

*This opinion is nonprecedential except as provided by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
A23-1090**

State of Minnesota,
Respondent,

vs.

Theodore James Kolk,
Appellant.

**Filed February 12, 2024
Affirmed
Schmidt, Judge**

Anoka County District Court
File No. 02-CR-20-1016

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

Brad Johnson, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney,
Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrew J. Nelson, St. Paul,
Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Schmidt, Judge; and
Reilly, Judge.*

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

NONPRECEDENTIAL OPINION

SCHMIDT, Judge

Appellant Theodore James Kolk argues the district court abused its discretion by revoking his probation because the proven probation violations did not establish that the need for confinement outweighed the policies favoring probation. Additionally, Kolk argues that the district court abused its discretion by considering violations that were not alleged in the report. Finally, Kolk asserts that the district court should have imposed alternative sanctions that remained available. Because the district court did not abuse its discretion in revoking probation, we affirm.

FACTS

In February 2020, respondent State of Minnesota charged Kolk with failing to register as a predatory offender. Kolk entered into a plea agreement in June 2021 and the state agreed to a downward dispositional departure of probation. The district court accepted the plea and set the matter for sentencing.

At the sentencing hearing in April 2022, Kolk informed the district court that he had relapsed due to his wife's diagnosis of stage IV cancer and moved his treatment to Rochester so he could care for her. The district court granted Kolk a downward dispositional departure in accordance with his plea agreement, stayed execution of the 46-month sentence, and placed him on probation for five years. The district court also required Kolk to complete chemical-dependency treatment as a condition of his probation.

In September 2022, Kolk signed a sanctions-conference order admitting that he violated his probation by continuing to use controlled substances. He also agreed to remain

sober and enter treatment by September 27, 2022. A subsequent probation-violation report alleged that Kolk tested positive for controlled substances and that he failed to enter a chemical-dependency treatment program. At the following hearing, Kolk admitted he failed to: abstain from using controlled substances, successfully complete treatment, enroll in treatment by the agreed-upon date, and remain law-abiding as reflected by a June 2022 conviction for disorderly conduct. The parties presented the court with an agreement that, in exchange for admitting the violations, the dispositional decision would be continued to a later date to allow Kolk to enter a long-term treatment program in Rochester.

The district court found that Kolk's admissions were sufficient, there was clear and convincing evidence that he violated his probation, and that the violations were willful, intentional, and without lawful excuse. The district court released Kolk to address warrants in two other counties, reinstated his probation with all original conditions, and scheduled a new dispositional hearing for December 2022.

Kolk did not appear at the December dispositional hearing. The record indicates that Kolk had an active warrant and that he had been terminated from treatment. The district court issued a warrant.

At an April 2023 hearing, the district court found Kolk was not amenable to probation and that the need for confinement outweighed the policies favoring probation. However, the district court continued the hearing to get more information as to Kolk's whereabouts at the time of the December hearing at which Kolk had failed to appear.¹

¹ The parties later confirmed that Kolk was in custody in a different county on the date of the December 2022 dispositional hearing.

At the continued hearing, the state requested the district court to revoke Kolk's probation and execute his sentence, noting Kolk had failed to complete treatment despite having many opportunities. The court stated, "[i]f there are new probation violations being alleged, then a new probation-violation report should be filed because I'm not going to address anything new." The district court continued the hearing to get more information.

Following arguments after the second continuation, the district court revoked Kolk's probation. In doing so, the court noted that the probation revocation was not based upon Kolk's continued drug use after his probation violation hearing. Instead, the district court revoked probation given Kolk's admissions made at the October 19th hearing and the fact that he did not successfully complete treatment while his disposition hearing was pending.

The district court revoked Kolk's probation and committed him to the commissioner of corrections for 46 months, with credit for time served. This appeal follows.

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). Whether the district court made the findings required for revocation of probation is a question of law, which this court reviews de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

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). "The 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. The decision to revoke

requires a showing that the offender's behavior demonstrates that he or she cannot be relied on to avoid antisocial activity. *Id.* at 251. Before revoking probation, 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." *Id.* at 250.

Kolk does not challenge the first two *Austin* factors and contends only that the district court abused its discretion in determining that the need for confinement outweighs the policies favoring probation. Public policies favoring probation limit revocation to circumstances where confinement is necessary to protect the public from further criminal activity by the offender, the offender needs correctional treatment which can most effectively be provided if he is confined, or it would unduly depreciate the seriousness of the violation if the court did not revoke probation. *State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008) (citations omitted); *see also Modtland*, 695 N.W.2d at 607. Only one of these circumstances must be satisfied to justify the revocation of probation. *See Austin*, 295 N.W.2d at 251.

Kolk first argues the district court's finding that "[p]ublic protection is appropriate" was insufficient to revoke his probation because it is not the same as a finding that confinement is necessary to protect the public from further criminal activity by Kolk. But Kolk admitted that he did not remain law-abiding, in violation of his probation, as reflected by his continued controlled substance use and his June 2022 conviction for misdemeanor disorderly conduct. These admissions support the district court's finding that confinement was necessary to protect the public from further criminal activity by Kolk.

Kolk next challenges the district court's finding that he needs treatment in a confined setting. The district court, however, repeatedly referenced Kolk's unsuccessful attempts at completing treatment outside of confinement. Those failed attempts support the district court's finding that treatment can most effectively be provided in confinement.

Lastly, Kolk argues that the district court abused its discretion by concluding that reinstating Kolk's probation would have unduly depreciated the severity of his violations. The record demonstrates that Kolk failed to complete treatment, admitted that he continued to use controlled substances, and admitted to committing a further criminal offense. Kolk's conduct provides sufficient support for the district court's finding that continuing probation would unduly depreciate the seriousness of his admitted violations.

Because all three of the relevant circumstances are satisfied here, and only one must be satisfied to justify revoking probation, we see no abuse of discretion in the district court's decision to revoke Kolk's probation.

Kolk further argues that the district court improperly relied on violations that were not alleged in a violation report, admitted by Kolk, or proven by clear and convincing evidence. But there is no indication in the record that the district court relied upon unalleged probation violations. Instead, the district court expressly noted it was not considering anything other than Kolk's admitted violations and his continued failure to complete treatment.

Finally, Kolk cites two statutes to argue the district court should have imposed intermediate sanctions instead of revoking his probation. But those laws do not support Kolk's contentions. Minnesota Statutes section 609.14, subdivision 3(1), for example,

provides the district court with a range of available remedies that may be exercised at the court’s discretion. The statute does not require the district court to take any particular action. Minn. Stat. § 609.14, subd. 3(1) (stating “the court may . . . order intermediate sanctions”). Similarly, the supreme court has held that Minnesota Statutes section 609.135 (2022) also provides the district court with discretion to impose intermediate sanctions. *See Modtland*, 695 N.W.2d at 608 n.3 (stating “the court may, in light of the nature of the probation violation, alter the terms of the defendant’s probation—including imposition of intermediate sanctions—under Minn. Stat. § 609.135 (2004)”).

While intermediate sanctions are one of several available options to address probation violations, the legislature has left the decision as to the appropriate remedy in a particular case to the discretion of the district court. *See* Minn. Stat. § 645.44, subd. 15 (2022) (“‘May’ is permissive.”). The district court had no obligation to impose intermediate sanctions and the record reflects that the court acted well within its discretion and the statutory framework by revoking Kolk’s probation and ordering execution of his sentence.²

Affirmed.

² Kolk’s reliance on the language from *State v. Cottew* is misplaced because the district court did not determine “that revocation of [Kolk’s] probation and execution of the underlying sentence [was] not appropriate, at least in part, because rehabilitation [was] still possible.” 746 N.W.2d at 637. Although such a finding may justify the imposition of intermediate sanctions, the district court here made no such finding.