

*This opinion is nonprecedential except as provided by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
A24-0504**

State of Minnesota,
Respondent,

vs.

Ella Raine Perry,
Appellant.

**Filed December 2, 2024
Affirmed
Ede, Judge**

Scott County District Court
File No. 70-CR-23-386

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

Ronald Hocesvar, Scott County Attorney, Elisabeth M. Johnson, Assistant County Attorney, Shakopee, Minnesota (for respondent)

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

Considered and decided by Schmidt, Presiding Judge; Ross, Judge; and Ede, Judge.

NONPRECEDENTIAL OPINION

EDE, Judge

Appellant challenges a district court's order revoking her probation and executing a 36-month prison sentence. Because we conclude that the district court (1) did not err by failing to make the requisite findings and (2) did not abuse its discretion by revoking probation, we affirm.

FACTS

Charges, Guilty Plea, and Probation Conditions

Respondent State of Minnesota charged appellant Ella Raine Perry with the following offenses: (count 1) driving while under the influence (DWI), in violation of Minnesota Statutes section 169A.20, subdivision 1(1) (2022); (count 2) operating a vehicle with an alcohol concentration of 0.08 or more, in violation of Minnesota Statutes section 169A.20, subdivision 1(5) (2022); and (count 3) driving after cancellation of a driver's license, in violation of Minnesota Statutes section 171.24, subdivision 5 (2022).

In March 2023, Perry pleaded guilty to count 2, operating a vehicle with an alcohol concentration of 0.08 or more. In exchange for Perry's guilty plea, the parties agreed: (1) that the state would dismiss counts 1 (DWI) and 3 (driving after cancellation); (2) that the state would recommend that Perry receive a stayed 36-month prison sentence and a term of probation for up to five years; and (3) that, as a condition of probation, Perry would (a) serve 81 days of electronic home monitoring (EHM), (b) cooperate with a chemical-use assessment and follow resulting recommendations, (c) abstain from the use or possession of alcohol, (d) submit to random chemical testing, and (e) complete a victim-impact panel. The district court imposed a sentence consistent with the parties' agreement.

First Probation Violation

Scott County Community Corrections submitted a probation-violation report in May 2023. Perry's probation agent alleged that Perry had violated her conditions by failing to complete 81 days of EHM and periodic alcohol monitoring. More specifically, the agent stated that Perry had "failed to comply with the rules of the program after her whereabouts

[were] unknown on May 9, 2023,” that Perry had failed to participate in alcohol monitoring on two days in April, and that, on another occasion, Perry had blocked the testing device’s camera. The agent noted Perry’s history of alcohol abuse, underlying issues with problematic gambling, and that Perry’s previous DWI offense conduct had occurred immediately after she left casinos. The agent recommended that Perry: (1) refrain from entering gambling establishments and participating in gaming activities; and (2) complete a gambling assessment and follow resulting recommendations.

Several months later, Perry’s agent submitted an addendum to the previous probation-violation report. In this addendum, the agent alleged three new violations: (1) that Perry failed to abstain from alcohol; (2) that Perry failed to maintain contact with him; and (3) that Perry failed to provide urinalysis samples three times. The agent recommended that Perry: (1) not enter any gaming establishments; and (2) complete a driving course, a gambling assessment, and a diagnostic assessment, as well as follow all recommendations that the assessments produced.

At an August 2023 hearing, Perry admitted that she had violated the terms of her probation by failing to abstain from alcohol. In exchange for her admission, the district court ordered that Perry: (1) serve 30 days in jail and submit to 30 days of alcohol monitoring after her release from custody; (2) cooperate with a gambling assessment and follow the resulting recommendations; and (3) not enter any gambling establishments. The district court further ordered that, if Perry successfully complied with those requirements, the court would reinstate her on probation under the previously imposed terms and conditions.

Second Probation Violation

In October 2023, Perry's probation agent submitted a second probation-violation report. The agent alleged that Perry violated her conditions by leaving the state without permission and failing to stay away from gambling establishments. In support of the allegations, the agent explained that Perry's alcohol-monitoring device began "checking in from California" several days after her release from jail. Pictures from the device showed Perry on a casino gaming floor near slot machines. The agent recommended that Perry: (1) serve jail time and 30 days of EHM upon release from custody; and (2) complete a mental-health assessment and the previously ordered gambling assessment, as well as follow all recommendations resulting therefrom.

At an October 2023 hearing, Perry admitted the alleged violations. In exchange for her admission, the parties agreed that Perry would serve 50 days in jail, with credit for 26 days served, and early release from the remaining term to a gambling treatment program. If Perry were discharged without completing that program, the parties agreed that she would return to jail to serve the remaining balance of her 50-day sentence. The district court accepted the parties' agreement, ordered that Perry comply with the terms of it, and reinstated her on all other prior probationary terms and conditions.

Third Probation Violation

In December 2023, Perry's agent submitted a third probation-violation report. The agent alleged that Perry violated the conditions of her probation by failing to complete gambling treatment, failing to contact probation, and failing to submit to chemical testing two times. The agent reported that, although Perry emailed him that she was kicked out of

treatment, Perry also claimed that she would be starting a new program at an outpatient facility. Perry did not provide the agent with information about her location. On the same day that the agent received the email from Perry, the agent also received an email from a counselor at the gambling treatment program. In that email, the counselor said that Perry left treatment after staff found a male hiding in her closet. Although Perry had left with the male before staff could ask her to leave, the program officially discharged Perry from treatment. Despite her discharge without completing the program, Perry did not return to jail as previously ordered by the district court. Perry left a voicemail for her agent, but she did not otherwise communicate with probation. Ten days later, law enforcement arrested Perry at her mother's home.

In the third probation-violation report, the agent asserted that a failure to revoke Perry's probation, after her third violation in less than six months, "would unduly depreciate the seriousness of this violation and the [district] court's previous orders and attempts to help [Perry]." The agent therefore recommended that the district court execute Perry's sentence and commit her to the custody of the commissioner of corrections for 36 months, 24 of which would be in custody, with the remaining 12 months to be served on supervised release.

Probation Revocation Hearing

The district court held a revocation hearing, at which Perry agreed that her probation conditions required that she complete gambling treatment, remain in contact with her probation agent, and submit to chemical testing. Perry also admitted that she did not complete treatment, did not contact her agent after she was released from treatment, and

twice failed to provide urinalysis samples when required. And Perry admitted that she violated each condition while she was on probation and that the violations were both intentional and inexcusable.

The state requested that the district court revoke the stay of execution in accordance with the probation agent's recommendation. In support of this request, the state explained that this was Perry's third violation since March 2023, that Perry continued to consume alcohol, that Perry had not treated her alcohol-use issues, and that Perry had not completed the gambling treatment that she needed. The state also noted that the criminal conduct underlying Perry's DWI charges arose out of her issues with gambling and drinking. And the state addressed the *Austin* factors and *Modtland* subfactors, arguing that each factor was satisfied.¹

Perry's probation agent informed the district court that, during supervision, gambling was a major issue for Perry and that Perry had expressed a need to consume alcohol so that she could confidently place higher bets. The agent believed that Perry needed both mental-health and chemical-dependency programming, which "would best be served while she's incarcerated" because of her recent behavior. And the agent reported that Perry was extremely impulsive and posed a risk of flight.

Defense counsel requested that the district court order Perry back to gambling treatment and noted that the court should use revocation only as a last resort. Counsel asked the district court to consider that Perry's unsuccessful discharge from treatment did not

¹ See *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980); see also *State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005).

result from gambling but from her decision to allow a male in her room. According to Perry's counsel, rehabilitation had not failed because Perry had only one week of gambling treatment left and had previously completed all that the program had required of her. Despite Perry's failure to immediately surrender after she left treatment, counsel asked the district court to credit her efforts in emailing probation and notifying her agent that she was trying to enroll in an outpatient treatment program.

Revocation and Appeal

In issuing its ruling, the district court noted that, although Perry's conditions required that she report to jail and contact probation after she left treatment, she did neither. The district court reiterated that this was Perry's third violation and found that Perry was not amenable to probation. In particular, the district court pointed to Perry's "three violations in a matter of a few months" and reasoned that she was "not presenting as somebody . . . [who was] at all amenable to probation." The district court expressed hope that, with treatment in a confined setting, Perry would be "in a much better position." In finding that the violations were intentional, the district court distinguished between a person who simply relapses and Perry, who both disregarded chemical testing and left Minnesota without permission to gamble in California. The district court elaborated:

I have considered the *Austin* factors in assessing this violation. As indicated[,] I think the violations in this case are intentional and inexcusable. I do believe that confinement is necessary to protect the public from further criminal activity. This is your fourth DWI. I mean clearly there [are] a lot of issues and the message isn't getting through. It would unduly depreciate the seriousness of the violation if your probation was not revoked.

Based on these determinations, the district court revoked Perry's stay of execution and committed her to the commissioner of corrections for 36 months.

Perry appeals.

DECISION

In seeking reversal of the district court's decision to revoke the stay of execution, Perry contends (1) that the court erred by failing to make the findings required under *Austin* and (2) abused its discretion because the record does not support a determination that the need for her confinement outweighed the policies favoring probation. We disagree.

If the district court finds that an individual violated the conditions of their probation or the individual admits such a violation, the court may "continue an existing stay of execution and order probation" or revoke probation and execute their sentence. Minn. R. Crim. P. 27.04, subd. 3(2)(b). "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. Smith*, 994 N.W.2d 317, 320 (Minn. App. 2023) (quotation omitted), *rev. denied* (Minn. Sept. 27, 2023). "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. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted).

Before the district court may revoke an individual's 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 [the] need for confinement outweighs the policies favoring probation." *Austin*, 295 N.W.2d at 250. Moreover, "[t]he

decision to revoke 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). “[W]hether a lower court has made the findings required under *Austin* presents a question of law, which is subject to de novo review.” *Modtland*, 695 N.W.2d at 605.

Perry challenges the district court’s decision as to the third *Austin* factor—whether the need for confinement outweighed the policies favoring probation. When analyzing that factor, district courts must “balance the probationer’s interest in freedom and the state’s interest in [e]nsuring [her] rehabilitation and the public safety, and base their decisions on sound judgment and not just their will.” *Id.* at 606–07 (quotation omitted). In doing so, district courts address the following three *Modtland* subfactors, which 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 [s]he is confined; or
- (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Id. at 607 (quoting *Austin*, 295 N.W.2d at 251) (other citation and footnote omitted). “Only one *Modtland* subfactor is necessary to support revocation.” *Smith*, 994 N.W.2d at 320.

I. The district court did not err by failing to make the findings required under *Austin*.

Perry argues that the district court did not specifically make a finding that the policies favoring probation were outweighed by the need for confinement. The record defeats this claim.

Although Perry is correct that the district court did not explicitly find that the need for confinement outweighed the policies favoring probation, we have affirmed the revocation of probation even when a district court did not make such an express finding. *See, e.g., State v. Scofield*, No. A23-0801, 2024 WL 1039246, at *3 (Minn. App. Mar. 11, 2024) (concluding that, although the district court did not specifically state that the need for confinement was outweighed by the policies favoring probation, the court nonetheless “made that finding because it found that the first and third *Modtland* subfactors were satisfied”).² As in *Scofield*, the district court here explicitly found that the first and third *Modtland* subfactors were satisfied.

Regarding the first *Modtland* subfactor, the district court found that confinement was necessary to protect the public from further harm because the underlying charge was Perry’s fourth DWI and because she was not complying with her probationary conditions. And as to the third *Modtland* subfactor, the district court found that “[i]t would unduly depreciate the seriousness of the violation if [Perry’s] probation was not revoked.” The district court reasoned that “clearly there [were] a lot of issues and the message [was not] getting through” to Perry. And the district court noted that Perry had violated her probationary conditions three times “in a matter of a few months.” Because the district court found that at least two of the *Modtland* subfactors were satisfied, we conclude the district court implicitly determined that the policies favoring probation were outweighed

² Consistent with Minnesota Rule of Civil Appellate Procedure 136.01, subdivision 1(c), we cite nonprecedential opinions only as persuasive authority.

by the need for confinement and did not err by failing to make the findings required under *Austin*. See *Scofield*, 2024 WL 1039246, at *3; see also *Modtland*, 695 N.W.2d at 605.

II. The district court did not abuse its discretion in deciding that sufficient evidence supported its determination that the need for confinement outweighed the policies favoring probation.

Perry nonetheless maintains that the district court’s findings on the three *Modtland* subfactors are not supported by the record. We are unconvinced.

A. First *Modtland* Subfactor

Perry first asserts that the district court’s finding that confinement was necessary to protect the public is not supported by the record because “there was no indication that [she] was engaging or about to engage in criminal activity” and the actions that led to her violations were not criminal, nor did they pose a risk to public safety. In addressing the first subfactor, the district court emphasized that the underlying crime was “a very dangerous offense” and that it was Perry’s fourth DWI. The district court also observed that Perry had several probation violations, that Perry left Minnesota without permission to gamble in California, and that Perry’s violations were intentional.

The record establishes that Perry was convicted of DWI offenses in 2018 and 2021—before she pleaded guilty to the instant DWI charge—and that all of Perry’s DWI convictions occurred after leaving casinos. Perry admitted that she had visited a gambling establishment in California, and she acknowledged that she relied on alcohol consumption for confidence in placing higher bets. The evidence also reflects that Perry had violated probation by providing a positive urinalysis sample. We therefore conclude that the

evidence supports the district court's finding that confinement was necessary to protect the public.

B. Second *Modtland* Subfactor

Contending that appropriate treatment was available in the community, Perry next argues that the record does not support a finding that she needs correctional treatment that can most effectively be provided if she is confined. We acknowledge that the district court did not make such an express finding. But the district court did specifically find that Perry was not amenable to probation and that she “clearly . . . need[ed] some significant mental health treatment.” And the district court expressed its hope “that[,] with treatment in confinement[,] . . . [she would] come out of this at the end of the day in a much better position[,] . . . [h]aving had the opportunity to have essentially forced treatment and some forced mental health therapy in a more stable setting.” *See Austin*, 295 N.W.2d at 251 (noting that it is not unreasonable to conclude that treatment had failed where an offender failed to participate in treatment opportunities or “to show a commitment to rehabilitation”); *see also State v. Jennings*, No. A12-1637, 2013 WL 869947, at *3 (Minn. App. Mar. 11, 2013) (affirming the district court's revocation of probation because the district court's findings that appellant was not amenable to probation and needed correctional treatment were supported by the record).

The district court also found that, after Perry left treatment, she failed to report to jail as required. Moreover, the terms of Perry's probation included that she remain in contact with the agent and submit to chemical testing; she did neither. The district court

noted that this was Perry's third violation in a few months, that the violations were intentional, and that Perry needed treatment.

The record reasonably supports these findings. It reflects that Perry failed to return to jail after leaving treatment, despite the district court's order that she do so in that circumstance. The probation-violation report notes that Perry did not notify her agent of her whereabouts after she left treatment and that she did not cooperate with chemical testing. The evidence also establishes that this was Perry's third probation violation and that her conduct had not improved after two prior violations and reinstatements. Based on our careful review of the record, we conclude that the district court's implicit findings on the second *Modtland* subfactor are supported by the facts that were before the court.

C. Third *Modtland* Subfactor

Lastly, Perry contends that the district court abused its discretion by finding that it would unduly depreciate the seriousness of the violation if probation were not revoked. Perry posits that the district court "could have addressed the seriousness of the violation in the community by imposing other sanctions such as local jail time, or a more rigorous check-in or communication system with the probation agent, or house arrest" because she "demonstrated and expressed willingness to enter chemical dependency treatment and abide by the rules of probation."

At the probation-revocation hearing, the district court reminded Perry that it had previously expressed its concern that she was not taking probation seriously. The district court also noted that Perry had left treatment without reporting to jail as ordered and that she did not apprise probation of her whereabouts. In addition, the district court observed

that this was Perry’s third probation violation and that the violations before the court were intentional. After distinguishing between an individual who merely relapses and Perry’s more egregious conduct of immediately absconding to California to gamble following a prior probation violation—in further contravention of the district court’s orders—the court found that “clearly there [were] a lot of issues and the message [was not] getting through.” Thus, the district court determined that “it would unduly depreciate the seriousness of the violation if [Perry’s] probation was not revoked.” For the same reasons as set forth above, we conclude that the record reasonably supports these findings.

Perry cites three nonprecedential opinions in support of her argument that “the district court’s assertion that it had ‘considered the [*Austin*] factors in assessing this violation’ is not adequate”: *State v. Jensrud*, No. A23-1566, 2024 WL 2888871 (Minn. App. June 10, 2024); *State v. Rogers*, No. A22-0649, 2023 WL 125845 (Minn. App. Jan. 9, 2023); and *State v. Baerg*, No. A21-1517, 2022 WL 3581314 (Minn. App. Aug. 22, 2022). But none of these decisions persuade us to reverse. In each case, the district court had merely recited the *Austin* factors and the *Modtland* subfactors, without analyzing them. *See Jensrud*, 2024 WL 2888871, at *3; *Rogers*, 2023 WL 125845, at *2; *Baerg*, 2022 WL 3581314, at *6. By contrast, the district court here did far more than just recite the factors and subfactors—it discussed the evidence that it relied on to reach its determination and provided case-specific reasons why the need for Perry’s confinement outweighed the policies that favored continuing her probation.

In sum, “[t]he ultimate decision whether to order revocation and imprisonment lies solely within the district court’s discretion.” *State v. Fortner*, 989 N.W.2d 368, 377 (Minn.

App. 2023). The record establishes that the district court's decision to revoke 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 considered Perry's lack of cooperation with probation, the seriousness of the underlying conviction, and Perry's need for treatment. And the district court's factual findings were reasonably supported by the record. We therefore conclude that the district court did not err by failing to make the requisite *Austin* findings and did not abuse its discretion by revoking Perry's probation and executing her 36-month sentence.

Affirmed.