

*This opinion is nonprecedential except as provided by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
A22-1291**

State of Minnesota,
Respondent,

vs.

Keith Melvin Baerg,
Appellant.

**Filed April 24, 2023
Affirmed
Reilly, Judge**

Watonwan County District Court
File No. 83-CR-18-31

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

Stephen Lindee, Watonwan County Attorney, Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

Jacob M. Birkholz, Michelle K. Olsen, Birkholz & Associates, LLC, Mankato, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Segal, Chief Judge; and Florey, Judge.*

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

NONPRECEDENTIAL OPINION

REILLY, Judge

On appeal after remand in this probation-revocation matter, appellant argues that the district court erred in finding that the need for his confinement outweighed the policies favoring continued probation under *State v. Austin*, 295 N.W.2d 246 (Minn. 1980). Because the district court's findings on the third *Austin* factor are supported by the record and sufficient to justify the revocation of appellant's probation, we affirm.

FACTS

In January 2018, respondent State of Minnesota charged appellant Keith Melvin Baerg with first-degree criminal sexual conduct and third-degree criminal sexual conduct in violation of Minn. Stat. §§ 609.342, subd. 1(e)(i), .344, subd. 1(c) (2016). Baerg entered a *Norgaard*¹ plea of guilty to third-degree criminal sexual conduct, and the district court sentenced Baerg to 117 months in prison, stayed for 15 years. The district court placed Baerg on probation and imposed several conditions, including that he complete sex-offender treatment and abstain from using or possessing alcohol or illegal drugs.

In September 2019, Baerg's probation officer filed a probation violation report, alleging that Baerg failed to abstain from alcohol use. Baerg admitted to the violation and the district court reinstated Baerg on probation. In 2020, Baerg began sex-offender treatment at CORE Professional Services (CORE). Under the treatment agreement, if

¹ A *Norgaard* plea may be entered into when a defendant is unable to admit facts due to memory loss but agrees that there is sufficient evidence for a conviction. *State v. Ecker*, 524 N.W.2d 712, 716-17 (Minn. 1994). At the time of his plea, Baerg asserted that he was intoxicated the night of the offense and could not remember what happened.

Baerg denied the underlying offense that led him to treatment, he would need to complete a polygraph within 30 days. The agreement stated that if Baerg failed the polygraph examination and continued to deny the offense, he would be terminated from treatment. In addition, when he entered the program, CORE informed Baerg that he would have treatment assignments and that he was expected to complete them and present them at every session.

Baerg continued to deny his underlying offense and submitted to a polygraph test in September 2020. The polygraph indicated deception. Staff informed Baerg that if he continued denying his offense, he would be terminated from the program. Between February and May 2021, Baerg did not consistently complete his assignments and often forgot to bring his workbook to the sessions. In April, Baerg's CORE counselor informed Baerg that continuing to miss assignments would lead to his termination from the program. She also informed Baerg that he was behind on his bill payments and that he would be at risk of termination from treatment if he did not get current.

In May 2021, CORE terminated Baerg "for failure to make adequate progress. . . . based on his unwillingness to acknowledge his sexual offense and his failure to consistently complete the treatment assignments." Baerg's probation officer filed a second probation violation report and the district court held two hearings, a contested probation-violation hearing and a later disposition hearing. Baerg's probation officer, Baerg's CORE counselor, and the executive director for Alpha Emergence, a different treatment program, testified at the contested probation-violation hearing. Baerg's CORE counselor testified about Baerg's lack of progress during treatment. The counselor testified

that CORE terminated Baerg from its program “[b]ased on the presentation of the assignment[s] and the defense mechanisms he was using and the ongoing denial of the offense.”

At the disposition hearing, the state asked the district court to execute Baerg’s sentence, arguing that Baerg’s attitude about his offense had not changed while on probation and he twice violated probation. Counsel for Baerg argued that Baerg had a desire to complete treatment at Alpha Emergence because it was a better fit for him. He asked the court to allow Baerg to stay on probation to complete treatment there.

The district court revoked Baerg’s probation, finding that Baerg violated his probationary conditions by failing to complete sex-offender treatment, the violation was intentional and inexcusable, and the need for confinement outweighed the policies favoring probation. Baerg appealed the district court’s decision arguing, in part, that the district court failed to make adequate findings on the three *Austin* factors. This court determined that the district court made adequate findings on the first and second *Austin* factors but did not make adequate findings on the third. We reversed and remanded for further proceedings. *State v. Baerg*, No. A21-1517, 2022 WL 3581314, at *6 (Minn. App. Aug. 22, 2022) (*Baerg I*).

Following remand from this court, the district court held a hearing to make findings on the third *Austin* factor. The district court noted that it would make findings based on the existing record but would allow the parties to make arguments. Counsel for Baerg asserted that the need for confinement did not outweigh policies favoring probation because Baerg had been accepted into the Alpha Emergence treatment program, had no

violent offenses while on probation, did not have continuing problems with alcohol, the underlying offense involved a single victim, and Baerg did not have an underlying history of criminal-sexual-conduct offenses. Counsel asked the district court to reinstate Baerg on probation and allow him to attend Alpha Emergence.

The district court determined that confinement was “necessary to protect the public from further criminal activity by the offender” because the reasons for Baerg’s offense were “drinking and criminal sexual behavior.” The district court found that Baerg first violated probation by drinking alcohol, and then he further violated probation by failing to complete sex-offender treatment. The district court also determined that “it would unduly depreciate the seriousness of the violation if probation were not revoked.” The district court noted that after Baerg violated probation the first time, the district court gave him another chance and “he didn’t take advantage of that other chance.” The district court found that revocation was appropriate and necessary because Baerg failed to complete sex-offender treatment while on probation for a criminal-sexual-conduct offense.

This appeal follows.

DECISION

Baerg challenges the district court’s order revoking his probation. “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 make three findings: (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. These factors, known as the *Austin* factors, require district courts to “seek to convey their substantive reasons for revocation and the evidence relied upon.” *Modtland*, 695 N.W.2d 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 de novo whether a district court has made the necessary findings under *Austin*. *Id.* at 605.

In *Baerg I*, we determined that the district court’s findings were adequate on the first and second *Austin* factors to support revocation of his probation but that the district court’s findings on the third factor were inadequate. 2022 WL 3581314, at *4. Thus, we focus our analysis here on the third *Austin* factor. The third *Austin* factor requires the district court to make a finding that the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250. The district court may find that the need for confinement outweighs the policies favoring probation if at least one of these three subfactors is met: (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 another stay of the sentence “would unduly depreciate the seriousness of the violation.” *Modtland*, 695 N.W.2d at 607 (quoting *Austin*, 295 N.W.2d at 251). The district court “must balance the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *Id.* at 606-07 (quotation omitted). The district court must also consider

that “[t]he purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed.” *Austin*, 295 N.W.2d at 250.

On appeal, Baerg argues that the district court again failed to make sufficient findings on the third *Austin* factor.² We disagree and conclude that the district court’s findings on the third *Austin* factor are adequate to support the revocation of Baerg’s probation.

The district court found that the first and third *Modtland* subfactors were satisfied. For the first subfactor, the district court explained that confinement was necessary to protect the public from further criminal activity because Baerg’s offense involved alcohol use and criminal sexual behavior, and Baerg’s probation violations involved drinking alcohol and failing to complete sex-offender treatment. The district court reasoned that Baerg is “a convicted sex offender who drank while he was on probation, when drinking was a contributing factor to the underlying offense” and that Baerg “hasn’t addressed the underlying criminal sexual behavior.” The district court found that the combination of the drinking violation with the failure to complete sex-offender treatment created “a public safety interest.”

As to the third *Modtland* subfactor, the district court determined that “it would unduly depreciate the seriousness of the violation if probation were not revoked,” because

² Baerg also argues that the district court erred by failing to comply with Minn. R. Crim. P. 27.04 because it did not create written findings of fact summarizing the evidence it relied on after the hearing. This argument lacks merit. The district court stated its findings and reasons on the record, which under *Modtland* is enough to permit review. 695 N.W.2d at 608 n.4.

Baerg “had two significant opportunities to not go to prison and he didn’t take advantage of those.” First, Baerg received a downward dispositional departure. Second, the district court reinstated Baerg on probation after his first violation for drinking alcohol. The district court found that Baerg “didn’t take advantage of the original plea offer and he didn’t take advantage of the Court giving him that second opportunity.” The district court reasoned that if it “were to continue to give [Baerg] a chance again for not completing sex offender treatment when he’s on probation for a sex offense, that would seriously depreciate the seriousness of the violation because he got an opportunity.”

Baerg argues that the district court’s findings lack evidentiary support and fail to explain how the probation violations created a risk to public safety. He contends that the district court’s finding that he has not addressed the underlying criminal sexual behavior is clearly erroneous because he was “actively engaged in treatment” and is willing to participate in treatment. He also argues that the district court erred by considering his violation for drinking because it occurred two years prior and no longer presented a risk to public safety. We do not agree.

The record amply supports the district court’s determination that confinement is necessary to protect the public from further criminal activity. Baerg is an untreated sex offender who demonstrated an unwillingness to participate in sex-offender treatment: he did not regularly attend treatment sessions, failed to complete required assignments, continued to deny his underlying offense, and denied issues with alcohol. *See Baerg I*, 2022 WL 3581314, at *4 (concluding that “there is ample record evidence that Baerg was not satisfactorily completing the treatment program and lacked the intent to complete it”).

As the district court correctly noted, Baerg is a convicted sex offender whose underlying offense involved heavy alcohol use. And Baerg's two probation violations included the failure to complete sex-offender treatment and the use of alcohol. The district court properly conveyed its reasonings as required by *Modtland* and the record supports the findings. Thus, the district court did not abuse its discretion when it found that "confinement is necessary to protect the public from further criminal activity."

Although the district court only needs to make findings on one *Modtland* subfactor, the district court also found that it would unduly depreciate the seriousness of the violation if probation were not revoked because Baerg had a chance to complete sex-offender treatment and failed to do so. Baerg argues that this probation violation "is a technical violation and not as serious as the trial court states it is." He asserts that the CORE treatment program was not the right fit, that he was willing to participate in Alpha Emergence, and the district court should have allowed him to do so. Again, we are not persuaded.

Baerg was granted a downward dispositional departure to allow him to complete a sex-offender-treatment program. *See 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"). Baerg was not engaged in his treatment program and, ultimately, was terminated before completing a sex-offender-treatment program. While Baerg now argues that he would have had more success at a different program, district courts have "broad discretion in determining if there is sufficient evidence to revoke probation" and are not prohibited from revoking probation even if

alternative treatment options exist. *Austin*, 295 N.W.2d at 249. The district court adequately conveyed its reasoning for finding that it would unduly depreciate the seriousness of the violation if probation were not revoked, and the district court's reasoning is supported by the record. Baerg had a chance to complete sex-offender treatment and failed to do so. Thus, the district court did not abuse its discretion in revoking Baerg's probation.

Affirmed.