

*This opinion is nonprecedential except as provided by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
A22-1215**

State of Minnesota,
Respondent,

vs.

Dawn Marie Delille,
Appellant.

**Filed March 20, 2023
Affirmed
Connolly, Judge**

St. Louis County District Court
File No. 69DU-CR-19-4239

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

Kimberly J. Maki Hromatka, St. Louis County Attorney, Nathaniel Stumme, Assistant
County Attorney, Duluth, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges the revocation of her probation, arguing that the judge who
presided over the revocation proceedings was disqualified because of a reasonable question

of bias and that the district court's failure to make findings on the second and third *Austin/Modtland* factors entitles her to reversal of the revocation. We affirm.

FACTS

Based on incidents in February 2019 and November 2019, appellant Dawn Delille pleaded guilty to two charges of first-degree sale of 17 or more grams of methamphetamine within a 90-day period. The plea agreement allowed her to argue for a downward dispositional departure. Because of appellant's failed court appearances, her discharges from treatment programs, her continued use of controlled substances prior to and on the date of her pre-sentence investigation (PSI) interview, and her failure to attend treatment or report to probation, the PSI report advised against a dispositional departure. Appellant's probation officer recommended the presumptive sentences of 85 months in prison for the first offense and 105 months in prison for the second offense.

At the March 31, 2022, sentencing hearing, appellant argued for a downward dispositional departure on the ground that her recent attempts to seek treatment warranted long-term probation. Respondent State of Minnesota withdrew its opposition to the dispositional departure. The district court sentenced appellant to the maximum presumptive sentences of 102 and 126 months in prison, but stayed those sentences and placed appellant on probation for a term of five years.

Ten days after the sentencing hearing, on April 11, 2022, appellant was arrested on charges of misdemeanor driving while under the influence and driving after revocation. She admitted to using methamphetamine during the preceding three days, i.e., within a

week of her sentencing. The probation officer stated that appellant had endangered public safety and needed correctional programming in a custodial setting.

At the probation revocation hearing, conducted by the same district court judge who presided at sentencing, appellant's counsel advised the court that appellant would be admitting the violation and that she would be arguing only disposition. Appellant answered affirmatively that she was giving up her right to a contested hearing, admitted to understanding the terms and conditions of probation including that she not use nonprescription mood-altering substances, and admitted she violated that term of her probation by using methamphetamine. Appellant also admitted that she was charged with new offenses, but the district court did not base its revocation decision on the new charges. The district court revoked the stays of execution and ordered appellant to serve the previously imposed sentences concurrently.

Appellant now argues that the revocation decision must be reversed (1) based on evidence of the district court judge's bias against her and of his questionable partiality or, in the alternative, (2) based on the district court's failure to make two of the *Austin/Modtland* findings.

DECISION

1. Bias and Impartiality of the District Court

Appellant did not allege the bias or question the impartiality of the district court judge prior to this appeal. Therefore, the standard of review is plain error. *State v. Schlien*, 774 N.W.2d 361, 365-66 (Minn. 2009). A revocation decision will be reversed only if the defendant can show actual bias. *State v. Moss*, 269 N.W.2d 732, 734-35 (Minn. 1978); *see*

also *State v. Plantin*, 682 N.W.2d 653, 663 (Minn. App. 2004) (holding that conviction of a defendant who submitted to trial without objecting to alleged bias will be reversed only if defendant can show actual bias), *rev. denied* (Minn. Sept. 29, 2004).¹

“The Code [of Judicial Conduct] defines ‘impartial’ and ‘impartiality’ as the ‘absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.’ Terminology, Code of Judicial Conduct.” *State v. Pratt*, 813 N.W.2d 868, 876 (Minn. 2012). “The prohibition against a judge presiding when his or her impartiality might reasonably be questioned leaves considerable room for interpretation and does not provide a precise formula that can automatically be applied.” *Id.* (Quotations omitted).

Appellant argues first that the district court judge who presided over the revocation hearing was not impartial because, when he presided over the sentencing hearing, he told appellant “[C]ase law [*e.g. State v. Finch*, 865 N.W.2d 696, 705 (Minn. 2015)] tells me I can’t say that I’m not going to give you any chances if you violate probation – off to prison you go . . . so I’m not going to say that.” According to appellant, “[b]y phrasing his warning in this way, the judge delivered a clear message: that though he could not ‘say’ he would revoke [appellant’s] probation for any violation, that is what he would do,” and therefore he had “prejudged” appellant’s probation violation and deprived her of an impartial judge.

¹ In her reply brief, appellant argues that a defendant does not need to show actual bias, that the correct standard of review is not plain error but structural error, and that *Moss* was overruled by *Schlien*. But appellant misreads *Schlien*, which actually states that “even if we assume that the [structural] error was waived, the unobjected-to error may be reviewed for plain error.” 774 N.W.2d at 365.

But *Finch* is distinguishable: The judge in *Finch* said that he had “made it very clear at [the sentencing hearing to the defendant, that] if he had *any* probation violations of *any* of the conditions of his probation, *the Court would be executing his prison time.*” *Id.* at 704. The judge here explicitly did *not* tell appellant that any probation violation would result in her going to prison; he rather warned her that the magnitude of the offenses of which she was convicted put her on a “short leash” with regard to probation, told her that relapses did not “happen on their own,” and urged her to “surround [her]self with the right people.”

Moreover, contrary to appellant’s statement that the judge “revoked her probation due to a single violation for use of intoxicants,” her revocation was not imposed because of “a single use” of an intoxicant. The probation-violation report said appellant: (1) was arrested while driving, (2) took field-sobriety tests that led to a suspicion that she was under the influence of a controlled substance, (3) was charged with misdemeanor DWI and driving after revocation, (4) admitted to using methamphetamine for the past three days, and (5) was “under the influence” while being booked and was continuously falling asleep, a condition that was “concerning as she was operating a motor vehicle just a short time prior which poses a significant public safety risk.” The report noted further that “[t]he defendant did not just relapse [i.e., use a controlled substance], she was operating a motor vehicle and was doing so knowing she does not have a valid license.”

The transcript of the probation violation hearing also indicates that the district court had not predetermined the result. He first asked appellant whether she had used methamphetamine and picked up any new charges that were pending at the time of the hearing, and she admitted that she had committed the violations; if the judge had already

determined the result of the hearing, he would not have needed to ask appellant for this information.

The district court judge then asked the probation officer for a recommendation and learned that the officer recommended revoking the stay and executing the previously stayed sentences of 102 and 126 months' imprisonment. The judge inquired of the state and learned that it supported the recommendations of the probation officer because (1) not revoking probation would deprecate the seriousness of appellant's probation violation, (2) appellant had been given many opportunities for treatment and had stopped going, (3) she had also stopped working, and (4) her confinement was necessary to protect the public. The judge also asked appellant's attorney about appellant's options and learned that she could be placed in a residential treatment program or in the Female Offender Program.

Finally, the district court judge asked appellant for her views, and she said she had called her probation officer and was told she did not have to go to her outpatient program. The judge then checked with the probation officer, who said she had talked to appellant about transferring her things to the Female Offender Program but "never said that she did not have to continue to attend outpatient treatment," and, when she asked the treatment program if appellant had been discharged after sentencing, she was told "they did not discharge her. She quit coming." The district court asked appellant how many times she had been through treatment, and she answered "Many, many times."

In response to appellant's statement that she apologized for being "back here," i.e., back in court because of an offense, the judge said, "Well, obviously, I'm concerned. I was very much on the fence [between incarceration and probation] at sentencing as to

whether or not to give you a chance. I certainly understand the state's frustration here. I am obviously very frustrated myself." The district court would not have described himself as "very frustrated" if he had already decided to revoke appellant's probation.

The district court went on to acknowledge that, when a probation violation was limited to one relapse, he generally would not revoke probation and would give the defendant "a chance to go through treatment." He then distinguished appellant's situation: she was "not the normal person" with just one relapse, and she had "been through treatment numerous times." Moreover, she knew "what [she was] supposed to be doing" while on probation, and she had not done it. Only after this explanation did the district court say he did not think appellant was amenable to probation, revoke the stay, and impose the two prison terms to run concurrently. The transcript reflects that the district court's impartiality at appellant's probation revocation hearing cannot reasonably be questioned.

2. The Findings

Appellant also argues that the revocation order must be reversed because the district court did not make adequate findings on the second and third *Austin/Modtland* 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 *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980)). Before probation can be revoked, the district court must make findings as to (1) the specific condition that was violated, (2) whether the violation was intentional or inexcusable, and (3) whether the need for the defendant's confinement outweighs the policies favoring probation: these are known as the *Austin/Modtland*

findings. *Modtland*, 695 N.W.2d at 605; *Austin*, 295 N.W.2d at 250. In making these findings, district courts “must seek to convey their substantive reasons for revocation and the evidence relied upon.” *Modtland*, 695 N.W.2d at 608. “[I]t is not the role of appellate courts to scour the record to determine if sufficient evidence exists to support the district court’s revocation.” *Id.* The district court can satisfy the “written findings” requirement by “stating its findings and reasons on the record, which, when reduced to transcript, is sufficient to permit review.” *Id.* at 608, n.4. The *Austin/Modtland* findings ensure that the district court creates a thorough and fact-specific record of the reason for revoking probation and that the district court does not reflexively revoke probation when a defendant has violated a probation condition. *Id.* The question of whether a district court has made the findings is a question of law that this court reviews de novo. *Id.* at 605.

The transcript of the revocation hearing shows that the district court asked appellant if (1) she knew what the terms and conditions of probation were, (2) she knew that one condition was that she could not use any sort of mood-altering substance unless it had been prescribed, and (3) she was admitting that she used methamphetamine while on probation; appellant answered each question in the affirmative. Thus, the district court’s questions and appellant’s answers constitute a finding as to the specific condition of her probation that was violated, satisfying the first *Austin/Modtland* finding.

As to the second finding, the district court did not use either the word “inexcusable” or the word “intentional” during the hearing. But based on our de novo review, appellant’s admissions provide sufficient evidence that she acknowledged that her violation was intentional and inexcusable. At the beginning of the hearing, when the district court asked

appellant's attorney if this was a contested probation violation hearing, she answered, "No, Your Honor. There is an admission [of the violation.] We would like to argue disposition." The district court then asked appellant, "[I]s it, in fact, your intent to admit to the probation violations today?" and appellant answered, "Yes, it is." Appellant did not argue that the violation was unintentional or excusable. The record demonstrates that the district court found that appellant's use of controlled substances was intentional and inexcusable.

The district court's findings reference its initial reluctance to stay execution of the sentence based on appellant's prior failed treatment attempts. The district court stayed execution of appellant's prison sentences because the court found her amenable to chemical dependency treatment based on her motivation to stay sober. The court found that appellant was no longer amenable to probation based on her continued use of controlled substances, even when she knew that her successful abstention from controlled substances was the reason the court stayed execution of the prison sentences. We are satisfied that appellant's admission to using controlled substances when her commitment to sobriety was essential to the court's finding at sentencing that she was amenable to probation, which sufficiently conveyed the court's finding that appellant's violation for using controlled substances was intentional and inexcusable. *See Modtland*, 695 N.W.2d at 608; *see also State v. Wolhart*, No. A17-0629, 2017 WL 5077565, at *2 (Minn. App. Nov. 6, 2017) (affirming revocation decision where district court did not explicitly find violation intentional or inexcusable but noted appellant understood consequences of dismissal from sex-offender treatment based

on his refusal to accept responsibility), *rev. denied* (Minn. Jan. 16, 2018).² And the district court’s failure to explicitly find the undisputed fact that appellant’s probation violations were neither excusable nor unintentional did not prevent it from meeting this standard.

As to the third finding, appellant argues that the district court’s findings are “general and non-specific” and do not convey its reasons for revoking probation. In considering the third *Austin/Modtland* factor—whether the need for confinement outweighs policies favoring probation—the district court is to consider three subfactors, any one of which is sufficient to support the revocation: whether “(i) confinement is necessary to protect the public from further criminal activity by the offender”; “(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.” *Modtland*, 695 N.W.2d at 607. Again, the district court did not expressly identify the subfactor it relied on when it found that the need for confinement outweighed the policies favoring probation.

Nevertheless, the record shows that the district court based its revocation decision on the third subfactor. The court found that, although this was a relapse and a first probation violation, appellant is not a typical offender because she has “been through treatment numerous times” and “know[s] what [she is] supposed to be doing.” The court stated it was revoking probation because the need for confinement outweighs the policies favoring probation “based upon [her] history” and the seriousness of the offense. We

² Although this decision is not precedential, we find its analysis persuasive.

conclude that the record conveys the district court's finding that it would unduly depreciate the seriousness of appellant's violation for continuing to use controlled substances to not revoke her probation. *See id.* at 608. The district court did not abuse its discretion in determining that the need for confinement outweighed the policies favoring probation because the district court adequately conveyed its reasons, and those reasons are supported by the record.

Affirmed.