

*This opinion is nonprecedential except as provided by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
A22-1647**

State of Minnesota,
Respondent,

vs.

Brandon William Soular,
Appellant.

**Filed May 22, 2023
Affirmed
Connolly, Judge**

Hennepin County District Court
File No. 27-CR-19-8686

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

Mary F. Moriarty, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney,
Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Bratvold,
Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges the revocation of his probation, arguing that the district court abused its discretion because its conclusions supporting the revocation were illogical and conflicted with the record. We affirm.

FACTS

Appellant Brandon Soular engaged in electronic communication relating to sexual conduct with A., then 11, in 2016. In 2018, appellant, then 25, met B., then 14. In 2019, appellant possessed videos of pornographic work involving B., who was then 15. He was charged with and pleaded guilty to engaging in electronic communication relating to sexual conduct with a child (count one) and possessing electronic pornographic work involving a minor (count two), after admitting that he had asked if he could watch A. masturbate and that he possessed videos of B. masturbating.

The district court stayed imposition of sentence and placed appellant on probation for three years with conditions including: (1) no contact with minors and vulnerable adults, (2) no contact with A. or B., (3) no access to or use of internet without his probation officer's approval, and (4) completion of sex-offender treatment programming.

Appellant remained in contact with B., who turned 18 in November 2021. In February 2022, he was required to transition from outpatient to residential sex offender treatment because of this contact, but he continued to maintain contact with B. while in treatment.

Appellant's probation officer initiated revocation proceedings based on a report alleging that appellant had a work cell phone without the probation officer's knowledge, that appellant had maintained contact with B. after having been repeatedly told to stop contacting her, and that he failed to complete sex-offender treatment. At the probation-violation hearing in July 2022, B. testified that she was then 18 and she loved appellant,

wanted and consented to their relationship, and sought couples therapy for the two of them. She also testified that she had not had contact with appellant since August 2019.

The district court “did not find her testimony to be credible,” revoked the stay of imposition, and imposed a sentence of 20 months in prison with a five-year term of conditional release. Appellant challenges the revocation, arguing that it was an abuse of discretion because B. told the district court that she wants to be in a relationship with appellant.

DECISION

“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). But we review de novo whether the district court made the required findings to revoke probation. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

A district court must consider and make specific findings on the three *Austin* factors before revoking probation. *See Austin*, 295 N.W.2d at 250. The *Austin* factors require a district court to (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.*

When analyzing the third *Austin* factor, district courts must balance “the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *Id.* To make a finding on the third *Austin* factor, a district court weighs the three “*Modtland* subfactors”: whether (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 [the offender] is confined,” or (3) “it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Modtland*, 695 N.W.2d at 607 (quotation omitted). Only one *Modtland* subfactor is necessary to support revocation. See *Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008) (stating that courts “normally interpret the conjunction ‘or’ as disjunctive rather than conjunctive”).

District courts “should not assume that they have satisfied *Austin* by reciting the three factors and offering general, non-specific reasons for revocation.” *Modtland*, 695 N.W.2d at 608. Probation revocation “cannot be a reflexive reaction to an accumulation of technical violations but 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 (quotations omitted). Moreover, a district court must be mindful that the purpose of probation is rehabilitation and that revocation should be a last resort. *Modtland*, 695 N.W.2d at 606. Therefore, district courts must make “thorough, fact-specific records” and “seek to convey their substantive reasons for revocation and the evidence relied upon.” *Id.* at 608.

The district court here found that, as to the *Austin* factors, (1) appellant’s probation violations included accessing the internet without approval, failing to inform probation that he had a work cell phone, maintaining contact with B., and failing to complete sex-offender programming; (2) the violations were intentional and inexcusable because appellant admitted them to his probation officer and to providers at the treatment center,

communicated with B. even while he was in residential treatment, did not tell his probation officer about the phone he used to communicate with B., and knew the conditions of his probation; and (3) the need for appellant's confinement outweighed the policies favoring probation. As to the *Modtland* subfactors, it found that: (1) appellant remains high-risk as an untreated sex offender, (2) it is likely that appellant would reoffend by having a relationship with B. if placed on probation again, (3) appellant has continued in the conduct that his treatment was intended to address, (4) appellant does not appreciate the seriousness of his offense, (5) appellant lied to his probation officers and the treatment providers, (6) appellant's re-admission to treatment is not guaranteed, (7) appellant was resistant to treatment and is not accountable for his offense, and (8) treatment in the community would be unproductive for appellant.

Appellant does not refute these findings. He admits in his brief that, throughout his time on probation, B. "met [a]ppellant at his apartment where they talked outside, hugged, and professed their undying love for one another," and they connected by playing video games when they could not be together. He argues that the findings do not support revocation because "[t]here was no rational connection between [a]ppellant's failure to rebuff the romantic advances of a willing partner and the [district] court's conclusory assessment that their relationship presented a risk to the public and constituted a rejection of rehabilitative programming in the community."

But the fact that B., now 19, says she wants to be in a romantic relationship with appellant does not alter the facts that, at the time of the offense, i.e., his possession of the video of her, she was a minor; the sentence imposed for that offense was stayed and he was

put on probation; he violated the conditions of his probation by maintaining contact with B., having a phone without reporting it, and not completing sex offender treatment; he continued to offend by maintaining contact with B.; and he gave the district court no reason to believe he would not maintain contact with B. if he were not in prison.

Contrary to appellant's argument, the fact that B. is no longer a minor is irrelevant. Appellant argues that "[his] consensual contact with [B] did not pose a risk to the public because she was old enough to consent to sex. The age of sexual consent in Minnesota is 16." But when appellant committed the crime for which he was sentenced, B. was not 16 and could not consent. She cannot now retroactively consent to the crime. Moreover, her desire to have contact with appellant does not alter the fact that appellant violated his probation: appellant was ordered not to have contact with B. and he did in fact have contact with her.

Affirmed.