

*This opinion is nonprecedential except as provided by  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  
A23-0062**

State of Minnesota,  
Respondent,

vs.

Burton Gregory Alan Stover,  
Appellant.

**Filed August 21, 2023  
Affirmed  
Gaïtas, Judge**

Stearns County District Court  
File No. 73-CR-20-3206

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Chief Deputy County Attorney, St. Cloud, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Gaïtas, Judge; and Florey,  
Judge.\*

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

## NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Burton Gregory Alan Stover challenges the district court's decision to revoke his probation after his fourth probation violation, arguing that the district court erred in determining that the need for confinement outweighed the policies favoring continued probation. Because we discern no abuse of discretion, we affirm.

### FACTS

Stover pleaded guilty to the offense of first-degree refusal to submit to chemical testing in July 2020.<sup>1</sup> At his sentencing hearing a few months later, the district court granted Stover's motion for a downward dispositional sentencing departure over the objection of respondent State of Minnesota. Rather than sentencing Stover to prison, the district court stayed execution of a 41-month prison sentence and placed Stover on probation for seven years. As conditions of probation, Stover had to complete a chemical-dependency evaluation, follow all resulting recommendations, and abstain from alcohol, among other requirements.

Between the September 2020 sentencing hearing and December 2021, Stover admitted to violating his probation three times. In July 2021, Stover admitted that he had used alcohol, failed to submit to random drug and alcohol testing, and failed to successfully complete an intensive supervision program because he was not in regular contact with his

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<sup>1</sup> An officer arrested Stover on suspicion of driving while impaired. Following the arrest, Stover refused to submit to a breath test for alcohol. Due to previous driving-while-impaired incidents, Stover was charged with the felony offense of first-degree refusal, Minn. Stat. §§ 169A.20, subd. 2(1), .24, subd. 2 (2018). Two additional offenses were dismissed at the time of his guilty plea.

probation agent. As a sanction for the probation violation, the district court ordered Stover to serve four days in custody, with credit for time served, and reinstated Stover's probation.

In September 2021, Stover again admitted to violating his probation. He acknowledged that he had used alcohol and that he had pleaded guilty to a new charge for negligently starting a fire. The district court reinstated Stover's probation and ordered him to serve 18 days in jail. Following Stover's release from jail, he was to complete inpatient treatment.

In December 2021, Stover admitted that he had violated his probation by failing to complete chemical-dependency treatment and by failing to maintain contact with his probation agent. Stover acknowledged that he had not reported for treatment upon his release from jail in September. As a sanction for the probation violation, the district court ordered Stover to serve 45 days in jail. But the district court ruled that Stover could be released to a treatment program when a bed became available. The district court reinstated Stover's probation.

In October 2022, Stover appeared for a fourth probation-revocation hearing—the proceeding that he now appeals. Stover's probation officer alleged that Stover had failed to maintain contact with probation, had traveled to Oklahoma without permission, had two contacts with police during which he appeared intoxicated, and had acquired several new criminal charges. During the hearing, Stover admitted that he had violated his probation by failing to maintain contact with probation.

The parties did not agree on a disposition for the violation. Stover's probation agent recommended an intermediate sanction rather than execution of Stover's prison sentence,

proposing 90 days in jail with release to a treatment program. The probation agent expressed concern that Stover had ongoing “mental health issues that are going unchecked.” Stover, who was represented by counsel, agreed with the probation agent’s recommendation. Defense counsel explained that Stover had difficulty maintaining contact with probation due to his homelessness, alcohol and drug addiction, and lack of a phone. Stover also addressed the district court, emphasizing his desire to participate in treatment and his good relationship with his probation agent. But the prosecutor asked the district court to revoke Stover’s probation. The prosecutor reminded the district court of the state’s initial objection to a dispositional departure and noted that Stover had repeatedly violated the conditions of his probation.

Following the arguments of the parties, the district court revoked Stover’s probation and executed the stayed 41-month prison sentence. Stover appeals.

### **DECISION**

Stover argues that the district court erred when it revoked his probation and sentenced him to prison. He contends that the district court abused its discretion by finding that the need to confine him to prison outweighed the policies that favored continued probation.

Probation revocation is not automatic under Minnesota law. *State v. McCoy*, 963 N.W.2d 472, 481 (Minn. 2021) (quotation omitted); *see also* Minn. Stat. § 609.14 (2022). When a criminal defendant violates any of the conditions of probation, “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). Subject to the limitation of *State v. Austin*, 295

N.W.2d 246 (Minn. 1980), the district court may “continue the stay on the same or further terms, impose intermediate sanction, or revoke the stay and impose or order the execution of the sentence.” *State v. Jones*, 869 N.W.2d 24, 27 (Minn. 2015) (citing Minn. Stat. § 609.135 (2014)).

To revoke probation and order the execution of a sentence, a district court must make findings on three factors. *Austin*, 295 N.W.2d at 250 (*Austin* factors). First, the district court must specifically identify the condition or conditions of probation that the defendant violated. *Id.* Second, the district court must find that the violation was intentional or inexcusable. *Id.* And third, the district court must find that the policies favoring probation no longer outweigh the need for confinement. *Id.*

The decision to revoke probation “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.” *Id.* at 251 (quotation omitted). “The purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed.” *Id.* at 250. When analyzing the third *Austin* factor, a district court should consider whether “(i) confinement is necessary to protect the public from further criminal activity by the offender; or (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.” *State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005) (quoting *Austin*, 295 N.W.2d at 251).

“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. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007) (quotation omitted).

Here, the district court determined that all three *Austin* factors weighed in favor of revoking Stover’s probation. Stover’s challenge on appeal is limited to the district court’s finding on the third factor. He argues that the record does not support the district court’s finding that the need for confinement outweighed the policies favoring continued probation, and accordingly, that the district court abused its discretion.

In considering whether the district court abused its discretion in applying the third *Austin* factor to the facts in the record, we first examine the district court’s findings. The district court acknowledged the three subfactors that it was required to consider when making findings regarding the third *Austin* factor. It noted its particular focus on the third subfactor, stating:

I’m more concerned with the third option, which is whether or not reinstating you would unduly depreciate the seriousness of the violation if probation were not revoked.

As I began my earlier comments, this could be construed as a technical violation created by your indigency. But I don’t think that to be the case. As I indicated, you made it to another jurisdiction just fine. You made it thousands of miles away, and you could have made it to a shorter distance to your agent’s office.

And I’m viewing this in the context of the overall conduct. This is your fourth violation. This has been ongoing for a period of time. This isn’t a short period of time in which you lost contact with your agent for a couple weeks or a month. We’re talking an extended period. That has interfered with the ability to monitor you. It has interfered with the ability to test

you as demonstrated by your admission that in fact on two occasions you were in fact intoxicated.

The offense for which you are on probation is very serious. It is a felony DWI. You received the benefit of the doubt of a dispositional departure earlier on in this case. And in very short order, over the span of two years, you have accrued four violations now. In my mind that is very serious. It shows an utter disregard for the requirements of your probation. And despite what I believe is your sincere request to try to get sober and maintain sobriety, you have demonstrated you are incapable of following even the most basic requirement of your probationary status.

The record supports the district court's underlying findings regarding Stover's conduct and the district court's finding that continued probation would unduly depreciate the seriousness of the violation. Stover admitted at the revocation hearing that he had violated probation by failing to remain in contact with his probation agent for an extended period. This violation prevented probation from supervising Stover or offering any rehabilitative services. The record shows that this was Stover's fourth probation violation within approximately two years. And, as noted by the district court, Stover was only on probation because he received a downward dispositional departure for the serious offense of felony test-refusal.

Stover contends that his probation violation was "technical" and not serious. However, the district court did not abuse its discretion by determining otherwise. As the district court observed, Stover's failure to maintain contact with probation frustrated the entire purpose of probation. And caselaw recognizes that a probationer's complete lack of compliance with supervision can be a serious violation warranting revocation. *See State v. Rottelo*, 798 N.W.2d 92, 95 (Minn. App. 2011), *rev. denied* (Minn. July 19, 2011)

(affirming probation revocation for a single failure to remain in contact because the defendant could not demonstrate compliance).

Stover suggests that the district court abused its discretion by failing to properly account for the mitigating factors Stover offered during the revocation hearing: his homelessness, addictions, and lack of phone access. But the record belies this argument. The district court expressly considered and rejected Stover's contention at the revocation hearing that his "indigency" made his failure to maintain contact with probation a "technical" violation.

Finally, Stover argues that the district court abused its discretion in finding that the seriousness of the violation warranted revocation because Stover's probation agent recommended continued probation rather than a prison sentence. But "[t]he district court is not required to adopt a recommendation of the probation department when determining whether to revoke probation and order imprisonment." *State v. Fortner*, 989 N.W.2d 368, 375 (Minn. App. 2023). The district court was within its discretion to reject the probation agent's recommendation.

Given the latitude that a district court has in addressing probation violations and the district court's detailed and supported findings here, we are not persuaded that the district court erred in revoking Stover's probation. Because the district court was within its discretion to revoke Stover's probation and execute the 41-month prison sentence, we affirm.

**Affirmed.**