

*This opinion is nonprecedential except as provided by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
A22-1324**

State of Minnesota,
Respondent,

vs.

Gregory Robert Perkins,
Appellant.

**Filed May 15, 2023
Affirmed
Johnson, Judge**

Crow Wing County District Court
File No. 18-CR-18-1350

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

Donald F. Ryan, Crow Wing County Attorney, Candace Prigge, Assistant County Attorney, Brainerd, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Max B. Kittel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Gregory Robert Perkins was placed on probation after he pleaded guilty to a drug-related offense. The district court later found that Perkins committed several violations of the terms of his probation. Accordingly, the district court revoked his probation and

executed his prison sentence. We conclude that the district court did not abuse its discretion by determining that the need for confinement outweighs the policies favoring probation. Therefore, we affirm.

FACTS

In April 2018, the state charged Perkins with two counts of first-degree controlled substance crime, in violation of Minn. Stat. § 152.021, subd. 1(1) (2014), for possessing methamphetamine with intent to sell it and conspiring to possess methamphetamine with intent to sell it. The state alleged that, three years earlier, in April 2015, Perkins sold methamphetamine to a confidential informant on three occasions.

At the time he was charged, Perkins was residing in Oregon, where he had moved in 2016 after serving an 18-month prison sentence in Minnesota for an unrelated drug crime. After Perkins failed to appear for his initial appearance, the district court issued a warrant for his arrest. In early 2019, an Oregon law-enforcement officer stopped Perkins for a traffic or parking violation, discovered the outstanding warrant, and arrested Perkins.

In February 2021, the state and Perkins entered into a plea agreement by which Perkins agreed to plead guilty to count 2 and the state agreed to a 95-month stayed prison sentence, ten years of supervised probation, and the dismissal of count 1. The district court imposed the agreed-upon sentence.

In April 2021, Perkins's probation agent filed a probation-violation report, alleging that Perkins had failed to attend a meeting with the agent on two occasions, had failed to contact the agent after missing the meetings, and had failed to provide the agent with a change of address. When he was arrested on a warrant, Perkins was asked to submit to a

drug test but could not provide a sample because he had eaten baking soda in an attempt to tamper with a drug test. But Perkins admitted to using marijuana and methamphetamine. Officers searched Perkins's vehicle incident to his arrest and found methamphetamine, marijuana, and drug paraphernalia. In May 2021, the state filed a new complaint in which it charged Perkins with two more drug-related offenses.

Meanwhile, the district court conducted a hearing in mid-May 2021 on the alleged probation violations. The district court found that the state did not prove by clear and convincing evidence that Perkins failed to contact his probation agent because the agent had an outdated address on file. But, the district court found that the state proved that Perkins violated his probation conditions by possessing methamphetamine and marijuana and by not submitting to a drug test. A few days later, the state and Perkins agreed to additional probation conditions in lieu of revocation.

Two months later, in June 2021, Perkins's probation agent filed a second probation-violation report, alleging that Perkins failed to attend a meeting with the agent and failed to maintain contact with her. When he was arrested on a warrant the following month in Hennepin County, law-enforcement officers searched his vehicle and found 317 grams of methamphetamine in the trunk. The state again filed a new complaint in which it charged Perkins with another drug-related offense. The state later dismissed the charge after the evidence was suppressed, which caused the state to withdraw the second probation violation report in this case.

In February 2022, Perkins pleaded guilty to a drug-related charge arising from his possession of methamphetamine in April 2021. The state agreed to a 25-month prison

sentence and also agreed that Perkins could be released pending sentencing and reinstated on probation. The district court released Perkins with additional probation conditions. Three days later, Perkins did not attend a meeting with his probation agent, who was unable to find him at the address Perkins had provided. Four days later, Perkins visited his probation agent and stated that he was living at another location. Perkins agreed to submit to a drug test but left the probation office without doing so. The probation agent filed a third probation-violation report, alleging that Perkins failed to inform her of his current address and failed to submit to a drug test.

In June 2022, the district court held a probation-violation hearing related to the probation violations alleged in February 2022. Perkins testified that he stayed at a different address to avoid bad influences at the address he had provided to his probation agent. He testified that he could not complete the drug test within the allotted two-hour window and left the probation office after he could not locate his probation agent. The district court found that the state proved by clear and convincing evidence that Perkins committed the alleged violations.

At a dispositional hearing, the state asked the district court to revoke Perkins's probation and execute his 95-month prison sentence. Perkins requested that the district court keep him on probation. Perkins testified that he was sober while living in Oregon but began using drugs again after he returned to Minnesota. He testified that he missed a probation meeting in February 2022 because a person who had agreed to give him a ride did not pick him up. Perkins's adult daughter, who lives in Oregon, testified that, when Perkins lived in Oregon, he had no criminal charges. She further testified that, if Perkins's

probation were transferred to Oregon, treatment would be available to him, and she would help him comply with the conditions of his probation. The probation agent recommended that the district court execute Perkins's sentence because of his continued failure to comply with his probation conditions.

The district court revoked Perkins's probation and executed his 95-month prison sentence after finding that Perkins's violations were intentional and inexcusable and that the need for confinement outweighed the policies favoring probation. Perkins appeals.

DECISION

Perkins argues that the district court erred by revoking his probation and executing his prison sentence.

If a probationer violates one or more conditions of probation, a district court may either continue the probationer on probation or revoke probation and execute the sentence. Minn. R. Crim. P. 27.04, subd. 3(2)(b)(iv)-(v). The supreme court has prescribed a three-step analysis to guide district courts in deciding whether to revoke probation. A district court may revoke probation only if the court (1) designates the specific condition that has been violated, (2) finds that the violations were "intentional or inexcusable," and (3) finds "that need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). In making these findings, a district court "must seek to convey their substantive reasons for revocation and the evidence relied upon." *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). An appellate court applies an abuse-of-discretion standard of review to a district court's decision to revoke probation. *Id.* at 605.

In this case, the district court made an express finding with respect to each of the three *Austin* factors. The district court also explained its decision by reciting the events that had occurred since Perkins's guilty plea. The district court noted that Perkins received "a very favorable outcome in February of 2021, getting the benefit of a downward dispositional departure" because it was "deemed worth a shot as there was a hope that he would be amenable to chemical dependency treatment." The district court noted that Perkins proceeded to commit several probation violations, while making excuses that the district court did not accept and playing what the district court called a "cat-and-mouse game" with his probation agent. The district court commented that a probation agent cannot "supervise somebody who is not cooperative, who makes excuses constantly, [and] who fails the simplest directions."

Perkins challenges the district court's findings only with respect to the third *Austin* factor: that the need for confinement outweighs the policies favoring probation. *See Austin*, 295 N.W.2d at 250. A district court may find that the third *Austin* factor is satisfied if any of three sub-factors are present: (1) confinement is needed to "protect the public from further criminal activity by the offender," (2) confinement is necessary to provide treatment, or (3) a further stay of the sentence "would unduly depreciate the seriousness of the violation." *Id.* at 251 (quoting A.B.A. Standards for Criminal Justice, Probation § 5.1(a) (Approved Draft 1970)).

The district court found that all three sub-factors support revocation. With respect to the first sub-factor, the district court found that confinement was "necessary to protect the public from future criminal activity." The district court elaborated by saying that

Perkins has a “proclivity to engage in activities shown by history to make it easier for other people to get methamphetamine and drugs that kill and ruin people’s lives.”

Perkins contends that the district court erred in making this finding on the ground that his recent criminal activity consisted only of the use and possession of methamphetamine, which is unlike the underlying charge of selling methamphetamine. Perkins further contends that his recent criminal activity was adequately addressed by the 25-month prison sentence that was imposed in February 2022.

The record supports the district court’s finding with respect to the first sub-factor. Perkins admitted to using methamphetamine only two months after his 2021 arrest and release from prison. It was not unreasonable for the district court to consider Perkins’s recent possession of methamphetamine in the context of his conviction of conspiracy to sell methamphetamine. Perkins is incorrect that he was sentenced to 25 months of imprisonment for his probation violation. By agreement of the parties, the district court continued his probation in February 2022. The district court imposed a prison sentence because he had pleaded guilty to new charges. The district court did not abuse its discretion by finding that confinement in prison is necessary to protect the public from further criminal activity.

With respect to the third sub-factor, the district court found that to not revoke Perkins’s probation would unduly depreciate the seriousness of Perkins’s violations. Perkins again contends that he already received a 25-month prison sentence for the conduct that led to the probation-violation report. Perkins also contends that the district court’s finding is “a reflexive reaction to an accumulation of technical violations,” which do not

show that his “behavior demonstrates that he . . . cannot be counted on to avoid antisocial activity.” *See Austin*, 295 N.W.2d at 251 (quotation omitted).

The record supports the district court’s finding with respect to the third sub-factor. The district court gave Perkins several opportunities to abide by the terms of his probation, despite violations ranging from using drugs, deceptively attempting to conceal drug use from a drug test, failing to appear for meetings with his probation agent, and failing to keep his probation agent apprised of his address. Perkins violated the terms of his probation within two months of his sentencing hearing and continued to commit violations after the district court continued his probation. The district court did not abuse its discretion by finding that to not revoke Perkins’s probation would unduly depreciate the seriousness of Perkins’s violations.

Because the district court’s findings on the first and third sub-factors are sufficient to satisfy the third *Austin* factor, we need not consider Perkins’s arguments concerning the second sub-factor.

In sum, the district court did not err by revoking Perkins’s probation and executing his sentence.

Affirmed.