**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-1217**

State of Minnesota,
Respondent,

vs.

Anthony W. Carman,
Appellant.

**Filed July 1, 2008**
**Affirmed**
**Kalitowski, Judge**

Olmsted County District Court
File No. K8-01-3989

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mark A. Ostrem, Olmsted County Attorney, David F. McLeod, Assistant County Attorney, Government Center, 151 Fourth Street Southeast, Rochester, MN 55904 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, James R. Peterson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Crippen, Judge.[*]

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

## U N P U B L I S H E D  O P I N I O N

**KALITOWSKI,** Judge

On appeal from the order revoking his probation, appellant Anthony W. Carman argues that the district court abused its discretion by finding that the need for confinement outweighed the policies favoring probation. Appellant also contends that the district court erred as a matter of law by not explicitly ruling on appellant's motion to modify his sentence. We affirm.

## D E C I S I O N

### I.

Absent a clear abuse of discretion, we will not reverse a district court's determination that there is sufficient evidence to revoke probation. *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004). But whether a district court has made the required findings to revoke probation is a question of law, which we review de novo. *See State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005).

Before revoking a defendant's probation, a district court must make three findings:

> First, courts must designate the specific condition or conditions of probation the defendant has violated. Second, courts must find the violation was inexcusable or intentional. Once a court has made findings that a violation has occurred and has found that the violation was either intentional or inexcusable, the court must proceed to the third *Austin* factor and determine whether the need for confinement outweighs the policies favoring probation.

*Id.* (citing *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980)). The district court must make these findings on the record and "should not assume that [it] ha[s] satisfied *Austin*

by reciting the three factors and offering general, non-specific reasons for revocation." *Id.* at 608. To ensure that the district court "create[s] [a] thorough, fact-specific record[] setting forth [its] reasons for revoking probation," it should explain its substantive reasons for revocation and the evidence relied upon in reaching that determination. *Id.* "[I]t is not the role of appellate courts to scour the record to determine if sufficient evidence exists to support the district court's revocation." *Id.* Accordingly, we will reverse a district court's revocation of probation in the absence of the requisite findings, even if revocation is supported by sufficient evidence. *See id.* at 606 (abolishing the sufficient-evidence exception to the requirement that district courts make the three *Austin* findings).

Here, the district court addressed the procedural requirements of *Austin* and *Modtland* by finding that all three *Austin* factors were met and concluding that, based on the evidence, appellant was not amenable to probation. Appellant admitted violating the terms of his probation and he does not challenge the sufficiency of the district court's findings in support of the first two *Austin* factors. But even after finding that the first two *Austin* factors are met, a district court must carefully evaluate whether confinement is required and must not reflexively revoke probation merely because a violation has been established. *See Modtland*, 695 N.W.2d at 606.

Here, following a remand from this court, the district court made the following findings articulating the specific evidence it relied on in determining that the need for confinement outweighed the policies favoring probation: (1) appellant had been arrogant and manipulative from the beginning of his case; (2) appellant failed to appreciate the

seriousness of his offenses and the gravity of the consequences of failure on probation; (3) appellant failed to appreciate how his drug habits and drug trafficking had harmed his victims; (4) appellant admitted to using cocaine and alcohol, associating with known drug users, and entering an alcohol-selling establishment in violation of the terms of his probation; (5) appellant unsuccessfully participated in two different substance-abuse treatment programs and attended Narcotics Anonymous and Alcoholics Anonymous as an adolescent before committing the underlying offenses; (6) appellant tested positive for, and admitted using, marijuana at the time of his presentence investigation; (7) appellant characterized his marijuana use as "social occasional use" that was not problematic at the time of the presentence investigation; (8) appellant's fiancée and mother were not concerned about appellant's marijuana use; (9) the chemical-dependency assessment appellant completed as part of the presentence investigation recommended that he complete an intensive outpatient chemical-dependency treatment program and attend either Narcotics Anonymous or Alcoholics Anonymous two to three times per week; (10) there was no evidence in the record that appellant attended either Narcotics Anonymous or Alcoholics Anonymous during this period of time; and (11) according to both the author of appellant's presentence investigation report and appellant's probation officer, appellant was not motivated to participate in chemical-dependency treatment unless doing so would lessen his jail time.

Appellant cites no legal authority in support of his assertion that, on remand, the district court abused its discretion by refusing to reopen the record for the submission of new evidence. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (explaining that

failure to cite to legal authority renders a claim waived). Moreover, we have recognized that, when a case returns to the district court on remand without specific directions as to how the district court should proceed, it has discretion to proceed in any manner that is consistent with the remand order. *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988). Here, this court's November 21, 2006 order explicitly stated that the decision of whether to reopen the record on remand was within the district court's discretion. *See State v. Carman*, 2006 WL 3361951 (Minn. App. Nov. 21, 2006). On remand, the district court heard arguments by both parties regarding the appropriateness of reopening the record and determined that it was unnecessary to do so. We conclude that the district court's refusal to reopen the record was within its discretion.

The record indicates that the district court made legally sufficient findings based on the evidence it relied on in determining that the need for confinement outweighed the policies favoring probation as required by *Modtland*. Thus, the remainder of our review is limited to determining whether the district court abused its discretion in deciding to revoke appellant's probation based on that evidence.

When assessing whether confinement is appropriate, courts should consider: (1) whether confinement is necessary to protect the public from further criminal activity; (2) whether correctional treatment of the defendant can best be administered if he or she is confined; and (3) whether it would unduly depreciate the seriousness of the violation if probation was not revoked. *Austin*, 295 N.W.2d at 251 (citation omitted). In addition, when assessing *Austin*'s third factor, district courts must "bear in mind that policy considerations may require that probation not be revoked even though the facts may

allow it." *Modtland*, 695 N.W.2d at 606 (quotation omitted). In short, revocation should be a last resort, used only when treatment has failed and the offender cannot be counted on to avoid antisocial activity. *Id.*; *see also Austin*, 295 N.W.2d at 251.

It is evident from the district court's findings that its decision was not "reflexive." *See Modtland*, 695 N.W.2d at 606. In concluding that appellant was not amenable to further probation, the district court noted that, in light of the prior warnings given to appellant, returning appellant to probation would unduly depreciate the seriousness of his probation violations. The district court made several findings of fact pertinent to this determination, including: its reiteration of the explicit warning given to appellant regarding the consequences of violating probation on May 29, 2003; documentation from various corrections staff members showing that appellant had been arrogant and manipulative from the very beginning of this matter; the presentencing report's conclusion that appellant failed to appreciate the seriousness of the offenses in which he was involved and how his drug habits and drug trafficking had harmed his victims; and the number and severity of appellant's probation violations.

The district court also found that several policy considerations supported revocation here. Because of appellant's failure to seek out chemical-dependency treatment, Narcotics Anonymous, or Alcoholics Anonymous following his release, his mother's and fiancée's enabling attitudes toward his drug use, his lack of success following his participation in two drug treatment programs during his adolescence, and his demonstrated lack of motivation to participate in chemical-dependency treatment unless he would receive reduced jail time for doing so, the district court reasoned that

intensive inpatient substance-abuse treatment, which would presumably be provided to appellant while he is in custody, was a more appropriate way to treat his continuing substance-abuse problem. *See Austin*, 295 N.W.2d at 251. Although appellant argues that he made repeated efforts to obtain chemical-dependency treatment but was never given the opportunity to participate, his probation officer testified that appellant expressed no interest in receiving chemical-dependency treatment when he was released from jail. Rather, appellant expressed interest in seeking treatment only after he faced revocation of his probation.

In addition, although the record indicates that appellant was scheduled to start a pretreatment program called Jumpstart on March 3, 2004, this program was recommended by his probation officer due to appellant's persistence that he did not need chemical-dependency treatment. The probation officer's testimony regarding appellant's lack of motivation to seek treatment is consistent with the sentiment expressed by appellant during the presentence investigation when he stated that he was only interested in drug treatment if doing so would lessen his jail time. And because, based on its findings, the district court found the probation officer's testimony to be more credible than appellant's testimony on this issue, we will defer to the district court's conclusion that appellant did not make any efforts to avail himself of chemical-dependency treatment following his release from jail. *See State v. Losh*, 694 N.W.2d 98, 102 (Minn. App. 2005), *aff'd*, 721 N.W.2d 886 (Minn. 2006), *cert. denied*, 127 S. Ct. 2437 (2007). (deferring to the district court's witness credibility determinations at a probation-revocation hearing).

Furthermore, in light of the gravity of appellant's criminal history, the district court determined that appellant was entitled to less judicial forbearance. Appellant pleaded guilty to six counts of kidnapping (a level VI felony) and one count of first-degree burglary (a level VII felony). Due to the severity of appellant's offenses, we cannot say it was an abuse of discretion for the district court to exhibit minimal tolerance for appellant's probation violations. *See Austin*, 295 N.W.2d at 251.

In sum, because the record includes numerous findings indicating the district court's "substantive reasons for revocation and the evidence relied upon," all of which are supported by the record and consistent with the *Austin* factors listed above, we conclude that the district court was within its discretion to find that the need for appellant's confinement outweighed the policies favoring probation. *See id*. at 251.

**II.**

Appellant argues that the district court erred as a matter of law by not explicitly ruling on his motion to modify his sentence. We disagree.

Pursuant to Minn. R. Crim. P. 27.03, subd. 9, a court may at any time "correct a sentence not authorized by law." On appeal from the district court's denial of a rule 27.03 motion, we "will not reevaluate a sentence if the [district] court's discretion has been properly exercised and the sentence is authorized by law." *State v. Stutelberg*, 435 N.W.2d 632, 633-34 (Minn. App. 1989) (quoting *Fritz v. State*, 284 N.W.2d 377, 386 (Minn. 1979)).

Here, although the district court did not explicitly rule on appellant's motion to modify his sentence, it made sufficient findings indicating its denial of appellant's claim.

Finding number 24 recognized that appellant "alternatively moved the [c]ourt to modify his sentence pursuant to Minn. R. Crim. P. 27.03(9) claiming that his co-defendants received shorter prison sentences." And in finding number 25, the district court conveyed its denial of appellant's claim, concluding that "[appellant's] position is misplaced" because he voluntarily and knowingly pleaded guilty and was consequently granted a downward departure from the presumptive guideline sentence that allowed him to remain in the community, whereas his co-defendants pleaded guilty and were sentenced to prison. And the district court's reaffirmation of the previously imposed 180-month prison sentence further expressed its denial of appellant's motion to modify.

Moreover, because the sentence imposed on appellant was lawful and supported by appropriate findings, we reject appellant's argument that modification of his sentence is required by Minn. R. Crim. P. 27.03(9). In *State v. Fields*, the sentence successfully challenged by the defendant at his probation-revocation hearing was an upward durational departure unsupported by appropriate findings. 416 N.W.2d 734, 735 (Minn. 1987). Here, the 180-month prison sentence imposed on appellant was lawful, as it was within the presumptive duration set forth in the sentencing guidelines. Furthermore, the record shows that appellant knowingly, voluntarily, and with the assistance of competent counsel, entered into the plea agreement whereby he received a sentence that was longer in duration, but included the privilege of being on probation. *See Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998) (stating that a manifest injustice occurs if a guilty plea is not accurately, voluntarily, and intelligently entered).

Because the district court made sufficient findings indicating its denial of appellant's claim and because the sentence received by appellant was lawful, we conclude that the district court did not err.

**Affirmed.**