

*This opinion is nonprecedential except as provided by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
A24-0039**

State of Minnesota,
Respondent,

vs.

Mark David Nasi,
Appellant.

**Filed August 26, 2024
Affirmed
Harris, Judge**

St. Louis County District Court
File No. 69DU-CR-20-615

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

Kimberly J. Maki, St. Louis County Attorney, Jon D. Holets, Deputy St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Harris, Presiding Judge; Bratvold, Judge; and Cleary, Judge.*

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

NONPRECEDENTIAL OPINION

HARRIS, Judge

Appellant challenges the revocation of his probation, arguing that the district court abused its discretion by revoking probation because the record does not establish that the need for confinement outweighed the policies favoring probation. Because the district court made sufficient findings supported by the record, we affirm.

FACTS

In February 2020, respondent State of Minnesota charged appellant Mark David Nasi with first-degree criminal sexual conduct involving sexual penetration of a child under the age of 13. The complaint alleged that in October 2018, Nasi was intoxicated and sexually assaulted his four-year-old daughter while she was in his care. Nasi entered a *Norgaard* plea¹ in exchange for a downward dispositional departure. During the plea hearing, Nasi testified that he did not remember what happened because he was under the influence of alcohol during the offense. Nasi agreed that if the matter proceeded to trial there was a substantial likelihood that he would be found guilty based on the state's evidence.

In April 2021, the district court imposed a 144-month sentence with ten years of conditional release. Pursuant to the plea agreement, the district court stayed execution of

¹ In a *Norgaard* plea, “the defendant asserts an absence of memory on the essential elements of the offense but pleads guilty because the record establishes, and the defendant reasonably believes, that the state has sufficient evidence to obtain a conviction.” *Williams v. State*, 760 N.W.2d 8, 12 (Minn. App. 2009), *rev. denied* (Minn. Apr. 21, 2009); *see also State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 871-72 (Minn. 1961).

the sentence and placed Nasi on probation for three years. The district court determined that Nasi was particularly amenable to probation and sex-offender treatment.

In March 2022, the probation officer filed a probation-violation report alleging that Nasi violated probation by failing to abstain from using alcohol, failing to complete an updated rule 25 evaluation, and failing to participate in and complete sex-offender treatment. The probation-violation report alleged that Nasi admitted to drinking alcohol on three occasions, and two of the incidents involved police contact due to Nasi's behavior while intoxicated. The probation-violation report also alleged that Nasi was terminated from sex-offender treatment due to substance abuse. Following a contested-revocation hearing, the district court ordered Nasi to serve one year at Northeast Regional Corrections Center (NERCC) to complete sex-offender and substance-use programming, and extended Nasi's probation for a total of five years.

In October 2023, the probation officer filed a second probation-violation report alleging that Nasi violated probation by failing to abstain from using alcohol. The probation-violation report alleged that Nasi was intoxicated at a hotel and the hotel clerk called police to have Nasi removed from the hotel. Nasi was "extremely uncooperative, kicking/punching the interior of [the] squad and ripped [the] light from the ceiling of the squad." The fire department transported Nasi to the hospital on an emergency hold.

Nasi admitted the probation violation. Specifically, Nasi admitted he used alcohol to the point of intoxication, he did not follow the recommendations of the chemical-dependency evaluation, he did not avail himself to all the resources in the community, and his alcohol use impacted his ability to participate in sex-offender treatment.

At a contested-disposition hearing, Nasi's counsel informed the district court that Nasi completed an updated chemical-use assessment and argued for Nasi to be released from custody directly to a high intensity residential-treatment program as soon as a bed was available. The state and probation argued that Nasi's probation should be revoked due to his ongoing use of alcohol and high risk to public safety.

The district court agreed with the state and probation and determined that Nasi was "incredibly dangerous" when drinking, that Nasi had not accepted responsibility for the damage he caused when drinking, that "it has not shown itself to be true" that Nasi is particularly amenable to probation and sex-offender treatment, and that "the public is not safe when [Nasi is] out and untreated . . . and drinking." When addressing Nasi, the district court stated, among other comments, "I could not, in good conscience, let you go and hurt someone again, and hurt someone different potentially in any of the ways that people do things when they lose complete control of themselves because of alcohol." The district court revoked probation and executed the stayed 144-month sentence. Nasi appeals.

DECISION

Nasi argues the district court abused its discretion by revoking probation because the record does not support that the need for confinement outweighed the policies favoring probation. We disagree.

Before a district court may revoke probation, it must: (1) identify the condition that was violated; (2) find that the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). "The [district] court has broad discretion in determining

if there is sufficient evidence to revoke probation” and this court will reverse “only if there is a clear abuse of that discretion.” *Id.* at 249-50. “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. Fortner*, 989 N.W.2d 368, 374 (Minn. App. 2023) (quotation omitted).

Nasi challenges the third *Austin* factor—whether the need for confinement outweighs the policies favoring probation. When analyzing this factor, the district court “must balance the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *State v. Modtland*, 695 N.W.2d 602, 606-07 (Minn. 2005) (quotation omitted). Specifically, the district court must find that one of the following subfactors is met: (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; *see also State v. Smith*, 994 N.W.2d 317, 320 (Minn. App. 2023) (“Only one *Modtland* subfactor is necessary to support revocation.”).

First, Nasi argues that the record does not show that confinement is necessary to protect the public from further criminal activity. Nasi argues that the “only probation violation was for consumption of alcohol” and “[t]here is no indication that the probation violation found created a need to protect the public from [Nasi] committing further criminal acts.” In determining that this factor was met, the district court stated, “the primary purpose of confinement when we are talking about a sentence to prison is incapacitation or keeping

other people safe, because you are not able to damage them.” And the district court determined that Nasi is “incredibly dangerous” when drinking alcohol. The record supports the district court’s determination that the public is at risk when Nasi is using alcohol. Nasi committed the underlying offense while under the influence of alcohol. Further, the underlying probation violation involved police contact due to Nasi’s behavior while intoxicated in the community, and Nasi’s alcohol use continuously prevented him from engaging in sex-offender treatment.

Second, Nasi argues that the district court abused its discretion because Nasi completed an updated chemical-use assessment that recommended high intensity residential treatment, and “revocation should be used only as a last resort when treatment has failed.” *Modtland*, 695 N.W.2d at 606 (quoting *Austin*, 295 N.W.2d at 250). Although Nasi still had treatment options available in the community, the Minnesota Supreme Court has held that it is not unreasonable to conclude treatment has failed when a probation offender failed to take advantage of treatment opportunities or “show a commitment to rehabilitation.” *Austin*, 295 N.W.2d at 251. The district court made a similar finding, stating, “you were given the opportunity to avail yourself of lots of different treatment options, and you didn’t do it. That’s why you’re going to prison and I want to make it crystal clear.” The district court also stated,

you’ve had a lot of opportunity to work on how you were going to manage fixing and addressing it, and you have not been . . . willing to do it. You do as much as you can to try to get to wherever, and then . . . you don’t accept responsibility for the damage . . . that you’ve done. So I cannot, in good conscience, place you back on probation with . . . what has happened.

The district court also found that Nasi failed to begin sex-offender treatment after he was released from local confinement. These findings are supported by the record. The record shows that, at the time of the disposition hearing, Nasi was not engaged in sex-offender treatment and relapsed after a prolonged period of sobriety following substantial treatment at NERCC and in the community, which hindered his ability to engage in sex-offender treatment.

Third, Nasi argues that it would not unduly depreciate the seriousness of the violation if Nasi's probation were not revoked. Nasi argues that he had high intensity treatment available in the community and the district court could have addressed the seriousness of the violation by imposing intermediate sanctions. However, the district court has broad discretion in determining whether to impose intermediate sanctions or revoke probation. *State v. Cottew*, 746 N.W.2d 632, 637-38 (Minn. 2008). And the district court may consider the probationer's original offense and intervening conduct, and a prior "grant of a downward dispositional departure when deciding whether to revoke probation." *Austin*, 295 N.W.2d at 251; *State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015), *aff'd on other grounds*, 883 N.W.2d 790 (Minn. 2016). The district court addressed this factor when it found that Nasi is no longer amenable to probation and noted that the presumptive sentence on the underlying offense was 144 months in prison. The district court stated,

and the reality is, the presumptive sentence on this was 144 months with the Commissioner of Corrections because of the things that you . . . did at the time that you did them, and you pled guilty. And I recognize that you did that not remember[] what was happening, because you were in a blackout state, but

also, I would expect that you should recognize that the evidence was pretty substantial, which is why I suspect that you did that. You had the opportunity to prove yourself that you were going to be able to be supervised, and safe, to the public, and you haven't done it.

In sum, “[t]he ultimate decision whether to order revocation and imprisonment lies solely within the district court’s discretion.” *Fortner*, 989 N.W.2d at 377. The record demonstrates that revoking probation was not a “reflexive reaction to an accumulation of technical violations.” *Austin*, 295 N.W.2d at 251 (quotation omitted). Instead, the district court carefully considered Nasi’s alcohol use and his ability to successfully engage in treatment in the community alongside the risk he posed to public safety. *See Fortner*, 989 N.W.2d at 376-77 (concluding that district court did not abuse its discretion when it revoked probation after having previously granted departure because treatment failed and not revoking probation would unduly depreciate seriousness of violation, even when community treatment was available). And the district court clearly conveyed its reasons to revoke probation on the record. *See Modtland*, 695 N.W.2d at 608 (stating that before revoking probation, district court must “create [a] thorough, fact-specific [record] setting forth [its] reasons for revoking probation,” and “must seek to convey [its] substantive reasons for revocation and the evidence relied upon”). Therefore, the district court did not abuse its discretion when it revoked Nasi’s probation.

Affirmed.