

*This opinion is nonprecedential except as provided by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
A21-0535**

State of Minnesota,
Respondent,

vs.

Cody Michael Thorson,
Appellant.

**Filed September 7, 2021
Affirmed
Florey, Judge**

Benton County District Court
File Nos. 05-CR-17-2253; 05-CR-19-1217

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

Philip K. Miller, Benton County Attorney, Karl L. Schmidt; Assistant County Attorney,
Foley, Minnesota (for respondent)

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

Considered and decided by Reyes, Presiding Judge; Hooten, Judge; and Florey,
Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this appeal from the district court's order revoking his probation, appellant argues
the district court abused its discretion in concluding that the need for his confinement

outweighed the policies favoring continued probation because this finding was not supported by the record. We affirm.

FACTS

Appellant Cody Thorson pleaded guilty to a second-degree drug offense in April 2019. In September 2019, while awaiting sentencing, Thorson pleaded guilty to a fifth-degree drug offense. The district court sentenced Thorson for both offenses in November 2019.

At the time of sentencing, Thorson's criminal history included seven prior felony convictions, five for controlled substances, and two for second-degree assault and unlawful possession of a firearm. The presumptive sentence was 111 months on the second-degree controlled-substance conviction and 24 months on the fifth-degree-possession conviction. The parties agreed to a downward dispositional departure based on Thorson's recent completion of a chemical-dependency-treatment program, participation in a Suboxone program, and his ability to continue on Suboxone while serving the agreed-upon jail time.

At the sentencing hearing, Thorson, who was represented by counsel, stated that he was not currently in an aftercare program, explaining that he had been dealing with family deaths. The district court imposed the parties' agreed-upon sentence, which included a stayed 111-month prison sentence, 25 years of probation, and 365 days in jail. The probation conditions included: remain law abiding, report to the probation officer and notify the officer within 72 hours of any contact with law enforcement or new charges, follow all treatment programming recommendations, participate in mental-health counseling, take all prescribed medications in the prescribed dosage and frequency, refrain

from using or possessing non-prescribed mood-altering chemicals, comply with any random chemical testing requested by probation or law enforcement, and do not possess any drug paraphernalia. Thorson was provided with a written order explaining his sentence and probationary conditions.

Thorson failed to turn himself in to begin his jail time, and the district court issued a warrant for his arrest. The probation officer later filed a violation report, alleging that Thorson violated his probation by failing to serve his jail sentence, to provide his agent with verification that he was participating in mental-health services, to make himself available for random testing, to provide verification that he was taking mental-health medication as prescribed, and to make contact with his probation officer or anyone at the Department of Corrections (DOC) since his sentencing hearing.

In April 2020, Thorson was arrested and charged with the gross-misdemeanor offense of giving a peace officer a false name. Because Thorson displayed COVID-19 symptoms while in jail, the warrant for his arrest for the previous convictions was quashed. In May, Thorson was charged with misdemeanor possession of hypodermic needles and possession of drug paraphernalia.

Thorson appeared by phone for his probation-violation hearing in September 2020. He stated that he was unable to begin his jail sentence because of the COVID-19 pandemic, and also stated that he had not been given a probation officer's name or contact, so he never started probation. The district court told Thorson to contact the county jail and the DOC by September 11, 2020.

Thorson failed to appear at his next court hearing in November 2020, and the district court issued another warrant for his arrest. In January 2021, Thorson was arrested and appeared before the district court in custody and represented by counsel. The probation officer filed an addendum to her earlier report, alleging additional violations of failing to notify his probation hours within 72 hours of contact with law enforcement, being charged with new crimes, and failing to follow the district court's September 2020 release order.

In March 2021, Thorson appeared by video from jail at a remote contested-probation-revocation hearing. The probation officer testified that since his sentencing hearing, Thorson had neither contacted her nor provided any verification that he made progress on his other probationary conditions except for providing a urine sample immediately following his sentencing hearing. The probation officer also stated that Thorson would have received a copy of his sentencing order, explaining the terms of his probation, following his sentencing hearing. On cross-examination, the probation officer testified that she never contacted Thorson.

Thorson testified that he completed chemical-dependency treatment and participated in the community Suboxone program at the time of sentencing but admitted that was before sentencing and was part of the basis for him receiving a downward dispositional departure. He also testified that he was currently taking his mental-health medications as prescribed. He admitted that he did not turn himself in to complete jail time and did not contact probation, stating that he did not know he had to contact probation and that he was not provided the name or contact information of his probation officer.

The probation officer and the state asked the district court to commit Thorson to prison. The state argued that the *Austin* factors supported revocation of Thorson's probation, specifically arguing that Thorson was a danger to the public and that to not commit him would minimize the seriousness of his violations. Thorson's counsel argued for another opportunity on probation, stating that Thorson followed through on "almost all" of his probationary conditions but that he was not aware that he was supposed to contact probation.

The district court found that the state proved the alleged probation violations by clear and convincing evidence and that the violations were intentional and inexcusable. When Thorson asked for one more opportunity to comply with probation, the district court stated:

Well, I certainly would, Mr. Thorson, had I any optimism that you would be successful on your own. I just think that your addiction has such a grip on you that you blew off probation. You could not even contact your agent even after I released you from custody and told you that you had to contact your agent by 4:30 the following day. You never contacted [your agent].

It is more than one mistake. It is a series of bad judgment, and I think you just need to get your head cleared from chemicals, and hopefully things will fall into place.

I am satisfied though under the circumstances here that the need for confinement outweighs the public policies favoring probation in that specifically your treatment is necessary to be accomplished in a correctional setting because you can't do that voluntarily on your own.

The district court then executed Thorson's stayed prison sentences to run concurrently.

Thorson appeals.

DECISION

The district court did not abuse its discretion in revoking Thorson’s probation and executing his prison sentences.

Thorson argues that the district court abused its discretion in revoking his probation because the required findings were not supported by the record. “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). To revoke probation, the district court must find that (1) the probationer violated a specific condition of probation; (2) the violation was intentional or inexcusable; and (3) the need for confinement outweighed the policies favoring probation. *Id.* at 250; *see also State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (explaining that the district court must make specific findings on all three *Austin* factors to revoke probation).

With regard to the third factor—that the need for confinement outweighs the policies favoring probation—the district court should consider *Modtland* findings by “balanc[ing] the probationer’s interest in freedom and the state’s interest in insuring his rehabilitation and the public safety.” *Id.* at 607 (quotation omitted). The district court considers 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.” *Id.* (quotation omitted).

Thorson does not challenge the district court's findings on the first and second *Austin* factors. He argues that the district court abused its discretion in revoking his probation because its findings on the third *Austin* factor are not supported by the record. Specifically, Thorson argues his probation should be reinstated because the district court failed to make findings on the first and third *Modtland* factors. However, in determining whether the third factor is met, the subfactors as stated by the supreme court in *Modtland* do not require the district court to make findings on all three subfactors; rather, a finding on one of the subfactors is sufficient to uphold the district court's probation revocation. See *Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008) (recognizing that appellate courts "normally interpret the conjunction 'or' as disjunctive rather than conjunctive").

Thorson further argues the record does not support the district court's finding on the second *Modtland* subfactor because he completed "almost all" of the conditions of probation. However, review of the record shows that Thorson did not inform his probation officer of his activities and never contacted her following his sentencing hearing. Thus, even if he was making progress on his probation conditions, no evidence of that progress was available to the probation officer or the district court, and nothing is found in the record. Thorson also argues that he did not know that he had to contact probation and was not provided the name of his probation officer. However, Thorson was provided with a

written order explaining his sentence and probationary conditions following the initial sentencing hearing.¹

While there is evidence that Thorson completed at least one chemical-dependency-treatment program, that completion occurred before sentencing, and was part of the basis for the district court's grant of a downward dispositional departure. Finally, Thorson argues that the district court's reasons for revoking probation are not more than "general, non-specific reasons for revocation." But the district court found that "treatment [was] necessary to be accomplished in a correctional setting because [Thorson] can't do that voluntarily on [his] own," and also explained that Thorson's addiction had "such a grip" on him that he was unable to comply with probation, despite multiple opportunities to do so. This finding is sufficient to satisfy the second *Modtland* subfactor, and thus, to satisfy the third *Austin* factor. Therefore, the district court did not abuse its discretion in revoking Thorson's probation based on this record.

Affirmed.

¹ Furthermore, as the state pointed out, Thorson had been on probation for felony violations on multiple occasions in the past, so he was familiar with the process.