

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1459**

State of Minnesota,
Respondent,

vs.

Victor Steven Fortner,
Appellant.

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

Olmstead County District Court
File No. 55-CR-21-4286

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

Mark A. Ostrem, Olmsted County Attorney, A. Michael DeBolt, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

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

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

SYLLABUS

When determining whether to revoke probation and order imprisonment, a district court must independently determine whether revocation and imprisonment are appropriate under the applicable legal standards and is not bound by a joint recommendation of the parties and the probation department to continue the offender on probation.

OPINION

LARKIN, Judge

Appellant challenges the district court's order revoking his probation, arguing that the district court abused its discretion by concluding that the need for his confinement outweighed the policies favoring probation. Appellant emphasizes that the parties and the probation department jointly recommended that he continue on probation. Because the district court did not abuse its discretion in rejecting that recommendation, we affirm.

FACTS

On November 16, 2021, appellant Victor Steven Fortner pleaded guilty to introducing a controlled substance into a state correctional facility. On February 28, 2022, the district court granted Fortner's motion for a downward dispositional departure, stayed execution of the presumptive 24-month prison sentence, and placed Fortner on supervised probation for five years. Among his conditions of probation, Fortner was required to abstain from chemical use; enter and successfully complete the long-term chemical dependency treatment program at Minnesota Adult and Teen Challenge (Teen Challenge); avoid contact with any people or establishments involved in the sale, use, or distribution of drugs and alcohol; and notify probation of any contact with law enforcement within 72 hours of such contact.

In granting the downward dispositional departure, the district court determined that Fortner was particularly amenable to both probation and long-term chemical-dependency treatment based on the recommendation of the probation department and Fortner's acceptance at Teen Challenge. The district court explained that "getting [Fortner]

treatment, getting [Fortner] into a place of long term sobriety . . . serves the best interest of public safety.”

On March 8, 2022, Fortner started long-term treatment at Teen Challenge. On April 12, 2022, Fortner told his probation officer that he had to leave inpatient chemical-dependency treatment because his girlfriend was going to federal prison in July. Fortner’s probation officer informed Fortner that he needed to remain in treatment, but Fortner left Teen Challenge the next day against staff advice and without permission from his probation officer. Fortner signed a sanctions order for violating probation and was ordered to “re-engage with chemical dependency services.”

In the three months that followed, Fortner was in outpatient treatment at Fountain Centers, but he reportedly had “thirteen incidents of various no-shows, missed UA’s, logging in late or leaving early” and was discharged from that program. On June 7, 2022, Fortner had contact with police while at a park with his girlfriend, who had overdosed, and he did not notify his probation officer of the police contact. Between June 16 and July 13, Fortner tested positive for alcohol or fentanyl five times, and he admitted to two other instances of alcohol consumption. On July 22, 2022, Fortner was found intoxicated in his car, which he had driven into a ditch. The state subsequently charged him with driving while impaired and fifth-degree possession of a controlled substance.

On July 25, 2022, the probation department filed a violation report with the district court, alleging that Fortner had violated the no-chemical-use and the no-contact conditions of his probation, as well as the requirement that he notify probation within 72 hours if he had contact with law enforcement. The probation department reported that Fortner “has

engaged in a cat and mouse game of using a legal means to mask his abuse of marijuana and amphetamine” and that he continued to consume alcohol. The probation department recommended that Fortner be released to Teen Challenge and, upon completion of its long-term treatment program, be placed on electronic home monitoring for 45-90 days.

On July 26, 2022, Fortner appeared for a probation-violation hearing. In discussing whether Fortner wanted to admit the alleged probation violations, the district court asked Fortner if he understood that “it’s possible that the [district] court could revoke [his] stay of execution and send [him] to prison.” Fortner responded that he “did not know that,” but after a brief discussion, he stated that he understood that the district court did not “necessarily have to follow the recommendations of probation.” Fortner waived his rights to a contested hearing and admitted to the three probation violations.

The district court informed the parties that it would continue the hearing and that it would “be giving strong consideration as to whether or not [Fortner] is going to remain on probation.” The district court stated that it was “more than happy” to hear arguments as to why Fortner should be allowed to remain on probation, but the district court noted that the allegations and the admissions “here today are extremely serious given the nature of the underlying offense.”

On August 1, 2022, the parties returned for the continued hearing. The district court informed the parties that they were there to discuss the third “Austin” factor. The prosecutor informed the court that it was his understanding that there would not be “a contested third Austin factor hearing,” that “the recommendations [were] of mutual agreement by both parties,” and that those recommendations would be presented to the

court by a representative of the probation department. The prosecutor, Fortner, and the probation department then jointly recommended that Fortner continue on probation and re-enter the long-term treatment program at Teen Challenge.

The district court again stated that it was considering revoking Fortner's probation and explained:

The law in this area is very grey, judges are given a lot of discretion and unless some other appellate court tells me that I've really screwed things up, it's pretty much up to me. And what I need to find today is *whether the policies governing probation are outweighed [by] the need for confinement*. And the law . . . tells me that I need to look at your interest in freedom against the state's interest in ensuring public safety and your rehabilitation. *I should be considering whether confinement is necessary to protect the public from further criminal activity by you, whether you're in need of correctional treatment that can be more effectively provided if you're confined[,] or if I don't revoke probation if it would unduly depreciate the seriousness of the violation.*

(Emphasis added.)

During the hearing, Fortner's probation officer summarized the joint recommendation for continued probation. Fortner's attorney provided a brief argument, and Fortner made a statement. The district court indicated that it needed more time to consider the issue and continued the hearing a second time.

On August 4, 2022, the parties appeared for the second continued hearing. The district court announced that it had decided to revoke Fortner's probation and explained:

I find that there's clear and convincing evidence in the record that you need correctional treatment that can most effectively be provided if you're confined and I'm speaking directly to chemical dependency treatment. I understand that there is chemical dependency treatment available for you in the

community. The problem with that though is that it is the same chemical dependency treatment that was available for you when I sentenced you which you completed the short-term but almost immediately left the long-term program against their advice and without their permission.

It was my hope and my expectation because you promised me when I sentenced you that you would enter into and successfully complete that long-term program and you had looked to even go further than that and start getting involved in the leadership there. That hope and that promise were not fulfilled. *I'm sad about that, I'm disappointed in that but to send you back to that program that you voluntarily removed yourself from and then not only removed yourself from but went back right into the same pattern of use, dishonesty, manipulation that formed the basis of all the addiction issues that led you to that place. It reenforces the need for treatment and I'm just not satisfied that I can be convinced that you're going to take advantage of it in the community anymore. . . .*

So while I agree that there is programming available for you in the community, *I just don't have the confidence based on your history of failed treatments, some successes to be fair, but most recently the very disappointing failed treatment at Teen Challenge and then the discharge from Fountain Centers. I just can't be convinced that it's going to get done in the community and you need it for yourself as well as the people around you.*

Secondly, *I'm also finding that there's clear and convincing evidence in the record that it would unduly depreciate the seriousness of these violations if I didn't revoke probation.* This was a presumptive commitment to prison; it was granted over the state's vehement opposition.

. . . .

. . . The real focus and the real reason why I chose to give you your opportunity here on this departure was because I saw a lot of promise in the path that you were on. And the path that you were on was one of sobriety, it was one of moving forward in your personal life, your personal faith, you had a strong support network and it sounds like you still have a lot of

support but the real focus of that was this issue of sobriety and continued moving forward with, you know, putting life back together. *And these violations just cut against that 100 percent. It's not just that you went out there and, you know, had a relapse, this was ongoing regular use and it involved some very serious, dangerous, drugs, I mean, you had Fentanyl in your system, you know, and I suspect there were other drugs involved as well. And so, you know, the seriousness of violations when I look back at the reasons why it is that the departure was granted, I just can't overlook them. So those are the reasons why it is that I'm choosing to execute the sentence.*

(Emphasis added.)

The district court revoked Fortner's probation and executed his 24-month prison sentence.

Fortner appeals the revocation of his probation.

ISSUE

Did the district court abuse its discretion by revoking Fortner's probation and executing his stayed prison sentence?

ANALYSIS

Fortner contends that the district court "abused its discretion because all parties including probation agreed probation should be reinstated" and because "the record does not establish that the need for confinement outweighed the policies favoring probation."

Minnesota statutes provide that "[e]xcept when a sentence of life imprisonment is required by law, or when a mandatory minimum sentence is required," a district court "may stay imposition or execution of sentence and . . . may place the defendant on probation," the conditions of which may include intermediate sanctions. Minn. Stat. § 609.135, subd. 1(a)(2) (2022). If it appears that a defendant "has violated any of the conditions of

probation or intermediate sanction, or has otherwise been guilty of misconduct which warrants the imposing or execution of sentence, the court may without notice revoke the stay and direct that the defendant be taken into immediate custody.” Minn. Stat. § 609.14, subd. 1(a) (2022). “The defendant shall thereupon be notified in writing and in such manner as the court directs of the grounds alleged to exist for revocation of the stay of imposition or execution of sentence.” *Id.*, subd. 2 (2022).

If the defendant challenges the grounds for revocation, “a summary hearing shall be held thereon at which the defendant is entitled to be heard and to be represented by counsel.” *Id.* If the district court finds there are grounds to revoke probation and if a sentence was previously imposed and its execution stayed, the court may “continue such stay and place the defendant on probation or order intermediate sanctions in accordance with the provisions of [Minn. Stat. § 609.135 (2022)], or *order execution of the sentence previously imposed.*” *Id.*, subd. 3(2) (2022) (emphasis added).

The Minnesota Rules of Criminal Procedure set forth a more detailed process for revocation proceedings and similarly provide that if the district court finds or the probationer admits a probation violation, the court may execute the offender’s sentence. Minn. R. Crim. P. 27.04, subd. 3(2)(b).

“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.” *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). 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.” *State v. Currin*, 974 N.W.2d 567, 571 (Minn. 2022) (quotation omitted).

Before a district court revokes a defendant’s probation, it must (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” (the *Austin* factors). *Austin*, 295 N.W.2d at 250.

As to the first two *Austin* factors, the district court revoked Fortner’s probation for using alcohol or mood-altering substances, for having contact with someone known to use controlled substances, and for failing to notify his probation officer within 72 hours of his contact with law enforcement. Fortner admitted that his actions violated conditions of his probation, and the district court found the violations to be intentional and inexcusable. Fortner does not dispute those issues on appeal. Instead, he challenges the district court’s determination regarding the third *Austin* factor.

Once a district court finds an intentional or inexcusable violation of a specific probationary condition, it must “determine whether the need for confinement outweighs the policies favoring probation.” *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). In doing so, 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 bear in mind that “the purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed.” *Id.* at 606 (quotation omitted).

Revocation followed by imprisonment should not be the disposition unless the court makes one of the following findings based on the original offense and the intervening conduct of the offender: (1) “confinement is necessary to protect the public from further criminal activity by the offender,” (2) “the offender is in need of correctional treatment which can most effectively be provided if he is confined,” or (3) “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Id.* at 607 (quotation omitted). The district court determined that the last two factors supported revocation and imprisonment in this case.

We first address Fortner’s contention that the district court abused its discretion because the parties and the probation department agreed that he should have continued on probation. Fortner asserts that the district court improperly “considered revocation sua sponte.” He notes that “[n]o one requested that the district court revoke Fortner’s probation” and that “[r]evocation was not even seriously contemplated by the parties.” Fortner essentially argues that a district court abuses its discretion if it revokes probation when there is a joint recommendation from the parties and the probation department to continue an offender on probation.

Fortner does not cite, nor are we aware of, any authority that supports his position. The district court is not required to adopt a recommendation of the probation department when determining whether to revoke probation and order imprisonment. In fact, in the related context of a district court’s reliance on a diagnostic assessment as grounds for a downward dispositional sentencing departure, the Minnesota Supreme Court has said that “the mere fact that [a] person who prepared a report for the district court reached a certain

conclusion does not necessarily justify departing from the presumptive disposition under the guidelines.” *State v. Soto*, 855 N.W.2d 303, 309 (Minn. 2014) (quotation omitted).

Moreover, district courts generally are not bound by agreements of the parties in criminal cases. For example, a “judge *may* accept a plea agreement of the parties when the interest of justice would be served.” Minn. R. Crim. P. 15.04, subd. 3(3) (emphasis added). And a judge *may not* base a decision to depart from the presumptive sentences under the Minnesota Sentencing Guidelines solely on a plea agreement. *State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002). Similarly, appellate courts are not bound by the parties’ agreements or concessions on legal issues. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (“[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel’s oversights, lack of research, failure to specify issues or to cite relevant authorities.” (quotation omitted)).

For those reasons, we reject Fortner’s contention that the district court abused its discretion simply because it did not follow the joint recommendation of the parties and the probation department. A district court is not bound by such a recommendation. Instead, the district court must independently determine whether revocation is appropriate—much like a district court must independently determine whether to accept a plea agreement. *See* Minn. R. Crim. P. 15.04, subd. 3. In doing so, the district court must consider the reasons for and against revocation. *See State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984) (stating that the district court “erred in putting aside arguments for departure rather than considering them alongside valid reasons for non-departure” because such an approach

constitutes a failure to exercise discretion (quotation omitted)). The district court did so here.

In sum, the district court did not abuse its discretion by choosing not to follow the joint recommendation to continue Fortner on probation.

We next address Fortner's contention that the record does not establish that the need for his confinement outweighed the policies favoring probation. In concluding that Fortner needed correctional treatment in a confined environment, the district court reasoned that although chemical-dependency treatment was available to Fortner in the community, it was the same treatment program that was made available to him when he was sentenced. The district court explained that, although its "hope and [its] expectation" was that Fortner would succeed in that program, Fortner ultimately left the program and "went back right into the same pattern of use, dishonesty, [and] manipulation that formed the basis of all the addiction issues that led [him] to that place." The district court's detailed explanation included the following reasoning:

I just don't have the confidence based on your history of failed treatments, some successes to be fair, but most recently the very disappointing failed treatment at Teen Challenge and then the discharge from Fountain Centers. *I just can't be convinced that it's going to get done in the community and you need it for yourself as well as the people around you.*

(Emphasis added.)

The district court also determined that not revoking Fortner's probation would unduly depreciate the seriousness of the violation. The court noted that Fortner had been granted a departure "over the state's vehement opposition" and that both the underlying

offense and the probation violations were “serious.” The district court stated that it granted Fortner a departure because it “saw a lot of promise” in Fortner, but reasoned that it could not overlook the probation violations because

the path that [Fortner was] on was one of sobriety, it was one of moving forward in [his] personal life, [his] personal faith, [he] had a strong support network . . . but the real focus of [the departure] was this issue of sobriety and continued moving forward with, you know, putting life back together. *And these violations just cut against that 100 percent.*

(Emphasis added.) *See State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015) (stating that the district court properly considered a “grant of a downward dispositional departure when deciding whether to revoke probation”), *aff’d*, 883 N.W.2d 790 (Minn. 2016).

We do not see what more the district court could have said to convey the reasons for its decision to revoke Fortner’s probation and send him to prison. *See Modtland*, 695 N.W.2d at 608 (stating that “general, non-specific reasons for revocation” do not satisfy the *Austin* analysis). As the supreme court explained:

The requirement that courts make findings under the *Austin* factors assures that district court judges will create thorough, fact-specific records setting forth their reasons for revoking probation. We emphasize that, in making the three *Austin* findings, courts are not charged with merely conforming to procedural requirements; rather, *courts must seek to convey their substantive reasons for revocation and the evidence relied upon.*

Id. (emphasis added). The district court did so here.

“The decision to revoke . . . 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 (emphasis added) (quotation omitted). In *Austin*, the supreme court concluded revocation was appropriate because:

The appellant has been offered treatment but has failed to take advantage of the opportunity or to show a commitment to rehabilitation so it was not unreasonable to conclude that treatment had failed. Moreover, the record shows the seriousness of his violation would be denigrated if probation were not revoked. Consequently, under these facts, policy considerations required revocation.

Id. The same can be said of the circumstances here.

In sum, the district court's determinations that Fortner needed treatment in a confined setting and that not revoking probation would unduly depreciate the seriousness of the violations were well explained and supported by the record.¹

In conclusion, we note that district courts are entrusted with discretion to make difficult, independent decisions regarding the need for revocation and imprisonment when an offender is found to have violated probation. Although a proper exercise of that discretion requires the district court to consider both the reasons for and against revocation and imprisonment, the district court is not required to follow any joint recommendation of

¹ Because the record supports the district court's determinations that Fortner needed treatment in a confined setting and that not revoking probation would unduly depreciate the seriousness of the violations, we do not consider Fortner's argument that confinement was not necessary to protect the public. Although the district court noted that there were "a host of reasons" that put Fortner "and the people around [him] in danger based on [his] history," a district court needs to rely on only one of the policy bases discussed in *Modtland* to support a determination that the need for confinement outweighs the policies favoring probation. See *Modtland*, 695 N.W.2d at 607 (using the disjunctive "or" in discussing the bases for revocation and imprisonment).

the parties and the probation department. The ultimate decision whether to order revocation and imprisonment lies solely within the district court's discretion.

DECISION

In this case, the district court satisfied the requirements of *Austin* and *Modtland*, considered the reasons for and against revocation and imprisonment, and rendered a decision that is neither inconsistent with the record nor illogical. There is no basis to conclude that the district court abused its discretion in revoking Fortner's probation and sending him to prison.

Affirmed.