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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

No. A-1-CA-34471

5 **JEFFREY MANNING,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

8 **Charles W. Brown, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 Jacqueline R. Medina, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

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15 Mary Barket, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **FRENCH, Judge.**

1 {1} Defendant Jeffrey Manning appeals three rulings of the district court: (1) the
2 denial of his motion to withdraw his guilty plea before district court Judge Charles W.
3 Brown; (2) Judge Angela J. Jewell's determination that Defendant violated his
4 probation; and (3) the decision of Judge Jewell to sentence him as a habitual offender.
5 We affirm the district court's finding of a probation violation and habitual offender
6 sentencing. Treating Defendant's motion to withdraw his appeal as a habeas corpus
7 petition, we transfer this part of the appeal to our Supreme Court.

8 **DISCUSSION**

9 {2} Because this is a memorandum opinion and the parties are familiar with the
10 facts, this background section is limited to the factual and procedural events that are
11 required to place our analysis in context. Additional facts will be provided as
12 necessary.

13 {3} This case is procedurally complicated because two separate matters were
14 proceeding in the district court at the same time, in the same district court case
15 number, before two different district court judges. On March 7, 2014, Defendant filed
16 a motion to withdraw his plea before Judge Brown and requested an evidentiary
17 hearing. This motion was denied on April 8, 2014. Prior to the April 8, 2014 hearing,
18 while Defendant was still on probation, the State filed a motion to revoke Defendant's
19 probation on August 26, 2013. The probation violation hearings occurred over several

1 months as noted below. This motion was granted by Judge Jewell on July 29, 2014
2 and Defendant was sentenced to serve an eight-year habitual enhancement as a result.

3 {4} On August 21, 2014 Defendant filed two separate notices of appeal—an
4 untimely one from the order denying his motion to withdraw his plea—and a timely
5 one from the order revoking his probation. Defendant then filed one docketing
6 statement in this Court, concerning the probation revocation; although he served a
7 copy of that docketing statement on the district court, as well as a copy of a separate
8 docketing statement addressing the plea matter, the latter was never filed with this
9 Court. Therefore, during the calendaring process, we addressed only issues related to
10 the probation revocation. During briefing, however, Defendant also raised the
11 question of the district court’s denial of his motion to withdraw his plea, which should
12 have been the subject of a separate appellate proceeding.

13 {5} Defendant’s motion to withdraw his plea, coming long after the judgment and
14 sentence were entered and while Defendant was still on probation, is not cognizable
15 by this Court on direct appeal. *See State v. Barraza*, 2011-NMCA-111, ¶¶ 3, 5, 10-12,
16 267 P.3d 815. Instead, such a motion to withdraw is in the nature of habeas corpus,
17 as is made clear by the committee commentary to the 2014 amendments to Rule 5-802
18 NMRA, which states “motions to withdraw a plea after the entry of a final
19 judgment . . . should be treated as habeas petitions to be adjudicated under Rule 5-

1 802[.]” In turn, a district court order denying a petition for habeas corpus is not
2 appealable to this Court, but must be pursued through a petition for writ of certiorari
3 to our Supreme Court. *See* Rule 5-802(N)(2); *see also* *Barraza*, 2011-NMCA-111, ¶
4 12. We therefore transfer this portion of Defendant’s appeal to our Supreme Court, in
5 accordance with NMSA 1978, Section 34-5-10 (1966), which provides that “[n]o
6 matter on appeal in the supreme court or the court of appeals shall be dismissed for
7 the reason that it should have been docketed in the other court, but it shall be
8 transferred by the court in which it is filed to the proper court.”

9 **Probation Violation and Habitual Offender Sentencing**

10 {6} A district court may revoke a defendant’s probation after a hearing if the state
11 establishes that the defendant failed to comply with a condition of probation. *State v.*
12 *Parsons*, 1986-NMCA-027, ¶ 19, 104 N.M. 123, 717 P.2d 99. “We review a district
13 court’s decision to revoke probation under an abuse of discretion standard. To
14 establish an abuse of discretion, it must appear the district court acted unfairly or
15 arbitrarily, or committed manifest error.” *State v. Green*, 2015-NMCA-007, ¶ 22, 341
16 P.3d 10 (alterations, internal quotation marks, and citation omitted). Proof of a
17 probation violation “must be established with a reasonable certainty, such that a
18 reasonable and impartial mind would believe that the defendant violated the terms of
19 probation.” *Id.* In doing so, we “view[] the evidence in a light most favorable to the

1 [s]tate and indulg[e] all reasonable inferences in favor of the [district] court’s
2 judgment.” *State v. Erickson K.*, 2002-NMCA-058, ¶ 21, 132 N.M. 258, 46 P.3d 1258.

3 “The burden of proving a violation with reasonable certainty lies with the [s]tate.”
4 *Green*, 2015-NMCA-007, ¶ 22.

5 {7} Judge Jewell held procedural and evidentiary hearings approximately eight
6 different times on the alleged probation violation—trafficking cocaine and tampering
7 with evidence—between October of 2013 and April of 2015. At the July 23, 2014
8 hearing, the district court ruled—based on the evidence presented at all of the hearings
9 and the party’s summations—“I find that [Defendant] violated his unsupervised
10 probation. . . . As to the possession issue, which is a little bit trickier, I still find there
11 was a violation of conditions of probation[.]” The district court explained its finding
12 that regardless of whether there were other persons in the house, they were visitors.
13 And, “That’s his house. He can go into every room in that house, and if the probation
14 officer comes in and finds [cocaine] in that house, . . . that’s possession, because he
15 has access to it. He can reach out and get it.” In finding that the State may not have
16 met its burden—as to the marked buy money found in Defendant’s pocket—on
17 trafficking, the district court expressed reasonable certainty on the possession. “[F]or
18 those reasons, I believe there was a violation of his unsupervised probation, most
19 importantly, in the possession.”

1 {8} On April 15, 2015, the district court heard Defendant’s motion to reconsider his
2 revocation of probation and habitual offender sentencing. In affirming its finding of
3 a probation violation, the district court reiterated the multiple evidentiary grounds for
4 its ruling: (1) cocaine in Defendant’s possession, (2) cocaine in bathroom, and (3)
5 cocaine on paraphernalia in the house. In denying Defendant’s motion, the district
6 court, “inferred the possession of illegal drugs from [Defendant]. . . . I did a totality
7 of the circumstances in my decision, and I stand by it.”

8 {9} On appeal Defendant argues that the district court misapprehended the law of
9 possession or constructive possession based on the testimony of defense witnesses,
10 and thereby abused its discretion in finding a probation violation. Defendant urges this
11 Court to essentially reweigh the evidence and conclude that Defendant could not have
12 been found to possess cocaine or paraphernalia to a reasonable certainty. This Court
13 will not do so where it would require us to “assume the role of the district court and
14 delve into fact-dependent inquiries.” *State v. Randy J.*, 2011-NMCA-105, ¶ 28, 150
15 N.M. 683, 265 P.3d 734. We will not substitute our judgment for that of the district
16 court nor will we reweigh the evidence. *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 15,
17 121 N.M. 562, 915 P.2d 318. We emphasize that our role as a reviewing court is
18 limited. “The question for this Court is not what it would . . . decide[] based on the

1 testimony presented below[.]” *State v. Trujillo*, 2009-NMCA-128, ¶ 19, 147 N.M. 334,
2 222 P.3d 1040.

3 {10} First, Defendant directs this Court to testimony of Defendant’s witnesses to
4 establish facts regarding knowledge of the drugs, paraphernalia, and their possession,
5 which the district court rejected. The district court stated, “I did not believe I found
6 one witness credible when that witness testified that the paraphernalia was his and not
7 [Defendant’s.]”

8 {11} Second, Defendant’s reliance on case law requiring sufficient evidence for a
9 conviction for possession or constructive possession is inapposite. “Proof of a
10 probation violation need not be established beyond a reasonable doubt.” *Green*, 2015-
11 NMCA-007, ¶ 22. Rather, proof of a probation violation must be established with
12 “reasonable certainty,” such that a reasonable and impartial mind would believe that
13 Defendant “violated the terms of probation.” *Id.* Thus, we conclude that the district
14 court did not abuse its discretion in finding that Defendant violated the terms of his
15 probation contract, and thereby revoking his probation and sentencing him to eight
16 years incarceration under the habitual offender terms of the repeat offender plea and
17 disposition agreement.

18 **CONCLUSION**

1 {12} For the foregoing reasons, we transfer the habeas corpus portion of Defendant's
2 appeal to our Supreme Court, in accordance with Section 34-5-10, and affirm the
3 district court's orders revoking Defendant's probation and habitual offender
4 sentencing.

5 {13} **IT IS SO ORDERED.**

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7

STEPHEN G. FRENCH, Judge

8 **WE CONCUR:**

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MICHAEL E. VIGIL, Judge

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J. MILES HANISEE, Judge