STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0620

State of Minnesota,
Respondent,

vs.

Terry Carlton Ross,
Appellant.

Filed December 27, 2021
Affirmed
Reyes, Judge

Olmsted County District Court
File No. 55-CR-20-4338

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Assistant County Attorney, Rochester, Minnesota (for respondent)

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

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

NONPRECEDENTIAL OPINION

REYES, Judge

On appeal from the district court's revocation of his probation, appellant argues that the district court abused its discretion by finding that (1) he willfully and intentionally

violated his probation, and (2) the need for confinement outweighs the policies favoring continued probation. We affirm.

FACTS

Appellant Terry Carlton Ross has a criminal history against victim. After appellant's domestic-abuse conviction involving victim, the district court issued a Domestic Abuse No Contact Order (DANCO). Shortly thereafter, appellant was charged with and pleaded guilty to violating the DANCO. At the September 11, 2020 plea hearing, the district court dismissed the DANCO but ordered appellant to comply with pretrial services, including inpatient treatment and his return to jail following treatment unless the district court approved an aftercare plan. Appellant completed inpatient treatment. However, the district court did not approve an aftercare plan, thus requiring appellant to return to jail. Appellant did not return to jail, and the district court issued a warrant for appellant's arrest.

On October 21, 2020, appellant appeared in district court on the warrant. On October 23, 2020, the district court held appellant's presentence hearing, at which appellant alleged that he did not return to jail because he had been confused about the district court's order at the plea hearing. The district court determined that it had not approved a suitable aftercare plan and therefore remanded appellant into custody pending sentencing.

At appellant's sentencing hearing on December 14, 2020, appellant moved for a downward dispositional departure to a stay of execution of his sentence. The district court granted appellant's motion but imposed several probation conditions. Importantly, the district court ordered appellant not to contact victim as a condition of probation. The

district court also explained its reasoning for imposing the probation condition and told appellant twice not to contact victim. Shortly after sentencing, and prior to being released, appellant contacted victim from jail. The district court subsequently issued an arrest warrant for appellant for this probation violation.

Appellant's probation officer spoke with appellant over the phone on December 22, 2020, informing appellant of his probation violation and that he needed to turn himself in. Appellant did not turn himself in. On February 12, 2021, police found appellant in the back seat of a car with victim during a traffic stop. Officers arrested appellant on the probation warrant and informed appellant's probation officer.

The district court held a contested probation-violation hearing on February 22, 2021, with a different judge presiding. Appellant alleged that he had been confused about the district court's order not to contact victim and that he did not intentionally violate it. The district court found that all three factors outlined in *State v. Austin*, 295 N.W.2d 246, 249-250 (Minn. 1980), were met, revoked appellant's probation, and executed his presumptive sentence. This appeal follows.

DECISION

I. Standard of review

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." *Austin*, 295 N.W.2d at 249-50. "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." *Id.* 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." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted). Appellate courts review de novo whether a district court made the required *Austin* findings. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). Appellant only challenges the district court's findings on the second and third *Austin* factors. We address each of those factors in turn.

II. The district court did not abuse its discretion by finding that appellant willfully and intentionally violated probation under the second *Austin* factor.

Appellant argues that the record does not support the district court's finding that he willfully and intentionally violated probation because the district court questioned whether he had been confused about the probation condition at the time of the violation. We disagree.

At the probation-revocation hearing, the district court considered the merits of appellant's alleged confusion. But, contrary to appellant's contention, evidence that the district court considered appellant's alleged reason does not mean that it believed his reason. Indeed, the district court did not. Instead, the district court carefully considered appellant's alleged confusion because the presiding judge was not appellant's sentencing judge. The district court analyzed whether appellant's sentencing judge specifically addressed whether appellant knew of the condition at the time of violation. The district court considered the documents pertaining to sentencing and victim's letter to the

sentencing judge, and determined that appellant's relationship with victim was "at the forefront" of the sentencing judge's mind.

The district court also found credible the probation officer's testimony that appellant had a "toxic" relationship with victim, and therefore required appellant not to contact victim as a condition of probation. The district court ultimately found that appellant understood the probation condition of not contacting victim at the time of the violation.

The record supports the district court's findings. Appellant testified that he had been confused about the sentencing judge's order because, at his September 11, 2020 plea hearing, the judge had dropped the DANCO regarding victim. But the relevant inquiry is what occurred at the probation-violation hearing. There, the probation officer testified that, after the sentencing judge imposed the probation condition, appellant returned to jail and called victim. The probation officer listened to their phone call and testified that, during the call, appellant and victim plainly discussed that the sentencing judge ordered appellant not to contact victim. The district court found the probation officer's testimony credible, a finding to which we defer. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (recognizing that "credibility of witnesses and the weight to be given their testimony are determinations to be made by the factfinder" and district court's credibility determinations are "accord[ed] great deference") (quotation omitted)).

Finally, the record reflects that the sentencing judge *did* clearly order appellant not to contact victim. The district court therefore did not abuse its discretion by finding that appellant willfully and intentionally violated his conditions of probation.

III. The district court did not abuse its discretion by finding that the need for appellant's confinement outweighs the policies favoring continued probation.

Appellant argues that the district court's analysis under the third *Austin* factor is speculative and unsupported by the record. We disagree.

Under the third *Austin* factor, district courts "must balance 'the probationer's interest in freedom and the state's interest in insuring [the probationer's] rehabilitation and the public safety,' and base their decisions 'on sound judgment and not just their will.'" *Modtland*, 695 N.W.2d at 607 (quoting *Austin*, 295 N.W.2d at 250-51). In making this determination, district courts should consider whether "(i) confinement is necessary to protect the public," "(ii) the offender is in need of correctional treatment which can most effectively be provided if [the offender] is confined," or (iii) not revoking probation "would unduly depreciate the seriousness of the violation." *Id.* (quoting *Austin*, 295 N.W.2d at 251). The presence of only one *Modtland* subfactor is necessary to support 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"). And a district court may consider an underlying downward dispositional departure when deciding whether to revoke probation. *See State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015), *aff'd*, 883 N.W.2d 790 (Minn. 2016).

Here, the district court found that appellant would continue to have contact with victim because he wanted a relationship with victim and that "allowing [appellant] to be on probation unduly depreciates the seriousness of the choices that [appellant] continue[s] to make to have contact with [victim]." In its analysis, the district court discussed the

numerous occasions on which appellant violated a district court order by contacting victim. Additionally, the district court noted that the probation order not to contact victim itself stemmed from appellant's violation of a DANCO. Finally, the district court also considered the fact that appellant received a downward departure.

The record supports the district court's findings. After appellant's initial violation of calling victim from jail, he continued to have contact with victim. In fact, police found appellant with victim when they arrested him on the probation-violation warrant. The probation officer also testified that appellant again called victim from jail the night before the probation-revocation hearing. Additionally, appellant violated an explicit probation condition after receiving a downward departure. See *Fleming*, 869 N.W.2d at 331 (citing *State v. Moot*, 398 N.W.2d 21, 24 (Minn. App. 1986) (affirming probation revocation when "presumptive sentence was commitment to prison and the downward departure was solely to permit one last attempt to succeed at treatment")). Accordingly, we conclude that the district court did not abuse its discretion by determining that appellant met the third *Modtland* subfactor and, in turn, the third *Austin* factor. Because only one subfactor is necessary to support revocation, we do not consider appellant's arguments on the second subfactor.

Affirmed.