us is whether the totality of the circumstances establishes that the state has proven constructive possession by clear and convincing evidence. *See id.*; *Losh*, 694 N.W.2d at 101.

Coleman contends that the evidence that the district court relied on—namely, the fact that Coleman came out of the back bedroom of the 16th Avenue apartment and the fact that there was alcohol in several locations in the kitchen of that apartment—does not establish that Coleman consciously or knowingly exercised dominion and control over the alcohol. We disagree.

Even if we assume that the 16th Avenue apartment was accessible to others, as Coleman asserts, the evidence shows that Coleman consciously exercised dominion and control over the alcohol. Coleman was leasing and residing at the 16th Avenue apartment where the alcohol was found. Police found the alcohol in three different locations throughout the kitchen—on the counter, in the refrigerator, and in the freezer—all of which Coleman had control over. And one of these locations, the kitchen counter, was near his court-approved phone. From this evidence, it is logical to infer that Coleman was in constructive possession of the alcohol, as the district court found.

Coleman’s citation to *State v. Lorenz*, 368 N.W.2d 284, 288 (Minn. 1985), does not persuade us otherwise. In *Lorenz*, the Minnesota Supreme Court stated that, in general, “the mere fact that a defendant is one of two or more occupants of an apartment does not justify convicting the defendant of possessing controlled substances found in a common area of the apartment.” *Id.* Coleman’s reliance on *Lorenz* is misplaced because *Lorenz* involved a challenge to the sufficiency of the evidence to support a *criminal conviction* for drug possession, not a challenge to a factual finding in a *probation-revocation* proceeding. *Id.* at 287-88. And, as discussed above, the burden of proof in a criminal trial is higher than in a probation-revocation proceeding. Similarly, the standard of review on appeal from a probation-revocation decision is more deferential. *Compare Austin*, 295 N.W.2d at 249-50 (explaining that district courts have “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”), with *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (explaining that an appellate court “will not disturb the verdict if the jury, acting with due regard for

the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense”).

Moreover, while the record does reflect that there was an unidentified female in the bedroom with Coleman when the police arrived, there is no evidence that another person was on the lease for the 16th Avenue apartment or otherwise occupying it. And there is no evidence to suggest that the female was the owner of the two bottles of alcohol and multiple cans of malt liquor found in the apartment where Coleman was residing or that Coleman did not exercise dominion or control over the alcohol. Thus, *Lorenz* does not compel us to conclude that the district court abused its discretion by finding that Coleman constructively possessed the alcohol found in his apartment, and we decline to do so based on the record before us. In sum, the district court did not abuse its discretion by finding that Coleman violated a condition of his probation by possessing alcohol.

B. The record supports the district court’s finding that Coleman owned or operated an internet-capable device.

Coleman next argues that the district court abused its discretion by finding that he violated the condition of his probation relating to internet access and “own[ing] or operat[ing] any device that allows for internet capabilities or access to the internet.” Coleman contends that this probation-violation finding must be reversed because the district court only found that he had “access to an internet device, specifically a tablet,” and “no evidence showed Coleman accessed the internet.” This argument misses the mark.

The probation condition at issue provides in full: “No access to or use of internet without approval; *must not own or operate any device that allows for internet capabilities*

or access to the internet through any technology or third party.” (Emphasis added.) The district court found that Coleman constructively possessed an internet-capable device based on the probation officers’ testimony that police discovered a tablet in Coleman’s bedroom at his 16th Avenue apartment, and that Coleman knew the password for the tablet. Accordingly, the district court found that the state had proven by clear and convincing evidence that Coleman had violated the condition of his probation prohibiting him from owning or operating an internet-capable device.

The district court’s finding that Coleman violated this probationary condition is supported by the record. The record shows that Coleman owned an internet-capable device. Police found a tablet in the bedroom of Coleman’s 16th Avenue apartment, and Coleman provided police with the password to the tablet. This evidence shows, at a minimum, that Coleman jointly exercised dominion and control over the tablet, and therefore constructively possessed it. *See, e.g., Denison*, 607 N.W.2d at 800. Accordingly, the district court did not abuse its discretion when it found that Coleman violated the probationary condition prohibiting him from owning or operating an internet-capable device.

In sum, we discern no abuse of discretion with regard to the district court’s findings on the first *Austin* factor.

II. The district court did not abuse its discretion when it found that the third *Austin* factor was met.

Coleman next challenges the district court’s determination that the third *Austin* factor was met—namely that “the need for confinement outweighs the policies favoring

probation.” 295 N.W.2d at 250. He contends that the district court’s findings regarding this factor are not supported by the record. Once again, we discern no abuse of discretion by the district court.

When evaluating whether the need for confinement outweighs the policies favoring probation, the district court must “balance the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *Modtland*, 695 N.W.2d at 606-07 (quoting *Austin*, 295 N.W.2d at 250). In balancing these interests, the district court considers (1) whether “confinement is necessary to protect the public from further criminal activity” by the offender; (2) whether “the offender is in need of correctional treatment which can most effectively be provided if he is confined;” or (3) whether “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Id.* at 607 (quoting *Austin*, 295 N.W.2d at 251). Revocation is justified even if the district court finds that only *one* subfactor is satisfied. *See id.*; *see also Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008) (explaining that “we normally interpret the conjunction ‘or’ as disjunctive rather than conjunctive”).

Here, the district court found that the first two subfactors were satisfied. Therefore, if the record supports the district court’s determination with respect to either, we will not disturb the district court’s decision to revoke probation. *See Modtland*, 695 N.W.2d at 607; *Greenwood*, 748 N.W.2d at 283.

With respect to the first subfactor, the district court determined that confinement was necessary to protect the public from further criminal activity. In reaching this conclusion, the district court explained that Coleman’s lack of accountability for where he

was living suggested that he wanted to “live life on his own terms without any rehabilitation.” The district court emphasized that, without proper monitoring, Coleman “present[ed] a danger to the community.”

Coleman argues that the district court abused its discretion by finding that confinement is necessary to protect the public from further criminal activity because “nothing about the [probation] violations suggests that Coleman engaged in any criminal activity that put the public at risk.” He also argues that a lesser sanction such as GPS monitoring could adequately protect the public from any risk. We are not persuaded.

The record amply supports the district court’s determination that confinement is necessary to protect the public from further criminal activity. Coleman is an untreated sex offender who concealed two different residences from his probation officer. Notably, Coleman failed to disclose one residence after his probation officer had already discovered the other. A sex offender’s failure to report a change of address is prohibited by law. Minn. Stat. § 243.166, subds. 1b(a)(1)(iii), 3(b) (2020). And, as the district court correctly noted, Coleman’s failure to report these new addresses was not a mere technical violation—it impeded Coleman’s probation officer from monitoring his behavior and protecting the public. Coleman’s repeated attempts to evade monitoring support the district court’s finding that confinement is necessary to protect the public from further criminal activity. GPS monitoring is not a sufficient alternative because a GPS monitor can be removed. Thus, the district court did not abuse its discretion when it found that “confinement is needed to protect the public from further criminal activity.”

With regard to the second subfactor, the district court determined that Coleman’s “need for treatment [was] great” and that it could “only be accomplished in a correctional setting.” In support of this finding, the district court emphasized that Coleman’s “deceitful choices” demonstrated that he was “not interested and/or capable of availing himself of the resources he need[ed] to change his behavior and be rehabilitated.” Thus, the district court concluded, “confinement [was] the only choice.”

Coleman contends that the district court abused its discretion when it found that the second subfactor (relating to treatment) was met. He argues that “nothing in the record showed that he was in need of treatment that could only be provided in a correctional setting.” Coleman further argues that “[t]he district court had other, better options available to it.” Because we have already concluded that the district court did not abuse its discretion when it found that the first subfactor was met, we need not address Coleman’s arguments regarding the second subfactor, but we do so briefly. *See Modtland*, 695 N.W.2d at 607; *Greenwood*, 748 N.W.2d at 283.

The district court’s determination that Coleman was in need of sex-offender treatment in a correctional setting is supported by the record. Although the district court acknowledged that Coleman “may” be able to receive sex-offender treatment in the community, the record shows that Coleman was resistant to sex-offender treatment and is at high risk of reoffense. In addition, Coleman’s evasive conduct supports the district court’s finding that Coleman seeks “to live life on his own terms without any rehabilitation.” Thus, the district court did not abuse its discretion when it found that the need for confinement outweighs the policies favoring probation.

In summary, the record supports the district court's findings on the *Austin* factors challenged by Coleman. Accordingly, we discern no basis for concluding that the district court abused its discretion by revoking Coleman's probation.

Affirmed.