

*This opinion is nonprecedential except as provided by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
A23-0492**

State of Minnesota,
Respondent,

vs.

Cory Donald Ziesemer,
Appellant.

**Filed October 30, 2023
Affirmed
Connolly, Judge**

Douglas County District Court
File No. 21-CR-20-2026

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

Chad M. Larson, Douglas County Attorney, Alexandria, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and
Schmidt, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

On appeal from a decision revoking his probation and executing his prison sentence,
appellant argues that the district court abused its discretion in revoking his probation

because the policies favoring probation outweighed the need for confinement. Because the district court acted within its discretion in revoking appellant's probation, we affirm.

FACTS

In April 2021, appellant Cory Ziesemer pleaded guilty to fifth-degree possession of methamphetamine. The district court sentenced appellant to 15 months in prison, but stayed execution of that sentence, and placed appellant on probation for five years. The conditions of appellant's probation required that he abstain from alcohol and controlled substances, and remain law abiding.

While on probation, appellant began receiving intensive mental-health treatment and services through an Assertive Community Treatment (ACT) team. But in April 2022, respondent State of Minnesota charged appellant with fourth-degree criminal damage to property and two counts of felony driving while impaired (DWI). In light of the new charges, a probation violation report was filed alleging that appellant violated the terms of his probation for the fifth-degree possession offense by failing to remain law abiding and failing to abstain from alcohol and mood-altering chemicals.

Appellant agreed to plead guilty to one count of DWI and to admit to the probation violation. As part of this agreement, respondent agreed to recommend a downward dispositional departure consisting of a stayed 60-month prison sentence and 90 days in jail for the new DWI, and for appellant to be reinstated on probation for the fifth-degree possession offense.

On May 26, 2022, the district court sentenced appellant for the DWI offense in accordance with the plea agreement, and reinstated appellant's probation. But less than

two weeks later, appellant was arrested for driving after cancelation. A report was subsequently filed alleging that appellant had violated the terms of his probation by failing to abstain from alcohol and failing to remain law abiding. A later addendum to the probation violation alleged that appellant also failed to abstain from chemicals because he tested positive for methamphetamine and marijuana, and failed to remain law abiding because (1) he was charged with disorderly conduct on July 7, 2022, (2) an order for protection (OFP) was filed against appellant on July 6, 2022, and (3) appellant was arrested and charged with unlawful possession of a firearm on July 12, 2022.

On November 7, 2022, a second addendum to the probation violation report alleged that appellant violated the terms of his probation by failing to abstain from mood altering chemicals after he tested positive for methamphetamine, marijuana, and alcohol on November 4, 2022. And a third addendum to the probation violation report was filed on December 28, 2022, alleging that appellant was struggling with his mental health, and again tested positive for methamphetamine and marijuana.

A probation violation hearing was held in January 2023, at which appellant admitting using alcohol in June and July of 2022. He also did not dispute having used methamphetamine that summer, and admitted that he “[m]ight have” used methamphetamine in November 2022. Respondent did not pursue the failure-to-remain-law-abiding violations because “those charges [were] still pending.”

The district court found that appellant provided “sufficient facts” to support his “admission to the probation violations . . . , specifically the failure to abstain from non-prescribed controlled substance, specifically the methamphetamine, from June, July, and

November.” The district court also found that appellant’s violations were “intentional and inexcusable.” The district court then stated:

I don’t know that there are any services left that are available. I think that the need for confinement here outweighs the policies favoring probation. Confinement, in other words, sending you to prison, is necessary to stop this kind of criminal activity. The driving while impaired is really concerning. I mean, you could kill yourself, kill somebody else. You don’t want that kind of weight either. And there just aren’t good treatment options here available. I think that a period of enforced sobriety, which can most effectively be provided in the correctional setting, in the prison setting, is necessary. I don’t think there are any other treatment options for you here.

The district court, therefore, revoked appellant’s probation and executed his 60-month sentence for the DWI offense, and the concurrent 15-month sentence for the fifth-degree possession offense. This appeal follows.¹

DECISION

Appellant challenges the district court’s decision to revoke his probation and execute his prison sentence. Whether to revoke probation is within the district court’s discretion, and we will reverse a probation revocation only if there is a clear abuse of discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). Whether the district court made the required findings is a question of law that is reviewed de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

¹ Respondent did not file a brief in this appeal, and we ordered that the appeal proceed under Minn. R. Civ. App. P. 142.03, which provides that if a respondent fails to file a brief, then the case shall be determined on its merits.

When a defendant violates a condition of probation, the district court may revoke probation and execute the previously stayed sentence. Minn. Stat. § 609.14, subds. 1, 3 (2022). Before revoking a defendant’s probation and executing the stayed sentence, the district court must (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.” *Austin*, 295 N.W.2d at 250.

Appellant challenges only the third *Austin* factor. Under this 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, the district court considers 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 he 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 of the *Modtland* subfactors 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. Moreover, 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 (quotation omitted). And a district court must be mindful that the purpose of probation is rehabilitation, and 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.

Here, in addressing the third *Austin* factor, the district court made findings related to the first *Modtland* subfactor. Specifically, the district court found that “there are new criminal offenses and you keep coming back around that cycle.” The district court then found that “[c]onfinement . . . is necessary” to stop appellant’s criminal activity because the “driving while impaired is really concerning. I mean, you could kill yourself, kill somebody else.”

Appellant argues that the district court “erred in its determination that prison was necessary to stop further criminal activity to protect the public” because he “was not found in violation by the court . . . for failing to remain law abiding.” But an offender need not commit a new crime for a district court to properly determine that confinement is necessary to protect the public. *See, e.g., State v. Rottelo*, 798 N.W.2d 92, 95 (Minn. App. 2011) (addressing and rejecting the “often heard argument that [the appellant] committed no new crimes while he was on probation” (quotation omitted)), *rev. denied* (Minn. July 19, 2011). The record here reflects that appellant was charged with several offenses while he was on probation, including driving after cancelation and unlawful possession of a firearm. Although these charges were not resolved at the time of the contested revocation hearing, the allegations that appellant continues to drive after cancelation, when considered in conjunction with his admissions to continued alcohol and methamphetamine use, support

the district court's concern that confinement is necessary to protect the public from further criminal activity.

Moreover, despite being on probation for possession of methamphetamine, appellant admittedly continued to use methamphetamine. *See State v. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007) (stating that in deciding whether revocation is appropriate, the district court may consider the "original offense and the intervening conduct of the offender"). Appellant's methamphetamine use demonstrates that he cannot be counted on to avoid antisocial behavior.

Appellant also argues that confinement was not necessary to protect to the public because he had "periods of substantial compliance" and because respondent "could have petitioned to commit [appellant] as mentally ill and chemically dependent" as it had previously. But appellant's continued antisocial behavior demonstrates that his confinement is necessary to protect the public from further criminal behavior, and there is nothing in the record indicating that the county petitioned, or considered petitioning, to have appellant committed as mentally ill and chemically dependent. As such, civil commitment was not a confinement option that was presented to the district court.

Additionally, despite having periods of substantial compliance, the record reflects that a probation violation report, and several addenda to that report, were filed within a short amount of time, which demonstrates that appellant also had periods of substantial noncompliance. In fact, the record reflects that, within a few weeks of being sentenced for DWI, a report was filed alleging that appellant violated the terms of his probation by failing to remain law abiding and consuming alcohol. Appellant's admission to consuming

alcohol within weeks of being sentenced for DWI supports the district court's finding that appellant's confinement is necessary to protect the public from further criminal activity.

Appellant further argues that the record does not support the district court's finding on the second *Modtland* subfactor. To support his position, appellant notes that the supreme court in *Austin* stated 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. He argues that treatment has not failed, and revocation was not being used as a last resort because he was never directed to complete treatment in the community.

We are not persuaded. In addressing the second *Modtland* subfactor, the district court found that "there just aren't good treatment options here available. I think that a period of enforced sobriety, which can most effectively be provided in the correctional setting, in the prison setting, is necessary. I don't think there are any other treatment options for you here."

The district court's findings are supported by the record. Despite being ordered to abstain from alcohol and controlled substances, appellant continued to use alcohol and methamphetamine. In fact, appellant admitted to using alcohol within two or three weeks of being sentenced for DWI. And although there is nothing in the record indicating that appellant was ordered to complete treatment, appellant's probation agent testified at the revocation hearing that appellant "hasn't wanted to do treatment." As such, it was within the district court's purview not to order that appellant complete treatment.

Moreover, the record reflects that appellant was ordered to follow the recommendations of the ACT team. Appellant's probation agent testified that appellant

had been working with his ACT team on a “daily basis.” But the agent testified that, after appellant moved, the ACT team was “very limited” and unable to communicate with him and visit him. The agent also testified that appellant “refuses to take medication for his mental health,” and that appellant’s current dwelling situation is “dismal” in light of the lack of working water. Although appellant claimed at the revocation hearing that he was willing to go to treatment, the district court believed that the best treatment option for appellant was prison, and the record supports this decision. Therefore, the district court acted within its discretion by revoking appellant’s probation. *See Modtland*, 695 N.W.2d at 607-08 (stating that, if the district court made findings on the *Austin* factors, and the record supports those findings, the district court acted within its discretion in revoking probation).

Affirmed.