STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1394

State of Minnesota,
Respondent,

vs.

Christina Lee Bohnstedt,
Appellant.

Filed July 18, 2022
Affirmed
Gaïtas, Judge

Scott County District Court
File No. 70-CR-16-1437

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

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

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

Considered and decided by Cochran, Presiding Judge; Bryan, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Christina Lee Bohnstedt challenges the district court's revocation of her probation. She argues that the district court erred by failing to advise her of her right to counsel and other hearing rights at her first appearance on the probation violation, by

failing to make sufficient findings to support its revocation decision, and by relying on improper evidence and assumptions to revoke her probation. We affirm.

FACTS

In February 2016, Bohnstedt pleaded guilty to felony driving while impaired, Minn. Stat. § 169A.20, subd. 1(2) (2014). The district court stayed execution of a 42-month prison sentence and placed her on probation for seven years. As conditions of probation, the district court ordered Bohnstedt to (1) complete long-term drug and alcohol monitoring for 30 days each year and (2) enter and successfully complete the Scott County Safe Streets Program.

Several months after sentencing, Bohnstedt violated her probation by failing to properly use an alcohol-monitoring device. In October 2016, she admitted the violation. The district court reinstated her probation and ordered her to comply with the conditions imposed at sentencing. In January 2017, Bohnstedt again admitted to violating her probation after submerging her alcohol monitoring bracelet in water. The district court reinstated Bohnstedt's probation, but as a sanction for the violation, required her to serve 30 days in jail and to complete 60 days of electronic home monitoring.

On April 5, 2021—after five years of probation—Bohnstedt filed a motion for an early discharge from probation. She noted in her motion that she had completed inpatient and outpatient treatment, remained employed, and attended school to become an emergency medical technician (EMT). Bohnstedt's motion also acknowledged that she "had two technical violations due to missing breathalyzer tests" and that she was "currently

facing another technical violation due to missing said tests . . . again." The district court scheduled a hearing on Bohnstedt's motion to be held on April 30.

Two days after Bohnstedt filed her motion for early discharge, her probation officer filed a probation-violation report. The report alleged that Bohnstedt had missed ten alcohol-monitoring tests and, consequently, had failed to complete the Safe Streets Program. Based on the violation report, the district court issued an amended hearing notice, which characterized the April 30 hearing as a "Probation Violation and Motion Hearing."

On April 30, Bohnstedt attended the remote hearing without counsel. An assistant county attorney also attended on behalf of respondent State of Minnesota. At the outset of the hearing, the district court told Bohnstedt that it understood she had "made a request for early discharge from probation." Bohnstedt confirmed this was correct. The district court stated, "And I do also understand that there was a probation violation filed against you on April 7th." Bohnstedt again agreed. Then, the district court asked Bohnstedt, "What do you want to tell me today?" In response, Bohnstedt provided a lengthy explanation of her reasons for seeking early discharge from probation, during which she admitted to missing at least one alcohol-monitoring test. The assistant county attorney took no position beyond noting the pending probation violation. At the end of the hearing, the district court advised Bohnstedt that it was taking her motion for early discharge under advisement. On May 17, 2021, the district court issued an order denying the motion for early discharge from probation.[1]

[1] The order referenced the April 30 hearing as "a hearing to address Defendant's Motion for Early Discharge from Probation and the State's request to revoke probation as a result

The record reflects that a probation-violation hearing occurred before the district court on July 9, 2021, and that the district court ordered a public defender to represent Bohnstedt at that hearing. However, Bohnstedt did not request a transcript of the July 9, 2021 hearing in connection with this appeal.[2]

A few weeks later, on July 23, 2021, Bohnstedt again appeared before the district court with counsel for a probation-violation hearing. During that proceeding, she confirmed that her lawyer had advised her of her rights in connection with the alleged probation violation. She then admitted to violating her probation by failing "to successfully complete the Safe Streets program or its equivalent" and by missing at least ten chemical tests during the 30-day window when she was required to submit to testing as a condition of her probation.

A disposition hearing was held before the district court on August 12, 2021. Bohnstedt sought continued probation. In support of that request, her attorney noted that Bohnstedt had never submitted a positive chemical test, emphasized that Bohnstedt's ADHD had made consistent chemical testing a challenge, and stated that Bohnstedt was regularly monitored for drug use as part of her medical care. The probation officer in attendance recommended continued probation with intermediate sanctions. But the state asked the district court to revoke Bohnstedt's probation and to execute her prison sentence.

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of an alleged violation." But the order did not address the state's probation-revocation request.

[2] The appellant is responsible for requesting the record for appeal, including hearing transcripts. Minn. R. Civ. App. P. 110.02, subd. 1; *Noltimier v. Noltimier*, 157 N.W.2d 530, 531 (Minn. 1968).

According to the state, Bohnstedt's poor performance on probation indicated that she had continued to drink and drive.

Before deciding the disposition for the probation violation, the district court engaged Bohnstedt in a discussion about her performance on probation. During that exchange, the district court referenced the probation-violation report, which stated that there had been "many community calls" reporting that Bohnstedt had continued to use alcohol "on a daily basis" and nonmedical marijuana, that she had left the state without authorization, and that she had otherwise failed to comply with her probation. Bohnstedt explained that she believed a past romantic partner had made these calls. The district court responded,

> [I]t's not just one person that is calling probation. People are picking up the telephone, multiple people, to say that they're worried about you and they're worried about public safety. Now, I don't put a lot of stock in that. But the problem is that when you have people saying that, and you miss ten tests, and you're here for your third violation, we've got issues.

Although the district court stated that the alleged community calls did not inform its decision regarding consequences for the probation violation, it noted that Bohnstedt's repeated failure to comply with testing created an inference that she was drinking alcohol. The district court revoked Bohnstedt's probation and executed the 42-month prison sentence.

Bohnstedt appeals.

DECISION

I. The district court's failure to advise Bohnstedt of her right to counsel and other probation-violation hearing rights at the April 30, 2021 hearing does not require reversal of the district court's later decision to revoke her probation.

Bohnstedt contends that the April 30 hearing before the district court was a probation-violation hearing. She argues that the district court violated her constitutional right to counsel by failing to advise her of this right and by failing to obtain a valid waiver of counsel before she admitted to violating her probation. Moreover, Bohnstedt argues, the district court erred by failing to advise her of her due-process rights at the outset of the hearing. She contends that these constitutional errors warrant reversal of the district court's later decision to revoke her probation.

The state responds that the April 30 hearing was not a probation-violation hearing. According to the state, the proceeding was simply a hearing on Bohnstedt's motion for early discharge from probation, for which she was not entitled to counsel or other procedural protections.

"[A] defendant is entitled to representation at a probation revocation hearing." *State v. Kouba*, 709 N.W.2d 299, 304 (Minn. App. 2006) (quoting *State v. Ferris*, 540 N.W.2d 891, 893 (Minn. App. 1995)); *see* Minn. Stat. § 609.14, subd. 2 (2020) (a "defendant is entitled to be heard and to be represented by counsel" at a probation-revocation hearing); *see also* Minn. R. Crim. P. 27.04, subd. 2(1)(c). Additionally, because the revocation of probation is "a serious deprivation" of liberty, a defendant must be afforded due process in such proceedings. *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1972); *Pearson v. State*, 241 N.W.2d 490, 492 (Minn. 1976).

To effectuate these rights, the Minnesota Rules of Criminal Procedure require district courts to provide defendants with a rights advisory at the first appearance for an alleged probation violation. Under rule 27.04, a district court must advise the defendant of the rights to:

> a. a lawyer, including an appointed lawyer if the probationer cannot afford a lawyer;
> b. a revocation hearing to determine whether clear and convincing evidence of a probation violation exists and whether probation should be revoked;
> c. disclosure of all evidence used to support revocation and of official records relevant to revocation;
> d. present evidence, subpoena witnesses, and call and cross-examine witnesses, except the court may prohibit the probationer from confrontation if the court believes a substantial likelihood of serious harm to others exists;
> e. present mitigating evidence or other reasons why the violation, if proved, should not result in revocation;
> f. appeal any decision to revoke probation.

Minn. R. Crim. P. 27.04, subd. 2(1)(c).

A district court's failure to advise a defendant of the right to counsel before revoking or extending probation "mandates reversal of a probation revocation." *Kouba*, 709 N.W.2d at 304. When a district court fails to advise a defendant of the due-process rights required in a probation-revocation proceeding, the defendant must be able to show some prejudice to obtain reversal of the revocation on appeal. *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016); *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016).

We review de novo whether a defendant was denied the constitutional right to counsel. *See State v. Slette*, 585 N.W.2d 407, 409 (Minn. App. 1998). Where, as here, a probationer does not object to the district court's failure to provide the rights advisory

required by rule 27.04, subdivision 2, we apply the plain-error standard of review. *See State v. Beaulieu*, 859 N.W.2d 275, 281 (Minn. 2015). "In order to meet the plain error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights." *Myhre*, 875 N.W.2d at 804. "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). "With respect to the substantial-rights requirement, [the defendant] bears the burden of establishing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the [district court's decision]." *Horst*, 880 N.W.2d at 38 (quotation omitted).

We first address Bohnstedt's argument that the April 30 hearing was a probation-violation hearing. Under rule 27.04, there are two types of hearings that occur once a probation-violation summons or warrant has been issued—a first appearance and a revocation hearing. A first appearance occurs when "the probationer initially appears on the warrant or summons." Minn. R. Crim. P. 27.04, subd. 2(1). At the first appearance, the district court must appoint an interpreter if appropriate, provide the probationer a copy of the violation report, advise the probationer of the right to counsel and other due-process rights, appoint a public defender upon an eligible probationer's request, consider whether the probationer should be released from custody pending the revocation hearing, set conditions of release, and schedule a timely revocation hearing. *Id.*, subd. 2. "The revocation hearing must be conducted consistent with the rights outlined in subd. 2(1)(c)a-e" (the rights advisory provided at the first appearance). Minn. R. 27.04, subd. 3(1). Then,

the district court must determine whether the probationer violated probation, impose an appropriate sanction, and make findings. *Id.*, subd. 3(2)-(3).

The April 30 hearing did have hallmarks of a first appearance on a probation violation. Before the hearing, Bohnstedt's probation officer had filed a probation-violation report and a request to execute Bohnstedt's prison sentence. The hearing notice identified the hearing as a "Probation Violation and Motion Hearing." A prosecutor was present at the hearing. And the district court informed Bohnstedt that she was facing a probation violation. Given these circumstances, it would have been prudent for the district court to provide Bohnstedt with the advisory required by rule 27.04, subdivision 2(1)(c), at the outset of the hearing.

Nonetheless, we disagree with Bohnstedt that the district court's failure to follow rule 27.04 and to obtain a waiver of counsel violated her constitutional rights and requires reversal of the district court's later decision to revoke her probation. Because the merits of the alleged probation violation were not addressed at the April 30 hearing, and because the district court did not restrict Bohnstedt's liberty based on anything that happened at that hearing, the proceeding did not implicate Bohnstedt's constitutional rights to counsel and to due process.

Bohnstedt's case is distinguishable from the cases she relies on to establish reversible error. In *State v. Murray*, the probationer appeared at a first appearance on a probation violation without counsel and admitted to violating his probation. 529 N.W.2d 453, 454-55 (Minn. App. 1995). Although the district court informed the probationer of the right to counsel during that proceeding, we determined that the district court erred in

suggesting that counsel would only be available at a future proceeding if the probationer denied the allegations. *Id.* at 455. Because the district court's advisory regarding counsel was inaccurate, and the merits of the probation violation were addressed without counsel, we reversed the district court's revocation of probation. *Id.*

Similarly, in *Kouba*, we concluded that the district court violated the probationer's constitutional right to counsel by not advising the probationer of the right before the probationer agreed to extend his probation for one year to avoid a probation violation for failing to complete treatment. 709 N.W.2d at 305. There, the state argued on appeal that there had been no violation of the right to counsel because the hearing was nonadversarial. *Id.* at 304. We rejected that argument, observing that the probationer was entitled to counsel because "the consequences to him, extended probation for another year, were the same as if he had [proceeded to] a hearing at which he agreed to restraint of his liberty in the form of another year of extended probation." *Id.*

Here, the district court did not advise Bohnstedt of her right to counsel or her other due-process rights at the outset of the April 30 hearing. Likewise, the district court did not obtain Bohnstedt's waiver of counsel during that proceeding. But unlike *Murray* and *Kouba*, the district court did not determine the merits of the alleged violations based on anything that happened at the April 30 hearing. Nor did the district court impose any consequence for the alleged violations as a result of the proceeding. Instead, the district court only took Bohnstedt's motion for early discharge under advisement.

The merits of Bohnstedt's probation-violation matter were addressed in subsequent proceedings where she was afforded the constitutional protections required in probation-

violation proceedings. After the April 30 hearing, Bohnstedt appeared at three probation-violation hearings—on July 9, 2021, July 23, 2021, and August 12, 2021. She was represented by counsel for at least two of those hearings. On July 23, Bohnstedt acknowledged that she had spoken with her attorney about her rights; she then admitted to violating her probation. And on August 12, Bohnstedt was again represented by counsel, and she had an opportunity to argue and present evidence supporting her request for continued probation.

Bohnstedt argues that the merits of her probation violation were addressed to some extent at the April 30 hearing because she admitted to violating her probation during that proceeding. She contends that, given her in-court admissions on April 30, she had no choice but to admit the violations at the subsequent probation-violation hearings.

Bohnstedt did admit to missing chemical tests at the April 30 hearing, and those missed tests were also the basis for the alleged probation violations. But Bohnstedt made her admissions—unprompted—in the context of arguing for an early discharge from probation. The thrust of Bohnstedt's motion for early discharge was that she was otherwise successful on probation, but her mental health diagnosis prevented her from complying with required chemical tests. Moreover, Bohnstedt did not admit to missing the chemical tests for the first time on April 30. In her motion for early discharge, which Bohnstedt filed into the district court record before April 30 (and before the probation-violation report was filed), she also admitted to missing the tests. Thus, Bohnstedt's admissions were independent of the probation-violation proceedings. And the district court did not rely on those particular admissions to find that Bohnstedt had violated her probation or to impose

any consequence. We therefore reject Bohnstedt's argument that her admissions at the April 30 hearing make her case comparable to the circumstances in *Murray* and *Kouba*.

Although it would have been prudent for the district court to have provided the advisory required by rule 27.04 at the outset of the April 30 hearing, the failure to do so did not amount to plain error implicating Bohnstedt's substantial rights. Likewise, the district court did not violate Bohnstedt's constitutional right to counsel during that hearing. We therefore reject Bohnstedt's request to reverse the revocation of her probation on these bases.

II. The district court did not err in revoking Bohnstedt's probation.

Bohnstedt argues that the district court erred in its ultimate decision to revoke her probation and execute her prison sentence. She challenges the district court's application of the *Austin* factors, and she alleges that other errors at the August 12 disposition hearing require reversal of the district court's revocation decision.

A. The district court made the required *Austin* findings and did not abuse its discretion in determining that there was sufficient evidence to revoke Bohnstedt's probation.

In *State v. Austin*, the Minnesota Supreme Court directed district courts to consider three factors (the *Austin* factors) before revoking probation and to make specific findings on each of these factors. 295 N.W.2d 246, 250 (Minn. 1980). A 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." *Id.* The third factor requires a district court to further 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 he is confined; or (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked." *Id.* at 251. District courts must clearly address the three *Austin* factors and not merely recite them or give "general, non-specific reasons for revocation." *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005).

"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." *Austin*, 295 N.W.2d at 249-50. But whether the district court made the findings required to revoke probation is a question of law, which an appellate court reviews de novo. *Modtland*, 695 N.W.2d at 605.

Bohnstedt challenges the district court's decision on the first and third *Austin* factors. She argues that the district court did not designate the specific condition or conditions that were violated and therefore failed to satisfy the first *Austin* factor. Bohnstedt also contends that the district court did not expressly find the third *Austin* factor. Alternatively, she argues that the court abused its discretion in considering the third factor and by concluding that the need for confinement outweighed the policies favoring probation.

As to the first factor—identifying the condition of probation violated—we see no abuse of discretion. On July 23, Bohnstedt admitted to violating her probation by failing "to successfully complete the Safe Streets program or its equivalent" and by missing at least ten chemical tests during the 30-day window when she was required to submit to

testing as a condition of her probation. At the disposition hearing, the district court found that Bohnstedt had "missed ten tests in under 30 days" and that she "restarted on [Anoka County's Project SAVE] on March 19 of 2021, . . . lasted about 12 days and started missing more tests on March 31st of 2021." These findings, which mirrored Bohnstedt's own admissions, sufficiently designated the conditions that Bohnstedt violated, satisfying the first *Austin* factor.

As to the third *Austin* factor—whether the need for confinement outweighed the policies favoring continued probation—the district court made the following findings at the August 12 disposition hearing:

> You have multiple DWIs. And it doesn't take much to see that when people get behind the wheel of a vehicle and drive while intoxicated that people get hurt. And, in fact, people get killed.
>
> I accepted your admission for violating the terms of your probation. I must then look at the *Austin* factors, which deal with confinement, correctional treatment and the seriousness of the violation in regard to probation.
>
> Ms. Bohnstedt, the only way that I know that you're not drinking is for you to test and create a valid test. When you don't do that, I have to assume that you're drinking. That's how this situation gets set up. And when you don't test on ten times or ten occasions in less than 30 days, I have to assume that you are drinking.

Then, the district court found that "confinement is necessary . . . to keep the public safe," that Bohnstedt "can, in fact, get treatment while incarcerated," and that "it would unduly depreciate the seriousness of these violations or this violation if, in fact, probation were not to be revoked."

The district court's findings show that it provided more than "general, non-specific reasons for revocation" and considered each of the three subfactors included within the third *Austin* factor. *Modtland*, 695 N.W.2d at 608. Given this analysis, we conclude that the district court appropriately considered the third *Austin* factor and did not abuse its discretion in its ultimate decision to revoke Bohnstedt's probation.

B. Other alleged errors during the August 12 disposition hearing do not require reversal of the district court's decision to revoke Bohnstedt's probation.

Bohnstedt argues that the district court committed additional errors at the August 12 disposition hearing that require reversal of the district court's decision to revoke her probation. She first contends that the district court erred by considering hearsay statements in the probation-violation report at the August 12 disposition hearing. Bohnstedt argues that this evidentiary error also had a constitutional dimension, depriving her of her Sixth Amendment right to confront witnesses. U.S. Const. amend. VI; *see Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972) (stating that parolees in parole revocation proceedings are entitled to minimum due process rights, including the right to confront witnesses, but providing additional flexibility to consider evidence that would be inadmissible at trial); *see also Gagnon*, 411 U.S. at 786 (determining that the minimum due process rights afforded to parolees in *Morrissey* also apply to probationers in probation revocation hearings).

At the August 12 hearing, the district court referenced a passage in the probation-violation report, which stated that there had been "many community calls" reporting Bohnstedt's continued use of alcohol on probation. But Bohnstedt, who was represented

by counsel, failed to object to the district court's reference. "[Appellate courts] generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Moreover, the district court specifically stated that it did not consider the "community calls" in deciding whether to revoke Bohnstedt's probation. Because Bohnstedt did not object to the district court's reference to "community calls" and the district court did not rely on this evidence, we elect not to consider Bohnstedt's argument.

Bohnstedt also argues that the district court erroneously shifted the burden of proof at the August 12 hearing from the state to her. Specifically, she takes issue with the district court's statement, "when you don't test on . . . ten occasions in less than 30 days, I have to assume that you are drinking."

Bohnstedt correctly observes that the state must prove by clear and convincing evidence that a probationer violated a condition of probation. *State v. Cottew*, 746 N.W.2d 632, 638 (Minn. 2008). But the district court's statement, which was made at the August 12 disposition hearing after Bohnstedt had previously admitted to violating conditions of her probation, did not concern proof of a violation. Rather, it was a comment that the district court made in considering whether continuing Bohnstedt's probation would jeopardize public safety.

Affirmed.