STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0838

State of Minnesota,
Respondent,

vs.

Shawn Lorenzo Foote,
Appellant.

Filed January 6, 2020
Affirmed
Bjorkman, Judge

Dakota County District Court
File Nos. 19HA-CR-13-2308, 19HA-CR-16-750, 19HA-CR-17-1463

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

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

Considered and decided by Cochran, Presiding Judge; Bjorkman, Judge; and Reilly, Judge.

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

BJORKMAN, Judge

Appellant challenges the revocation of his probation, arguing that the district court deprived him of due process by conducting an independent investigation. Because the district court did not abandon its role as impartial fact-finder, we affirm.

FACTS

In December 2018, appellant Shawn Foote was on probation for convictions of violating a domestic-abuse no-contact order and theft. Among the conditions of his probation, Foote was required to remain law abiding, abstain from chemical use, submit to random chemical testing, and complete domestic-abuse programming. Foote's probation officer reported that Foote violated these conditions by committing eight new (mostly theft) offenses in the previous two years, failing to complete domestic-abuse programming, and missing chemical tests in November and December.

During the initial hearing, Foote admitted all of the alleged violations. He immediately experienced lightheadedness and appeared about to faint, prompting the district court to take a brief recess. When the hearing resumed, Foote confirmed that he felt "overwhelmed" but was able to think clearly, understood what was happening, and understood the allegations he was admitting. Based on Foote's admissions, the district court found that he violated his probation. Foote addressed the court about his 13-year history of addiction, after which the court questioned Foote directly. Foote denied that he was "under the influence of drugs or alcohol today." And when the court asked him, "If we did a random [chemical test], would you come back clean today?" he responded, "Yes,

I will." The court then recessed to review the record. During the recess, it directed the probation officer to conduct a chemical test. The court reasoned that Foote had missed requested tests and had not been tested "in such a long time," and in light of Foote's acknowledged "significant drug problem" the court "wanted to figure out what was going on." When the test came back positive, the district court advised the parties that it was continuing the hearing to ensure Foote was sober before he admitted violating his probation conditions.

At the next hearing, Foote reiterated his admissions, which the district court accepted. After further discussing Foote's numerous probation violations and his dishonesty at the previous hearing about his recent chemical use, the district court revoked Foote's probation. The court found that Foote's violations were intentional and inexcusable, the need for confinement outweighs the policies favoring probation, and continuing probation would unduly depreciate the seriousness of the violations. Foote appeals.

D E C I S I O N

A district court may revoke an offender's probation if it finds clear and convincing evidence that he violated a specific condition of probation, the violation was intentional or inexcusable, and the need for confinement outweighs the policies favoring probation. Minn. R. Crim. P. 27.04, subd. 3; *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004) (citing *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980)). A district court has broad discretion to determine whether to revoke probation, and we generally will not reverse that decision absent a clear abuse of discretion. *Ornelas*, 675 N.W.2d at 79. But we review questions

of law, such as constitutional issues, de novo. *State v. Cleary*, 882 N.W.2d 899, 904 (Minn. App. 2016).

Probationers "are entitled to constitutional safeguards before probation can be revoked." *Id.* That includes the right, as a matter of due process, to a revocation hearing before an impartial fact-finder. *Id.* To be impartial, the fact-finder must base its conclusions on "the facts in evidence," and must not "reach[] conclusions based on evidence sought or obtained beyond that adduced in court." *State v. Dorsey*, 701 N.W.2d 238, 249-50 (Minn. 2005). When the fact-finder violates this principle, the result is structural error requiring automatic reversal. *Id.* at 252-53.

Foote contends the judge at his probation hearing deprived him of an impartial finder of fact by questioning his sobriety, ordering the chemical test, and reporting its results.[1] We disagree for several reasons.

First, *Dorsey* requires a judge acting as fact-finder to be impartial, not passive. A judge is expressly authorized to question witnesses. Minn. R. Evid. 614(b). The judge "must exercise this prerogative most cautiously," *State v. Olisa*, 290 N.W.2d 439, 440 (Minn. 1980), and a party may object if it believes the judge fails to do so, Minn. R. Evid.

[1] The state characterizes Foote's claim as one of judicial bias and contends he has forfeited the claim by failing to request the district court judge's recusal. *See Braith v. Fischer*, 632 N.W.2d 716, 724-25 (Minn. App. 2001) (declining to address judicial-bias claim not presented to the district court), *review denied* (Minn. Oct. 24, 2001). We are not persuaded. A claim of judicial bias is distinct from a claim that the judge deprived the defendant of an impartial fact-finder. *Dorsey*, 701 N.W.2d at 249 (analyzing each claim in turn). Foote expressly limits his appeal to the second type of claim, and the state identifies no authority for the proposition that failure to move for recusal forfeits the constitutional claim. To the contrary, the *Dorsey* court reversed based on unobjected-to judicial conduct that deprived the defendant of an impartial fact-finder. *Id.* at 253.

614(c). But nothing in rule 614 or *Dorsey* deprives a judge of the authority to question witnesses when acting as fact-finder. Here, the judge exercised that authority repeatedly—not only asking Foote if he would pass a chemical test that day (after months of not submitting to testing), but also clarifying with the probation officer that Foote failed to comply with chemical testing; asking Foote why he did not go to domestic-abuse programming; and confirming that Foote's recent theft convictions were for stealing baby formula, which Foote acknowledged doing "to feed [his] drug addiction," as he had done in the past. Foote did not object to this questioning at the time and does not now assert error on that basis.

Second, the judge was acting not only as a fact-finder, as in *Dorsey*, but also as a sentencing authority. In *Dorsey*, the judge was charged with determining guilt at a trial. She abandoned her neutral fact-finding role by independently searching public records to determine the veracity of a witness's testimony and reporting the results of her investigation in court. 701 N.W.2d at 250-51. Here, the judge was charged with determining the consequence for Foote's admitted probation violations. *See* Minn. Stat. § 609.14, subds. 2a, 3 (2018) (addressing consequences for probation violation); *State v. Cottew*, 746 N.W.2d 632, 638 (Minn. 2008) (noting district court's discretion to determine whether to impose an intermediate sanction or revoke probation). Requiring Foote to undergo chemical testing—throughout his probationary term, and on the day of the hearing—was well within the judge's broad and exclusive authority to set and enforce probation conditions. *State v. Bradley*, 756 N.W.2d 129, 132 (Minn. App. 2008). Indeed, the probation officer was authorized to administer chemical tests only because the judge

delegated the implementation of that part of the sentencing order. *Id.* at 133. Given Foote's admission that he had not submitted to testing for months, his acknowledged continuing struggle with chemical dependency, and his unusual appearance while in court, ordering Foote to submit to chemical testing at the hearing was not independent investigation of a fact to be proved by the state but a permissible exercise of the judge's sentencing authority.

Third, it was Foote himself, not the judge, who presented evidence of the test result. At the first hearing, the judge noted the positive result as the reason for continuing the matter until Foote was sober. But at the second hearing, Foote expressly admitted that he "test[ed] positive for controlled substance." He also acknowledged sending a letter to the judge, apologizing for his chemical use and his dishonesty at the earlier hearing. This is markedly different from *Dorsey*, where the judge announced and then took judicial notice of the results of her own independent investigation concerning an evidentiary fact. 701 N.W.2d at 244.

Finally, the judge complied with *Dorsey*'s instruction that impartiality requires the fact-finder to reach its conclusions "based upon the facts in evidence." *Id.* at 249. Foote admitted that he violated probation by committing numerous new offenses (including theft offenses directly related to his ongoing drug use), repeatedly failing to submit to chemical testing, failing to participate in domestic-abuse programming, testing positive for chemical use the day of the first hearing, and lying to the district court about his recent drug use. The district court relied on all of those facts in revoking Foote's probation.

In sum, the district court did not err by questioning Foote at the probation hearing, ordering him to submit to chemical testing, and considering his admitted positive test result

among the numerous facts in evidence that justified revoking his probation. Because Foote has not demonstrated that the district court abandoned the role of impartial fact-finder, and he does not otherwise challenge the district court's *Austin* analysis, he is not entitled to relief from his probation revocation.

Affirmed.