

*This opinion is nonprecedential except as provided by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
A23-0855**

State of Minnesota,
Respondent,

vs.

Orlando Jose Abrego,
Appellant.

**Filed February 5, 2024
Affirmed
Larkin, Judge**

Anoka County District Court
File No. 02-CR-21-6747

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

Brad Johnson, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney,
Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Larkin, Judge; and Ede, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges the revocation of his probation, arguing that the district court failed to adequately consider the necessary factors, applied an incorrect standard, and inappropriately revoked his probation based solely on alcohol consumption. We affirm.

FACTS

On November 15, 2021, law enforcement responded to a call alleging that the caller's father, appellant Orlando Jose Abrego, had come home drunk and had a firearm in his possession. The caller reported that Abrego was prohibited from possessing firearms.¹ Law enforcement obtained and executed a search warrant at Abrego's home and found a handgun underneath a mattress on the side of a bed where Abrego was sleeping.

Respondent State of Minnesota charged Abrego with possession of firearm or ammunition by an ineligible person. Abrego pleaded guilty to the offense.

In March 2022, Abrego participated in a pre-sentence-investigation (PSI). The resulting PSI indicated that the presumptive sentence for the offense was a 60-month prison commitment. The PSI also reported that Abrego had four prior felony convictions, dating back to 2014, including felony driving while impaired (DWI), felony domestic assault, fourth-degree assault, and felony DWI test refusal. Abrego admitted that he had been "drinking to intoxication several times a week" following a "traumatic event" in which his daughter's best friend was shot near his home while celebrating his daughter's birthday. Abrego tried to save the child, but she ultimately died. Abrego reported that he thought he needed a gun to protect his family from violence.

The PSI noted that at the time of the offense, Abrego had been released from prison and was under supervision for his most recent felony conviction. The PSI stated that Abrego "has demonstrated an unwillingness to address his alcohol use in the community,

¹ Abrego is prohibited from possessing firearms because he has a prior felony conviction for domestic assault.

despite being afforded several opportunities to do so” and his “continued non-compliance on community supervision demonstrates an ongoing risk to public safety.” The PSI further stated that Abrego therefore did “not appear to be a viable candidate for probation supervision.”

Abrego moved the district court for a downward dispositional sentencing departure. He argued that substantial and compelling circumstances warranted a departure because he was “particularly amenable to probation.” He acknowledged having a “long history of substance abuse and mental health disorders,” “a great amount of trauma in his life,” and that he “uses alcohol and other chemicals as self-medication for the pain he continues to experience.” Abrego argued that he would best be served by intensive chemical-dependency treatment through community corrections. Abrego asked for “one last opportunity to pursue treatment outside of confinement.”

Abrego was not sentenced until September 21, 2022. Abrego completed an updated PSI prior to sentencing. The updated PSI noted that Abrego had successfully completed intensive outpatient chemical-dependency treatment in May 2022 and that he was attending weekly outpatient programming. Thus, the district court granted Abrego’s request for a downward dispositional departure and placed him on probation for five years. Abrego’s probationary conditions prohibited him from using alcohol; from engaging in assaultive, violent, disorderly, or threatening behavior; and from violating any state or federal criminal laws.

On February 22, 2023, the district court issued a warrant for Abrego’s arrest based on an allegation that he violated all three of those conditions. Specifically, a

probation-violation report indicated that Abrego was arrested for fourth-degree assault of a police officer and gross-misdemeanor obstruction of legal process when officers responded to a call to Abrego's home from his minor daughter. One of the responding officers reported "smell[ing] a strong odor of alcohol from [Abrego]."

At his probation-revocation hearing, Abrego admitted that he engaged in disorderly conduct when the police arrived at his home, that he was arrested, and that he had used alcohol. A representative from community corrections recommended that the district court revoke Abrego's probation and send him to prison, noting a "pattern [of] multiple [police] calls to [Abrego's] house" and that he had been "found guilty of obstruction in the past in this county." The community corrections representative argued: "We know that when [Abrego] drinks alcohol, he makes terrible choices and he continues to put the public safety at risk."

The state also recommended a prison commitment, arguing:

The concern . . . isn't that the defendant just continues to consume alcohol. It's the fact that when this particular defendant consumes alcohol, it raises concern in the community. That results in calls to law enforcement, has resulted in a firearm that he wasn't to possess, and family members who were concerned enough to call. . . [T]his is a person who when he uses alcohol despite the multiple opportunities to get help for that and orders not to consume alcohol presents a risk to others. That's ultimately the concern that the [s]tate sees here that justifies the commitment rather than ongoing probation. It is these types of violations with this offender that present risk to others.

The district court addressed Abrego, and noted that at his sentencing hearing, Abrego told the district court that he was "turning [his] life around." The district court

observed that Abrego made the same assertion during the probation-violation proceeding.

The district court revoked Abrego's probation, explaining:

[T]his[c]ourt finds by clear and convincing evidence that you violated the conditions of probation. In addition, I find that the need for confinement outweighs the policy favoring probation. Confinement is appropriate and necessary for public protection. The need to revoke the probation is in order to show the severity, and the seriousness of the violation depreciates if not confined. Therefore, it's the sentence of this [c]ourt that, as punishment, you shall be committed to the Commissioner of Corrections

Abrego appeals.

DECISION

I.

“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 do three things: (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. “[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.” *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). We review de novo whether a district court made the required *Austin* findings. *Id.* at 605.

Abrego’s challenge is limited to the third *Austin* factor: “whether the need for confinement outweighs the policies favoring probation.” *Id.* at 606. In making that determination, 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). Additionally, a district court should consider whether “confinement is necessary to protect the public from further criminal activity by the offender,” 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).

Abrego contends that the district court erred in revoking his probation because it “merely recite[d] the third *Austin* factor without articulating adequate justification” and because it presented its findings “in summary fashion, without reference to any factual findings.”

The district court’s finding that “[c]onfinement is appropriate and necessary for public protection” indicates that the district court was persuaded by the recommendations and remarks of the community-corrections representative and the prosecutor. Those remarks provided adequate justification for the district court’s third *Austin* finding. For example, the community-corrections representative informed the district court that “[w]e

know that when [Abrego] drinks alcohol, he makes terrible choices and he continues to put the public safety at risk.” And the prosecutor argued that “when this particular defendant consumes alcohol, it raises concern in the community[,] . . . result[s] in calls to law enforcement, has resulted in a firearm that he wasn’t [supposed] to possess, and [results in] family members who were concerned enough to call.” The prosecutor stated that Abrego’s continued use of alcohol—despite his participation in treatment and orders to abstain from drinking by the district court—presents a risk to others.

In addition, the district court noted that Abrego’s underlying sentence constituted a dispositional departure. A district court may consider a grant of a 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). And “[l]ess judicial tolerance is urged for offenders [violating conditions of a stayed sentence] who were convicted of a more severe offense or who had a longer criminal history.” Minn. Sent’g Guidelines 3.B (2022).

In sum, when considered in the context of the remarks in support of revocation, the district court adequately conveyed its substantive reasons for revocation and the circumstances on which it relied, and it thereby satisfied the requirements of *Austin*. *See Modtland*, 695 N.W.2d at 608 (“[I]n making the three *Austin* findings, . . . courts must seek to convey their substantive reasons for revocation and the evidence relied upon.”).

II.

Abrego also contends that the district court erred “when it expressly stated that [Abrego] bore the burden of providing substantial and compelling reasons to stay on probation.” Abrego refers to the following remarks by the district court as support:

I mean, that’s the problem I have is a departure is just that: A reason to give you an opportunity to change the ways you had to get to that point. I remember you talking about, you know, what brought you initially – the issue with your daughter and the birthday party and all of that and, you know, the area that you were living in and all the problems that you had in that area – and yet, you know, if I’m counting it correctly, you’ve had at least two dirty UAs, and the call that came in on this that brought the law enforcement there was, you were drinking and you had a firearm around you. I don’t know if it’s right or wrong, but someone in your family called the police and said, you know, I got a problem here.

And I don’t know what changes. *And I have to have substantial and compelling reasons not to put you in prison.* And I’ll tell you, you know, unfortunately, losing your job is not one of them. I have to protect public safety. I’ve got all these things I’ve got to look at, and that’s why when I depart with someone, you know, and I got the [s]tate saying I shouldn’t, I make it abundantly clear that, don’t come back in front of me because it makes it a lot harder for an argument for me to keep you out of prison.

(Emphasis added.)

Contrary to Abrego’s assertion in his brief to this court, those remarks do not indicate that the district court shifted the burden to Abrego to “essentially demonstrate that he would still be eligible for a departure in order to avoid revocation.” The district court did not say that Abrego had to prove anything, much less prove substantial and compelling circumstances justifying continued probation. To the extent that the district court erred by referring to “substantial and compelling reasons” to continue probation, the error is

harmless and must be ignored because the record shows that the district court ultimately applied the correct standard: “this [c]ourt finds by clear and convincing evidence that you violated the conditions of probation” and “the need for confinement outweighs the policy favoring probation.” *See* Minn. R. Crim. P. 31.01 (“Any error that does not affect substantial rights must be disregarded.”); *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998) (stating that an error affects substantial rights if “the error was prejudicial and affected the outcome of the case”).

III.

Finally, Abrego contends that it was “inappropriate” for the district court to revoke probation because of recent legislative changes limiting “the circumstances where the court is authorized to revoke probation in response to a violation.” Specifically, Abrego argues that a recent statutory change “expressly prohibit[s] revocation in response to a first time use of alcohol on probation.” *See* 2023 Minn. Laws ch. 52, art. 17 § 33, at 894 (amending Minn. Stat. § 609.14 (2022)). He concedes, however, that “neither retroactivity nor application of the amelioration doctrine compel this [c]ourt to enforce this new legislation in this appeal.” We therefore do not apply the new law.

Abrego also argues that the district court erred in exercising its discretion because it “did not make any findings weighing the rehabilitative options against its purely punitive revocation.” Abrego asserts that the district court “repeatedly and exclusively identified [Abrego’s] drinking violation as the basis for revocation.”

But in revoking Abrego’s probation, the district court relied both on his alcohol consumption and on his ensuing disorderly conduct and arrest when the police were called

to his home in response to a call from his daughter. Abrego's attempt to portray his probation revocation as the result of a reflexive reaction to a technical violation—that is, a single use of alcohol—ignores a record showing that Abrego has a history of drinking and then engaging in criminal behavior that endangers others. In fact, Abrego's attorney argued that “if we get alcohol taken care of here, he's not going to be putting himself in these situations anymore and putting any problems with public safety risk as a concern here.”

In sum, it is clear to us that Abrego was not sent to prison for a single, technical alcohol-use violation. He was sent to prison because his drinking had repeatedly led to criminal conduct that endangered others and he continued to drink under similar circumstances, despite the opportunity for community-based treatment. These circumstances do not show a commitment to rehabilitation in the community. *See Austin*, 295 N.W.2d at 251 (“[Austin] has been offered treatment but has failed to take advantage of the opportunity or to show a commitment to rehabilitation so it was not unreasonable to conclude that treatment had failed.”). The district court did not abuse its discretion in revoking Abrego's probation.

Affirmed.