

*This opinion is nonprecedential except as provided by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
A22-0479**

State of Minnesota,
Respondent,

vs.

Walter John Wessel,
Appellant.

**Filed November 21, 2022
Affirmed
Cleary, Judge***

Stearns County District Court
File No. 73-CR-15-7417

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

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney,
St. Cloud, Minnesota (for respondent)

Mark D. Kelly, Law Offices of Mark D. Kelly, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Frisch, Judge; and Cleary, Judge.

NONPRECEDENTIAL OPINION

CLEARY, Judge

Appellant argues that the district court abused its discretion by revoking his probation because the state failed to prove that his most recent probation violation was

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

intentional or inexcusable and that the need for confinement outweighs the policies favoring probation. We affirm.

FACTS

In 2017, respondent State of Minnesota charged appellant Walter John Wessel by amended complaint with six felony counts of violating a domestic abuse no-contact order. As part of a plea deal, which included the dismissal of charges including kidnapping and witness tampering, Wessel pleaded guilty to the six felony counts of violating a domestic abuse no-contact order.

The district court imposed sentences on the six counts totaling 90 months and five days of imprisonment but stayed execution for five years. The stayed execution constituted a dispositional departure. The district court set forth probation conditions, including a requirement that Wessel refrain from using controlled substances and submit to random drug testing.

In June 2017, probation filed a violation report alleging that Wessel violated the terms of his probation by failing to submit to random drug testing. Wessel admitted to the violation. The district court imposed a sanction of 15 days in jail and reinstated Wessel on probation.

In October 2019, probation filed a second violation report, alleging that Wessel violated the terms of his probation by using methamphetamine. Wessel admitted to the violation. The district court imposed a sanction of 30 days in jail and reinstated Wessel on probation.

In May 2020, probation filed a third violation report, alleging that Wessel violated the terms of his probation by again using methamphetamine. The allegation was ultimately proven.¹ The district court imposed a sanction of two days in jail and reinstated Wessel on probation.

In October 2021, probation filed a fourth violation report, alleging that Wessel violated the terms of his probation by using methamphetamine. Wessel admitted to the violation. In January 2022, probation filed an addendum to the violation report, alleging that Wessel had been released to a treatment program on December 21, 2021, and nine days later he was “discharged unsuccessfully” for engaging in “violence towards another client in the program.”

In January 2022, the district court held a probation disposition hearing and heard testimony from Wessel’s probation agent, who recommended revocation. The agent testified that revocation was appropriate because Wessel received a dispositional departure; it was Wessel’s fourth formal probation violation; when using methamphetamine, Wessel could be “erratic, unpredictable, and violent”; and Wessel had a significant criminal history, which included “34 criminal offenses,” including violence-related offenses. The agent testified that Wessel’s criminal behavior “centers around methamphetamine use.”

¹ Wessel initially denied the allegation, and the record is unclear as to whether the violation was proven. At oral argument before this court, Wessel’s attorney conceded that Wessel admitted to the violation. This is consistent with the record, which shows that the district court imposed a jail sanction. We therefore accept that the violation was proven. *See Custom Farm Servs., Inc. v. Collins*, 238 N.W.2d 608, 609 (Minn. 1976) (“An appellant has the burden of providing an adequate record for appeal.”).

The agent also discussed the violation addendum, which was based on an allegation that Wessel “assaulted another client that was a resident of the program.”

The district court ultimately concluded that Wessel’s methamphetamine use was an intentional and inexcusable violation of the terms of his probation, the “need for confinement outweigh[ed] the policy [favoring] probation,” and it “would unduly depreciate the seriousness of the violation if the probation was not revoked.” The district court revoked Wessel’s probation and ordered that his sentences be executed. This appeal followed.

DECISION

Wessel challenges the revocation of his probation. He argues that the state failed to prove that his most recent violation was intentional or inexcusable and that the need for confinement outweighs the policies favoring probation.

“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). 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).

Before a district court revokes a defendant’s probation, it 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.” *Austin*, 295 N.W.2d at 250.

On the second *Austin* factor, Wessel admitted to violating the terms of his probation by using methamphetamine, but he contends that his violation was merely a “technical” violation and therefore insufficient.

A district court may revoke probation if the probationer violates any of the probation conditions. Minn. Stat. § 609.14, subd. 1(a) (2020). But a district court’s decision must not be “a reflexive reaction to an accumulation of technical violations.”² *Austin*, 295 N.W.2d at 251 (quotation omitted). Rather, in revoking probation, a district court must rely on behavior that demonstrates that the probationer “cannot be counted on to avoid antisocial activity.” *Id.* (quotations omitted).

Here, the district court held a probation disposition hearing, received testimony on the issue of revocation, and thoroughly considered the issue. Given the multiple drug-related probation violations, Wessel’s admission to the most recent violation, Wessel’s significant criminal history, the evidence that Wessel’s criminal behavior is rooted in his drug use, and the evidence that Wessel has failed to take advantage of treatment opportunities, we cannot say that the district court acted impulsively or reflexively in finding that Wessel’s violation was intentional or inexcusable. *See State v. Osborne*, 732 N.W.2d 249, 255 (Minn. 2007) (concluding that the district court did not act reflexively where it “took pains to consider all relevant facts and details”). The district court did not abuse its discretion.

² A technical violation is defined by statute as “any violation of a court order of probation, except an allegation of a subsequent criminal act that is alleged in a formal complaint, citation, or petition.” Minn. Stat. § 244.196, subd. 6 (2020).

On the third *Austin* factor, Wessel challenges the district court's determination that the need for confinement outweighs the policies favoring probation. He argues that imprisonment "is not necessary to protect the public from further criminal activity" and treatment would be more effective outside of a prison setting.

Once a district court finds an intentional or inexcusable violation, it must "determine whether the need for confinement outweighs the policies favoring probation." *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). In doing so, the district court "must balance the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Id.* at 606-07 (quotation omitted). The district court must bear in mind that "the purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Id.* at 606 (quotation omitted).

In deciding whether the need for confinement outweighs the policies favoring probation, a district court should consider whether confinement is needed to protect the public from criminal activity, or whether "the offender is in need of correctional treatment which can most effectively be provided if he is confined," or whether "it would unduly depreciate the seriousness of the violation if probation were not revoked." *Id.* at 607 (quotation omitted).

Here, the district court determined that the need for confinement outweighed the policies favoring probation and that not revoking probation would unduly depreciate the seriousness of Wessel's violation. The record supports those determinations.

The record shows that Wessel has continued to violate the terms of his probation by using methamphetamine and failed to take advantage of treatment opportunities, despite prior, less severe, sanctions. As explained by the district court:

So clearly you've been made aware of the terms and conditions of abstention. You've been afforded the opportunity multiple times for treatment. Most recent was just in December of this year. You were to go to jail but I allowed you to be released to treatment. I said if you're not in treatment you need to be in jail, and you didn't even succeed there. You were there about a week.

The record also shows that Wessel poses a danger to the public when he uses methamphetamine. Wessel's probation agent testified that he can be "erratic, unpredictable, and violent" and his criminal behavior "centers around methamphetamine use." The district court considered alternatives to incarceration and reasonably concluded that revocation was necessary. In reaching that conclusion, the district court properly considered the fact that Wessel had received a dispositional departure at the outset. *See State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015) (stating that the district court properly considered a "grant of a downward dispositional departure when deciding whether to revoke probation"), *aff'd*, 883 N.W.2d 790 (Minn. 2016).

While Wessel argues that the district court erred because his imprisonment is not necessary to protect the public and treatment would be more effective outside of prison, the record suggests otherwise. Moreover, a district court need only rely on the existence of one of the policy bases discussed in *Modtland* to support a determination that the need for confinement outweighs the policies favoring probation. *See Modtland*, 695 N.W.2d at 607 (using the disjunctive "or" in discussing the bases for revocation).

Here, the district court determined that it would unduly depreciate the seriousness of the violation if it did not revoke Wessel's probation. The record supports that determination. The district court did not abuse its discretion.

Affirmed.