This opinion is nonprecedential except as provided by Minn.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
A21-1490
A21-1500

State of Minnesota,
Respondent,

vs.

Deondre Ramon Cush,
Appellant.

Filed June 20, 2022
Affirmed
Segal, Chief Judge

Ramsey County District Court
File Nos. 62-CR-19-8885, 62-CR-19-8896, 62-CR-19-8897, 62-CR-19-8898, 62-CR-19-8907, 62-CR-19-8913, 62-CR-19-8922, 62-CR-19-8923, 62-CR-19-8924, 62-CR-19-8925, 62-CR-19-8927, 62-CR-19-8929, 62-CR-19-8930, 62-CR-19-8932, 62-CR-19-8995, 62-CR-19-8997, 62-CR-19-8999, 62-CR-19-9001, 62-CR-19-9002, 62-CR-19-9004, 62-CR-19-9005, 62-CR-19-9006, 62-CR-19-9007, 62-CR-19-9030, 62-CR-19-9031, 62-CR-19-9036, 62-CR-19-9041, 62-CR-19-9045

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Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this consolidated appeal from the district court's revocation of appellant's probation, appellant argues that the district court abused its discretion in revoking appellant's probation because it made insufficient findings and because the record did not establish that the need for confinement outweighed the policies favoring continued probation. Appellant also argues that the district court abused its discretion in sentencing appellant as a career offender because the district court failed to make adequate findings and the record was insufficient to support the determination that the offenses were part of a pattern of criminal conduct. We affirm.

FACTS

Respondent State of Minnesota charged appellant Deondre Ramon Cush with 56 burglary offenses, each in a separate complaint. The complaints included 49 counts of second-degree burglary and 7 counts of third-degree burglary alleged to have been committed over a 12-month period between August 2018 and July 2019. A plea agreement was reached covering all 56 complaints. The terms of the agreement called for Cush to plead guilty to half of the burglary charges, including 26 counts of second-degree burglary and 2 counts of third-degree burglary. In exchange, the state agreed to dismiss the remaining 28 complaints and agreed not to charge him with any other burglaries he may have committed in that time frame. The plea agreement provided for aggravated sentences at the statutory maximum pursuant to the career-offender statute, Minn. Stat. § 609.1095, subd. 4 (2018), to be served concurrently. The sentences, however, were to be stayed with

a downward dispositional departure to ten years of probation. Cush would be required to wear a GPS monitoring device at all times for a minimum of five years and the agreement also provided that, "[i]f Cush removes or tampers with the GPS monitoring device at any time without authorization, all sentences will be executed."

As part of the plea agreement, Cush stipulated to the existence of the elements required for aggravated sentences under subdivision 4 of the career-offender statute (Minn. Stat. § 609.1095), admitting: (1) that he had seven prior felony convictions, including a third-degree burglary conviction and convictions for attempted theft of a motor vehicle and theft; and (2) that the current offenses he was pleading guilty to were "part of a pattern of criminal conduct." Finally, Cush agreed, as part of the plea, to waive his right to a trial on the facts needed to support an aggravated sentence and to "tell the judge about [those] facts."

At the plea hearing, Cush admitted to committing the 28 burglaries and provided details about each. The burglaries all occurred at businesses, mostly small restaurants or cafes. As described by Cush during the plea colloquy, he would typically throw a rock through the front window of the business and steal or try to steal whatever cash was available. Cush also made the other admissions and waivers of rights that were part of the plea agreement. The district court accepted Cush's guilty pleas and imposed sentences, to be served concurrently, at the statutory maximum of 120 months on each of the second-degree burglary convictions and 60 months on each of the third-degree burglary convictions pursuant to Minn. Stat. § 609.1095, subd. 4, of the career-offender statute. The

district court stayed execution of the sentences, imposed a jail sentence with credit for time already served in pretrial confinement, and placed Cush on probation for ten years.

The district court, along with setting out other conditions, specifically advised Cush during the hearing that he was "not to leave the State of Minnesota without probation's consent." He was also told:

> [Y]ou are to be placed on a GPS monitoring device that is effective and working at all times while you are on probation. And you [are] to comply specifically with that GPS monitoring. If you remove or tamper with the GPS monitoring at any time without authorization, that will be a violation of your probation and your sentences would be executed. If you do not do what you need to do to keep the device charged or with battery or so that it is able to track you, that will be a violation of probation.

Cush, who had been held in pretrial confinement, was released from jail on June 24, 2021. In July 2021, before he was placed on a GPS monitor, Cush traveled to Texas without notifying his probation officer or obtaining permission to travel outside the state. The probation officer filed a probation-violation report, and Cush was arrested after his return to the state. At his probation-violation hearing, Cush admitted that he left Minnesota without permission. In response to questioning by the district court, he asserted that he traveled to Texas because his mother had passed away and he had wanted to spread her ashes in Texas in accordance with her wishes.

Probation recommended that his probation be revoked, and the state agreed. The district court found that Cush had violated his probation, that the violation was intentional and without excuse, and that the need for confinement outweighed the policies favoring

probation. The court revoked Cush's probation and executed the concurrent sentences on all of his convictions.[1] Cush appeals.

DECISION

On appeal, Cush argues that the district court erred in revoking probation because the court failed to make adequate findings that the need for confinement outweighed the policies favoring probation and because the decision was motivated by improper considerations. Cush further argues that the district court erred by imposing aggravated sentences because the record did not support the determination that his offenses were part of a "pattern of criminal conduct" as required by the career-offender statute. We address each argument in turn.

I. The district court did not abuse its discretion in revoking Cush's probation.

To revoke probation, 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 need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). "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.* at 249-50. But this court reviews de novo

[1] The district court revoked probation "in each and every one of these files." Cush, however, reappeared the next day before a different district court judge in one of the cases, number 62-CR-19-8997. The probation officer advised the court that the "case wasn't cleared with those other cases," and thus required a subsequent appearance. Cush requested that his sentence in that case be executed, and the district court executed the sentence. Because Cush's probation was revoked separately in case number 8997, that appeal was filed separately (A21-1500), but was consolidated by this court with the appeal in the other 27 cases (A21-1490).

"whether a lower court has made the findings required under *Austin*." *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). "[I]n making the three *Austin* findings, courts are not charged with merely conforming to procedural requirements; rather, courts must seek to convey their substantive reasons for revocation and the evidence relied upon." *Id.* at 608.

A. The district court made the required findings under *Austin*.

Cush argues that the district court failed to make sufficient findings on the third *Austin* factor—whether the "need for confinement outweighs the policies favoring probation."[2] 295 N.W.2d at 250. In examining the third *Austin* factor, a district court "must balance the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Modtland*, 695 N.W.2d at 606-07 (quotation omitted). This involves consideration of three subfactors—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 607 (quoting *Austin*, 295 N.W.2d at 251).

Cush asserts that the district court's findings were deficient because the court merely recited one of the subfactors, stating that "if probation were not revoked in these matters, that it would unduly depreciate the seriousness of the violation"—without explaining its substantive reasons. In support of his argument, Cush relies on a number of recent

[2] Cush does not dispute the district court's findings on the first two *Austin* factors. The district court identified the condition that was violated and found that the violation was intentional and inexcusable.

nonprecedential opinions in which this court held that mere recitation of an *Austin* factor or subfactor was insufficient without further explanation.[3]

The district court's findings in this case, however, are distinguishable from the cases relied on by Cush. Here, the court went beyond mere recitation of a single factor or subfactor. The district court determined, based on Cush's answers to the court's questions, that his act of directly violating the court's instructions so quickly after being released from jail demonstrated that he was not, in fact, amenable to probation. The court stated:

> If Mr. Cush cannot even do a simple part of probation like getting probation's permission before he leaves the State of Minnesota, then the Court does not believe that Mr. Cush is able to be supervised on probation. He—there is nothing else that the Court can provide or that probation can provide for him in order to supervise him . . . .

This statement must also be viewed in conjunction with the record before the court, which included a defendant who had committed 28 burglaries in Ramsey County within a single year, who was given a chance to be on probation even though the sentencing guidelines called for a presumptive commitment to prison, and who within weeks of being released from jail left the state in direct violation of the terms of his probation.[4] In the context of

[3] *See, e.g.*, *State v. Harper*, No. A19-1320, 2020 WL 2119249, at *2-3 (Minn. App. May 4, 2020); *State v. Hill*, No. A19-0313, 2019 WL 5107465, at *4-5 (Minn. App. Oct. 14, 2019); *State v. Schwab*, No. A16-1371, 2017 WL 875260, at *2-3 (Minn. App. Mar. 6, 2017). These cases are not binding precedent but may be cited for their persuasive value. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

[4] The state referred to the failure to place Cush on the GPS monitoring device when he was released from jail as being caused by a "bureaucratic snafu."

this record, we conclude that the court's findings on the third *Austin* factor were legally sufficient.

B. The district court did not abuse its discretion in weighing the *Austin* factors.

Cush also argues that even if the district court made the required findings under *Austin*, its decision to revoke probation was an abuse of discretion. A district court's decision to revoke probation must be "based on sound judgment and not just [its] will." *Austin*, 295 N.W.2d at 251. "The 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.* (quotations omitted). Here, Cush asserts that this revocation was an abuse of discretion because it (1) was based on a "single technical violation" and (2) was an "impermissible exercise of the court's will."

Cush argues that his probation was revoked based on a "single technical violation." But *Austin* does not universally prohibit probation revocation in response to a technical violation. Instead, *Austin* states that a district court may not revoke probation as a "*reflexive* reaction" to a technical violation. *Id.* (emphasis added) (quotation omitted); *see also State v. Osborne*, 732 N.W.2d 249, 254-55 (Minn. 2007) (affirming probation revocation due to a "minor" technical violation where the revocation was supported by the record and was not reflexive).

Moreover, while the district court referred to the violation as being "technical," the transcript suggests that the district court viewed Cush's violation—traveling out of state

for multiple days without permission within a few weeks of being released on probation—as a substantial violation.[5] The district court explained that Cush's failure to comply with probation requirements for even "the most minimal period" led the court to believe that "there is nothing else that the Court can provide or that probation can provide for him in order to supervise him."[6] The district court thus considered and made a determination whether Cush's "behavior demonstrates that he . . . cannot be counted on to avoid antisocial activity." *Austin*, 295 N.W.2d at 251 (quotation omitted). We thus conclude that the district court's decision to revoke probation was not just a reflexive reaction to a technical violation.

Cush next argues that the district court impermissibly exercised its will because its decision was based on two issues personal to the district court judge: "a perceived affront to her authority, and her reputation as a judge who will not abide even technical violations." Cush points to two statements by the district court that he describes as "concerning." First, while asking Cush about the probation violation, the district court told him, "you were supposed to be doing what I ordered you to do and you didn't. You basically, you know, flipped me the bird." Second, the district court stated after announcing its decision:

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[5] The district court also stated, while discussing the first *Austin* factor, that it "ordered [Cush] to be on a very short leash." *See Osborne*, 732 N.W.2d at 254 (noting that persons with more severe offenses or a longer criminal history may be entitled to "less judicial forbearance" (quotation omitted)).

[6] We also note that Cush was placed on express notice both by the district court at the plea hearing and in his plea agreement addendum that any issue related to the GPS monitoring, even a failure to keep the GPS battery charged, would be a violation of his probation. Thus, while he was not yet placed on the GPS monitoring device, he was on notice that probation's knowledge of his location at all times was a critical component of his probation.

> Mr. Cush, I am sorry. I think the State of Minnesota and this Court gave you every opportunity to show us that you could be productive on probation supervision. And the fact that you tried to—and I know you didn't say this, but I see it as you trying to pull a fast one and to see if you could get away with leaving. And I just do not think that it sends the correct message to other people that really want to be on probation if this Court does not execute the sentences on all of these files.

Cush argues that these statements establish that the district court based its decision on issues beyond the *Austin* factors. We are not persuaded.

To support his argument, Cush relies on *State v. O'Brien*, a nonprecedential decision where we reversed the district court's probation revocation in a driving-while-impaired case because the district court stated, among other things, that "I just can't take a chance [with appellant's excessive drinking]. I don't want my face in the front page of the news, because that's what people complain about." No. A21-1266, 2022 WL 351227, at *3-4 (Minn. App. Feb. 7, 2022). We reasoned that these comments indicated that the district court's decision was "based at least in part on considerations personal to the district court judge"—namely, fear of public criticism. *Id.* at *4.

O'Brien is, however, distinguishable. Unlike *O'Brien*, the district court in this case did not explicitly invoke public opinion or concern over the judge's reputation. When considered in the context of the full record and the rest of the transcript, the court's comments about "send[ing] the correct message" and Cush "flip[ing] . . . the bird" appear to simply emphasize the seriousness of the violation. And as noted above, the seriousness of the violation is a valid consideration—whether the seriousness of the violation would be

depreciated if probation were not revoked. *See Austin*, 295 N.W.2d at 251. We thus discern no abuse of discretion in the district court's decision to revoke probation.

II. The district court did not abuse its discretion by sentencing Cush to an upward durational departure based on a pattern of criminal conduct.

In addition to challenging his probation revocation, Cush challenges the district court's decision to impose an upward durational departure.[7] This court "review[s] a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion. A district court abuses its discretion when its reasons for departure are legally impermissible and insufficient evidence in the record justifies the departure." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (citations omitted). Here, Cush argues both that the district court did not give legally sufficient reasons for imposing an upward departure and that the record does not support the departure.

The aggravated sentence in this case was based on Minnesota's career-offender statute. That statute permits the district court to impose an upward durational departure "up to the statutory maximum sentence if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed as part of a pattern of criminal conduct." Minn. Stat. § 609.1095, subd. 4. Cush admitted to having seven qualifying prior felonies.[8] He also stipulated that the 28

[7] A defendant may challenge an upward durational departure for the first time after probation is revoked. *State v. Fields*, 416 N.W.2d 734, 736 (Minn. 1987).

[8] To qualify under the statute, the five prior convictions must be sequential (meaning that each offense was separated by a conviction). Minn. Stat. § 609.1095, subd. 1(c) (2018); *State v. Huston*, 616 N.W.2d 282, 284 (Minn. App. 2000). Cush does not dispute that his prior felonies were sequential.

burglaries he pleaded guilty to were "part of a pattern of criminal conduct," agreed to the imposition of statutory maximum sentences in the plea agreement, and waived his right to a trial on the aggravating factors. The district court, in accepting the plea agreement, found that "there was a sufficient basis" for the durational departure because Cush "did have five or more prior felonies and . . . these offenses, based on his admission, are completed as part of a pattern of criminal conduct."

Cush argues that the district court did not give legally sufficient reasons for imposing the upward departure because the court relied only on Cush's stipulation to identify a pattern of criminal conduct. Cush, however, cites no cases that impose a requirement that a district court make such detailed findings on that issue. In fact, the case relied on by Cush, *Vickla v. State*, expressly provides that the career-offender statute "does not require any additional findings," beyond a determination that the defendant had five or more prior felony convictions and the current offenses are "part of a pattern of criminal conduct," before imposing an aggravated sentence. 793 N.W.2d 265, 269 (Minn. 2011) (quotation omitted). The district court is only required to "provide written reasons that specify that the requirements of the statute have been met." *Id.* (quotation omitted). The district court satisfied this obligation here.

Cush further argues that the record is insufficient to support the district court's finding of a pattern of criminal conduct because "there are no facts in the record other than the fact of prior convictions." Three of the seven prior felony convictions, however, involved a burglary and two theft-related offenses, including third-degree burglary, theft, and attempted theft of a motor vehicle. Cush's current offenses, as described by Cush in

his plea colloquy, were burglary offenses that also involved theft or attempted theft. We thus conclude that the record is adequate to support the determination that the offenses were part of a pattern of criminal conduct. *See, e.g.*, *State v. Gorman*, 546 N.W.2d 5, 9 (Minn. 1996) (concluding "that a pattern of criminal conduct [was] clearly established" when the defendant's criminal history involved convictions for third-, fourth-, and fifth-degree assault and disorderly conduct and the current offense was for unintentional second-degree murder, even though a number of his past felony convictions were for the unrelated offenses of burglary and possession of stolen property). The district court therefore did not abuse its discretion by imposing an upward durational departure based on the career-offender statute.

Affirmed.