

*This opinion is nonprecedential except as provided by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
A22-1153**

State of Minnesota,
Respondent,

vs.

Keith Arthur Bowers,
Appellant.

**Filed April 10, 2023
Affirmed
Gaïtas, Judge**

Olmsted County District Court
File No. 55-CR-19-3249

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, Andrew J. Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Gaïtas, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Keith Arthur Bowers challenges the district court's decision to revoke his probation and sentence him to 36 months in prison, followed by ten years of conditional

release. He argues that the district court abused its discretion by finding that the need for confinement outweighed the policies favoring continued probation, and by revoking his probation based on that finding. Because the district court's decision to revoke Bowers's probation was not an abuse of its discretion, we affirm.

FACTS

In May 2019, respondent State of Minnesota charged Bowers with third-degree criminal sexual conduct for sexually penetrating a 14-year-old girl when he was 35 years old. *See* Minn. Stat. § 609.344, subd. 1(b) (2016). Bowers pleaded guilty to an amended count of fourth-degree criminal sexual conduct in March 2020. In December 2020, the district court stayed imposition of sentence and placed Bowers on probation for five years.

Fifteen months later, in March 2022, a probation agent filed a report alleging that Bowers had violated his probation by failing to remain law abiding, abusing drugs, and failing to complete sex-offender treatment. On April 12, 2022, Bowers admitted to committing each of the alleged violations. Although the state asked the district court to revoke the stay of imposition and to stay execution of a 36-month prison sentence, the district court continued the stay of imposition.

A month later, on May 13, 2022, a probation agent filed a second violation report alleging that Bowers had failed to complete chemical-dependency treatment. The report stated that Bowers had absconded from treatment after just 14 hours. According to the report, Bowers had contacted the probation agent for permission to leave treatment, the

probation agent denied the request and warned that an arrest warrant would issue if Bowers absconded, and Bowers left the treatment program a few hours later.

In addition to discussing the alleged violation, the May 13 violation report also noted that Bowers was prone to engage in physically and sexually violent behavior, particularly with S.S., a woman with whom Bowers had been ordered not to have contact as a condition of probation. According to the report, S.S. claimed to have visible marks on her neck and other bruising from a violent encounter with Bowers during which Bowers kicked her.

Ten days later, on May 23, 2022, the probation agent filed an addendum to the violation report adding a second violation. The addendum alleged that Bowers made two phone calls to S.S. from jail, violating the no-contact condition of his probation. Additionally, the report stated that, after his first appearance on the new probation violation, Bowers had left three voice messages for the probation agent, calling her a “piece of sh-t” and a “skinny little worm headed piece of sh-t,” and expressing his hope that she would “burn in hell.”

Initially, Bowers denied both of the alleged violations and requested a contested hearing. But at the contested hearing, he admitted the violations and focused his argument on the disposition for the violations. Bowers explained to the district court that he left the chemical-dependency treatment program because he was concerned about his belongings, which were with an acquaintance whom he described as “a heroin addict.” According to Bowers, because he was unable to reach the acquaintance, who had Bowers’s important

documents, including his social security card and financial documents, he became “hyper-focused” on his property and could not remain in treatment. Bowers stated that he sent his probation agent a video that showed him packing his belongings, he dropped his belongings off with another friend, and then he turned himself in. He emphasized that he passed a drug test at the jail immediately thereafter. Bowers also noted that he had completed his weekly registration with the sheriff as a sex offender experiencing homelessness.

As to the second violation, Bowers acknowledged that he was prohibited from communicating with S.S. But he explained to the district court that he called S.S. from jail because he had not spoken with anyone “for days on end,” and he “just needed to talk to somebody positive.”

The district court found that Bowers “violated the terms of his supervised probation . . . by leaving the treatment facility against staff advice, and for having contact with an individual who was prohibited specifically by his agent,” and that the violations were “intentional and inexcusable.” Then, the district court gave the parties an opportunity to address disposition.

The probation agent and the state asked the district court to revoke Bowers’s probation and to impose an executed prison sentence. According to the probation agent, Bowers was just “skating by” on probation. He had been terminated from multiple treatment programs—including domestic-violence treatment, chemical-dependency treatment, and sex-offender treatment—due to his failure to attend and to make progress.

Bowers missed probation appointments, and his therapists reported that he struggled to “acknowledge areas that need to change in his life.”

Bowers asked for continued probation. He stated that he had made an “error in judgment” and that he was willing to complete treatment.

The district court revoked Bowers’s probation, imposed an executed prison sentence of 36 months, and ordered ten years of conditional release to follow the prison sentence.

In explaining the decision to revoke Bowers’s probation, the district court stated:

I am going to find that the need for confinement outweighs the policies that favor probation and specifically that confinement here is necessary to protect the public from further criminal activity.

Your probation agent[’]s report[s] have been very thorough, and I know you have had time to review them. The failure to complete sex offender programming on at least two options that were tried is concerning. The failure to complete chemical dependency programming as well is concerning. The agent describes the scenario or culmination of your life events and that these types of clients are more dangerous and risky to work with. And that the level of violence is concerning. Specifically, in regard to a hyperactive sexual behavior.

I heard your attorney and you when you turned yourself in. I heard you when you were clean after being out of treatment. I heard that you want another chance. But I also heard you say, if I knew I was going to go to prison, I would have done something different. And sir, I certainly don’t find that to be credible. You asked your agent to bet on you. And when she violated you and you were held [accountable], you then . . . showed your response when you were held accountable. And that is not appropriate. That is not a safe person to be in the community. And that is my ruling today.

Bowers appeals the district court’s decision to revoke his probation.

DECISION

Bowers argues that the district court abused its discretion by revoking his probation because the evidence did not establish that the need for confinement outweighed the policies favoring probation. He contends that the district court should have imposed less-restrictive sanctions to address the violations before resorting to the most extreme sanction of incarceration.

In *State v. Austin*, the Minnesota Supreme Court directed district courts to consider three factors (the *Austin* factors) before revoking probation and to make specific findings on each of these factors. 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 further consider several subfactors, specifically 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). District courts must clearly address the three *Austin* factors and not merely recite them or give “general, non-specific reasons for revocation.” *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). And district courts must be cognizant of the fact that “the purpose of probation is rehabilitation and revocation should be used only as a last resort [if] treatment has failed.” *Id.* at 606 (quotation omitted).

“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 an appellate court reviews de novo. *Modtland*, 695 N.W.2d at 605.

Bowers challenges the district court’s finding on the third *Austin* factor—that the need for confinement outweighed the policies favoring continued probation. He notes that, although the district court relied on the third subfactor to make that finding—determining that confinement was necessary to protect the public from further criminal activity—the district court did not sufficiently explain how his conduct implicated that subfactor. And he contends that the factual circumstances did not support the district court’s finding that confinement was necessary to prevent additional criminal activity.

To support these assertions, Bowers points out that neither of his probation violations involved new criminal offenses or conduct that endangered public safety. But new criminal charges or documented dangerous conduct is not required for a district court to revoke probation. *See State v. Rottelo*, 798 N.W.2d 92, 95 (Minn. App. 2011) (rejecting the argument that the district court abused its discretion by revoking probation even though appellant had not been charged with new crimes), *rev. denied* (Minn. July 19, 2011). A district court has broad discretion to revoke probation when a probationer violates a condition of probation. *State v. Cottew*, 746 N.W.2d 632, 636-37 (Minn. 2008). And in deciding whether revocation is appropriate, the district court may consider the “original

offense and the intervening conduct of the offender.” *State v. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007).

Here, the district court considered both the original offense and Bowers’s conduct on probation. The district court noted that the original offense involved criminal sexual conduct and the probation agent was concerned about Bowers’s increasingly violent conduct and “hyperactive sexual behavior” while on probation. It considered Bowers’s inability to complete sex-offender treatment on at least two occasions and cited Bowers’s blatant disregard for his obligations as a probationer. Although Bowers knew that his phone calls from the jail were being recorded, he called S.S. twice in direct violation of a no-contact probation condition. And Bowers left profane and verbally abusive messages for his probation agent after the probation agent “held [him] accountable.” The district court’s analysis belies Bowers’s argument that there was no meaningful consideration of whether confinement would protect the public from further criminal activity. Moreover, the record supports the district court’s findings regarding Bowers’s conduct.

Bowers also argues that the district court should have imposed intermediate sanctions because rehabilitation was still possible. *See Cottew*, 746 N.W.2d at 637 (“Intermediate sanctions are imposed when the district court has determined that the defendant has violated his probation but that revocation of the defendant’s probation and execution of the underlying sentence is not appropriate, at least in part, because rehabilitation is still possible.”). He observes, for example, that the district court had discretion to vacate the stay of imposition and impose a stay of execution as an intermediate

sanction. *See* Minn. Stat. § 609.14, subd. 3(1) (2020) (stating that, in addressing a probation violation for a defendant who received a stay of imposition, a district court may “again stay sentence or impose sentence and stay the execution thereof, and in either event place the defendant on probation or order intermediate sanctions . . . or impose sentence and order execution thereof”).

But Bowers’s argument is unpersuasive for two reasons. First, as noted, a district court has wide discretion in determining the appropriate disposition for a probation violation, and absent an abuse of that discretion, this court must affirm. *Cottew*, 746 N.W.2d at 636-37. Second, the record amply supports the district court’s finding that incarceration would most effectively protect the public and its implicit rejection of further community-based rehabilitation efforts. While on probation, Bowers failed to complete domestic-violence treatment, chemical-dependency treatment, and sex-offender treatment. He intentionally violated the conditions of probation multiple times, failed to attend probation appointments, failed to acknowledge that he needed to change anything about his life, and generally appeared not to take probation seriously.

Finally, Bowers seems to argue, without citing authority, that the district court abused its discretion by not expressly considering the availability of intermediate sanctions to address the probation violations. Because Bowers neither develops nor provides legal support for this argument, we do not consider it. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (“An assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is waived and will not be

considered on appeal unless prejudicial error is obvious on mere inspection.” (quotation omitted)).

Based on our careful review of the record, we determine that the district court made adequate findings on the three *Austin* factors and that the record supports those findings. Thus, the district court acted within its discretion by revoking Bowers’s probation. *See Modtland*, 695 N.W.2d at 607-08 (stating that, if the district court made findings on the *Austin* factors, and the record supports those findings, the district court acted within its discretion in revoking probation).

Affirmed.