

*This opinion is nonprecedential except as provided by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
A21-1266**

State of Minnesota,
Respondent,

vs.

Stephen Robert O'Brien,
Appellant.

**Filed February 7, 2022
Reversed and remanded
Frisch, Judge**

Hennepin County District Court
File No. 27-CR-16-22878

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Daniel L. Gerds, Minneapolis, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Gaïtas, Judge; and Cleary,
Judge.*

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

NONPRECEDENTIAL OPINION

FRISCH, Judge

This appeal follows the district court's revocation of appellant's probation and execution of his stayed sentence. Because the district court failed to make the required findings prior to the revocation and abused its discretion by basing the revocation on an erroneous factual finding, we reverse and remand.

FACTS

In November 2016, appellant Stephen Robert O'Brien pleaded guilty to felony driving while impaired under Minn. Stat. § 169A.20, subd. 1 (2016). The district court sentenced O'Brien to 42 months in prison but stayed execution of the sentence and placed him on probation for five years on the condition that, in pertinent part, he abstain from using alcohol. O'Brien violated this condition five times. After his second violation, the district court reinstated probation but imposed an additional condition prohibiting O'Brien from driving.

This appeal relates to the fifth probation violation, which occurred in July 2021. At the violation hearing, O'Brien admitted to using alcohol in violation of his probation. The district court found the violation "inexcusable" and heard arguments from the parties regarding the appropriate disposition for the violation. O'Brien asked to be transferred to the workhouse until the date of his discharge from probation, approximately two months after the hearing date. The state asserted that it understood that probation did not recommend the revocation of O'Brien's probation because probation did not believe the district court would actually revoke probation. The state requested that the district court

instead impose a consequence of 180 days in the workhouse, order chemical-dependency treatment, and extend O'Brien's probation for two years. Probation recommended that O'Brien, who is 70 years old, serve 180 days in the workhouse, complete chemical-dependency treatment, and then be discharged from probation.

The district court then asked: "What is he looking at in terms of prison time that you think the Court will ignore?" Probation clarified the duration of the stayed sentence and reminded the court that one of the probation conditions was that O'Brien refrain from driving. The district court then stated "[i]t's one thing to be a chronic alcoholic, but a chronic alcoholic is a dangerous mixture on the highway." The district court ordered that O'Brien's probation be revoked.

The state then requested the district court state findings as required by *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). The district court then found that the probation violation "was intentional and inexcusable" and that "the need for confinement outweighs the policies favoring probation" because O'Brien was driving in violation of his probation and he was "in need of a correctional treatment that can most [e]ffectively be provided during confinement."

O'Brien objected to the district court's finding on the grounds that he did not admit to driving in violation of his probation and that there was no evidence that he had done so. The district court conceded that it stood corrected as to the factual record but "that [did] not change the Court's decision" to revoke probation. Because the revocation proceeding occurred via remote technology due to the COVID-19 pandemic, the district court ordered that O'Brien appear in person the following day to be taken into custody. O'Brien appeared

the following day and asked for permission to voluntarily surrender in one week. The district court denied the request, and O'Brien was taken into custody. O'Brien appeals.

DECISION

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” (the *Austin* factors). *Austin*, 295 N.W.2d at 249-50. We review de novo whether a district court made the required *Austin* findings. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). And we review the district court’s *Austin* findings themselves for abuse of discretion. *Austin*, 295 N.W.2d 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.” *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted).

I. The district court erred by not making the required finding on the *Austin* factors before revoking O’Brien’s probation.

O'Brien argues the district court erred by failing to make the required findings on the *Austin* factors before revoking his probation. We agree.

We review this question de novo. *Modtland*, 695 N.W.2d at 605. In *Modtland*, the supreme court emphasized the importance of adhering to proper procedure in the decision to revoke probation:

Austin contemplates an evidentiary hearing in which the district court makes the requisite three findings *before* deciding whether to revoke the defendant’s probation. This process emphasizes that while an intentional or inexcusable probation violation is a necessary condition for probation to be revoked, it is not a sufficient condition. Rather, once an intentional or

inexcusable violation has been found, the court must proceed to an evaluation of whether the need for confinement outweighs the policies favoring probation.

Id. at 607-08.

The district court did not follow this procedure. Instead, the district court first found that O'Brien had violated his probation by using alcohol and labeled the violation as "inexcusable." After hearing from the parties regarding the disposition for the violation, the district court revoked O'Brien's probation. To be clear, the district court did not make the requisite three findings before deciding whether to revoke O'Brien's probation. Instead, and only when prompted by the state, the district court made the required findings on the *Austin* factors *after* it ordered the revocation. Accordingly, the district court erred because it did not consider the *Austin* factors before it revoked O'Brien's probation.

The state argues that O'Brien's "concern about timing" does not warrant reversal because the hearing lasted only 25 minutes, the district court found O'Brien's violation to be inexcusable, and the district court "provided an analysis of each separate factor within minutes of noting it intended to revoke probation." We are not persuaded. Nothing in either *Austin* or *Modtland* suggests that the duration of the hearing impacts the procedural requirement that a district court make the required findings before revoking probation. Second, even assuming the district court's finding that the violation was inexcusable properly addresses the first two *Austin* factors, *Modtland* expressly provides that the required process "emphasizes that while an intentional or inexcusable probation violation is a necessary condition for probation to be revoked, it is not a sufficient condition." 695 N.W.2d at 608. Third, *Modtland* also expressly provides that the district court must

“make[] the requisite three findings *before* deciding whether to revoke the defendant’s probation.” *Id.* at 607. That did not happen here. The district court therefore erred by failing to make the required *Austin* findings before it revoked O’Brien’s probation.

II. The district court abused its discretion by finding that policy considerations weighed in favor of revoking O’Brien’s probation.

As an independent basis for reversal, O’Brien argues the district court abused its discretion by relying exclusively on an erroneous factual assumption as the basis to find that policy considerations weighed in favor of revoking his probation. We review this question for abuse of discretion. *Austin*, 295 N.W.2d at 249-50.

In making a finding on the third *Austin* factor, the district court must consider whether: (1) confinement is needed to protect the public from further criminal activity, (2) correctional treatment is necessary and can most effectively be provided during confinement, or (3) a further stay would unduly depreciate the seriousness of the violation. *Modtland*, 695 N.W.2d at 607. We generally refer to these considerations as the *Modtland* subfactors. The district court need only find the existence of one of the *Modtland* subfactors to satisfy the third *Austin* factor. *See Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008) (recognizing that Minnesota appellate courts “normally interpret the conjunction ‘or’ as disjunctive rather than conjunctive”).

Here, the district court stated that it revoked O’Brien’s probation specifically because it found that O’Brien had been driving in violation of his probation and O’Brien “continues to drink and drive.” That factual conclusion finds no basis in the record. O’Brien did not admit that he had been driving, the parties submitted no evidence that he

had been driving, and there was no evidence that O'Brien "continues to drink and drive." To that point, O'Brien's counsel objected to the district court's finding because the district court had no admission or evidence that O'Brien had been driving, let alone drinking and driving. When confronted with the reality of the record, the district court conceded that it stood corrected but then stated "that does not change the Court's decision" to revoke probation. And while the district court acknowledged its mistaken factual conclusion, it did not set forth any other basis to support its conclusion that policy considerations weighed in favor of O'Brien's incarceration. Accordingly, because the factual basis for the district court's finding on the third *Austin* factor is "against logic and the facts in the record," the district court abused its discretion by concluding that policy considerations weighed in favor of revoking O'Brien's probation. *See Riley*, 819 N.W.2d at 167.

Finally, we express concern regarding the statements of the district court during the proceedings. At the probation-revocation hearing, the district court questioned the probation officer as follows:

THE COURT: [Probation officer], what is he looking at?

PROBATION: Yes, Your Honor, I am recommending the 180 days in the workhouse to complete Telesis and discharge upon completion of that time. I feel this is an extremely fair recommendation based on the fact that this is his fifth violation for continued alcohol use and as recently as yesterday, according to the monitoring department, where he was a 0.10. The Defendant, I've had him on probation for, you know, almost five years at this point, he's gone from admitting he has a problem to being in complete denial to trying to get around going to treatment to saying he knows how to stay sober, even though he does not [stay] sober. At this time, I feel it's appropriate for him to go to treatment while in custody rather than out in the community, because he's shown repeatedly that he cannot do it out in the community.

THE COURT: What is he looking at in terms of prison time that you think the Court will ignore?

PROBATION: The time is 42 months, Your Honor, and he has credit for 287.

When the parties appeared in person the following day, the district court further stated:

THE COURT: That's the problem. I can't make exceptions for people and especially in a situation like this, [Counsel]. I mean, your client is out of—you know, he's out of control with his drinking. You admitted yesterday that he is a chronic drinker and that's what chronic drinkers do and he has admitted that, you know, that is a serious issue for him.

My problem is I don't take chances with people who have four or five probation violations for excessive drinking. I just can't take a chance. I don't want my face in the front page of the news, because that's what people complain about and I know all of you in this courtroom know that. That people complain when the Courts let people like Mr. [O'Brien] out and then he goes out and he kills somebody. So, what do you think's going to happen with me? I don't trust him. I don't care what he tells you. He's being taken into custody today and I can't show any favoritism toward anybody.

I would treat him as I would treat any litigant who has a serious drinking problem, violates his conditions of probation five times, I mean, he had to know that sooner or later he was going to get caught and sent to prison. And you heard the probation officer yesterday, although I was a little appalled at what she said the reason she never asks for execution is because the bench won't do it. Well, this bench will do it. So, I mean, that's the message here. He's to be taken into custody and we're done.

These comments suggest that the decision to revoke O'Brien's probation was not based exclusively on O'Brien's conduct but instead based at least in part on considerations personal to the district court judge. "A judge shall not be swayed by public clamor or fear of criticism." Minn. Code Jud. Conduct Rule 2.4(A); *see also State v. Malone*, 963 N.W.2d

453, 465 (Minn. 2021) (“[J]udges are presumed to have the ability to set aside extra-record knowledge and make decisions based solely on the merits of a case.”); *In re Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011) (“[A] judge is required to ‘perform all duties of judicial office fairly and impartially’ and ‘shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.’” (quoting Minn. Code Jud. Conduct, Rules 2.2, 2.4)).

Because the district court failed to make the required findings before revoking O’Brien’s probation and then abused its discretion in justifying the revocation based on clearly erroneous factual findings and other personal considerations, we reverse the revocation of probation and remand for rehearing before a different district court judge.¹

Reversed and remanded.

¹ In his reply brief, O’Brien concedes that remand is appropriate. At oral argument, however, O’Brien raised the issue of whether the district court has continuing jurisdiction on remand given that O’Brien’s probationary period expired during the pendency of this appeal. In *State v. Sagataw*, 892 N.W.2d 47, 49-51 (Minn. App. 2017), we held that a district court has jurisdiction to conduct probation-revocation proceedings after a defendant’s stayed sentence has expired if the alleged probation violation occurred within the period of the stayed sentence. Here, because O’Brien’s admitted probation violation occurred within the period of the stayed sentence, the district court retains jurisdiction over the probation-revocation proceedings on remand.