

*This opinion is nonprecedential except as provided by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
A21-0218**

State of Minnesota,
Respondent,

vs.

Herbert Earl Brown,
Appellant.

**Filed November 1, 2021
Affirmed
Segal, Chief Judge**

Olmsted County District Court
File No. 55-CR-16-8729

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

Mark A. Ostrem, Olmsted County Attorney, Kaitlyn E. H. Kulseth, Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Segal, Chief Judge; and Frisch,
Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges his probation revocation arguing that the district court denied him an impartial fact-finder when the court questioned one of the state's witnesses, and

that the district court erred by referencing allegations in the complaint for the underlying offense instead of the facts admitted by appellant in his guilty plea. Because appellant was not deprived of an impartial fact-finder, and the district court did not abuse its discretion in revoking appellant's probation, we affirm.

FACTS

Appellant Herbert Earl Brown pleaded guilty to a felony domestic assault involving his girlfriend in May 2017 (the conviction case). This was his second felony domestic-assault conviction. At Brown's sentencing in June 2017, the district court granted him a downward dispositional departure to a stay of imposition of a prison sentence and placed Brown on probation. Five violation reports were filed by probation between Brown's sentencing and August 2020. Brown admitted many of the alleged violations, such as failing to comply with drug testing and treatment, failing to comply with domestic-violence programming, and failing to maintain contact with his probation officer. The district court chose to continue Brown's probation in each instance.

In October 2020, Brown's probation officer (PO) filed another violation report alleging that Brown had failed to follow a directive of his PO to stay at his approved residence.¹ The PO filed an addendum to the violation report a few days later alleging that Brown had failed to remain abstinent from mood-altering chemicals and failed to remain law-abiding.

¹ Brown's approved residence was the family home of one of his friends.

At the probation-revocation hearing, the PO testified that Brown had failed to follow directives because she believed he had not stayed the night at a shelter as instructed. Brown had been directed to spend the night at a shelter after he made a late-night call to the probation office to report that he could not get into the friend's house where he had been approved to stay.

With regard to the failure to remain free from mood-altering drugs, the PO testified that she had asked law enforcement to conduct a urinalysis drug test on Brown after Brown was taken into custody pursuant to the arrest and detention order. The sample tested positive for amphetamines. The PO further testified that Brown admitted he had taken Adderall even though he had no prescription for it. Brown moved to suppress the drug test results because the test was administered by law enforcement instead of the PO. The district court denied the motion.²

A sheriff's deputy was also called to testify as a witness by the state. He provided testimony concerning Brown's alleged failure to remain law-abiding. The deputy testified that he responded to a domestic call in August 2020 and that, when he arrived, he found Brown's girlfriend visibly upset in her car. The girlfriend told the deputy that Brown had assaulted her and had punched her repeatedly in the face.³ This was the same girlfriend who was the victim in the conviction case.

² Brown did not appeal the denial of his motion to suppress.

³ Brown was separately charged for the alleged August 2020 assault, but the case had not yet been resolved at the time of the revocation hearing.

The district court concluded that the state failed to prove the first alleged violation—that Brown did not follow the instructions of his PO with regard to staying at his approved residence. The court noted that Brown “was in communication with probation during this relatively brief interval” and “did the best he could to comply.”

Based on Brown’s admission that he used unprescribed Adderall, the district court found that the state had proven this probation violation by “clear and convincing evidence” and that the violation was “intentional or inexcusable.” The court noted, however, that it “would certainly not revoke probation on the basis of this use of drugs by an addict.”

The district court determined that the state had also proven by clear and convincing evidence that Brown had again assaulted his girlfriend and that he had thus failed to remain law-abiding. The court concluded that the assault warranted the revocation of Brown’s probation. The court explained that failing to revoke probation “under these circumstances would unduly depreciate the seriousness of the violation.” The district court noted that probation is a “rehabilitative process” where for offenses, such as drug use, relapse can be expected,

[b]ut assault is different. An individual on probation for doing violent harm to another person is reasonably expected by the court *never* to repeat that conduct. . . . [S]eriously hurting *another*—in this case *again*—by intentional violence, is too serious and too inconsistent with probation’s aims for probation to be continued.

The district court therefore executed Brown’s sentence. Brown appeals.

DECISION

Brown raises two issues in this appeal. First, he claims that the decision to revoke his probation must be reversed because the district court engaged in its own fact-finding when it questioned the PO about the drug test she had ordered and that this deprived him of his constitutional right to an impartial fact-finder. Brown's second argument is that the district court erred because the court relied on unproven allegations from the complaint in the conviction case, instead of the facts admitted by Brown when he pleaded guilty. He maintains that the district court's conclusion that revocation was warranted because of the similarities between the conviction case and the new assault is thereby flawed and must be reversed. We address each argument below.

I. Brown was not deprived of an impartial fact-finder.

Turning to Brown's first argument, individuals at risk of having their probation revoked are entitled to constitutional safeguards including the "right to a revocation hearing being held before a neutral and detached hearing body." *State v. Cleary*, 882 N.W.2d 899, 904 (Minn. App. 2016) (quotations omitted). "When reviewing a claim that a judge was partial against the defendant, we presume the judge discharged his or her judicial duties properly." *State v. Munt*, 831 N.W.2d 569, 580 (Minn. 2013) (quotation omitted). Impartiality is the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." *Cleary*, 882 N.W.2d at 904 (quotation omitted). The district court's impartiality can be "reasonably questioned when a 'reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality.'" *Id.*

(quoting *State v. Finch*, 865 N.W.2d 696, 703 (Minn. 2015)). We review the constitutional question of “[w]hether a defendant is deprived of his right to an impartial fact-finder” de novo. *State v. Hicks*, 837 N.W.2d 51, 59 (Minn. App. 2013), *aff’d*, 864 N.W.2d 153 (Minn. 2015); *see also Cleary*, 882 N.W.2d at 904.

The Minnesota Supreme Court recently reiterated that when a defendant claims that a judge was “disqualified because of a reasonable question of impartiality—rather than actual bias— . . . reversal is not automatic.” *State v. Malone*, 963 N.W.2d 453, 469 (Minn. 2021) (citing *Powell v. Anderson*, 660 N.W.2d 107, 120 (Minn. 2003)). When judicial impartiality is reasonably questioned, we balance “the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public’s confidence in the judicial process.” *Id.* (quotation omitted).

Brown’s argument that he was deprived of an impartial fact-finder focuses on the district court’s questioning of the PO at the revocation hearing. Brown claims that the district court’s questioning served to bolster the state’s argument and was “lengthy and at times leading.” In particular, Brown complains that the court essentially conducted its own investigation into the reason the PO requested law enforcement to administer the drug test, leading the PO to provide a reason that would satisfy legal standards.

The district court’s questioning occurred while the judge was deliberating whether evidence of the drug test result was admissible, after both parties had completed their

questioning of the PO.⁴ The district court asked the PO, “I need to find out from you why did you order that drug test?” The PO then explained that she was concerned that Brown might be “getting stuck back into that cycle of maybe not-so-great behaviors.” The PO added that, when Brown spoke to a probation officer on duty early in the morning after Brown’s night at the shelter, it was noted that Brown sounded “kind of . . . amped up.” The district court commented that this was new information. The court then stated, “So . . . you were hearing about and would’ve asked for the drug testing in part based on the fact that he seemed like he was revved up at a strange time of day and, for a guy who has used meth in the past, that could be an indication he’s using meth now.” The PO responded, “Yes, Your honor.”

We are not persuaded that this exchange created a reasonable question concerning the district court’s partiality. We note first that most of the information was already in the record in response to questioning by the state. And, second, there is no prohibition on questioning of a witness by the court. To the contrary, the rules of evidence expressly allow it. Rule 614(b) of the Minnesota Rules of Evidence provides, “The court may interrogate witnesses, whether called by itself or by a party.”

Finally, the district court’s line of questioning ultimately had no impact on either the finding of violation or the revocation of Brown’s probation. At the time of the district

⁴ Brown had challenged the admissibility of the drug test evidence, advising the court that his challenge was based on an unpublished opinion of this court, *State v. Cournoyer*, No. A18-0434 (Minn. App. Jan, 7, 2019). Brown cited the case to the district court for the proposition that “there is a reasonable suspicion implied standard to” administering a drug test.

court's questioning, Brown had already admitted to the use of Adderall and the district court stated it would not and did not revoke probation based on Brown's use of intoxicants. The district court's decision thus did not rest on the exchange between the district court and the PO.

On this record, we discern no denial of a fair trial before an impartial fact-finder.

II. The district court did not err in its findings supporting the revocation of Brown's probation.

Brown's second argument is that the district court erred in concluding that Brown's probation should be revoked because the district court relied on the allegations in the complaint against Brown in the conviction case, instead of the facts he admitted in his guilty-plea colloquy. Brown argues that the district court's finding that the new assault and the assault in the conviction case were similar is thereby faulty and the revocation decision must be reversed.

The district court noted that "[t]he offense for which Mr. Brown is on probation was an assault on [his girlfriend] in which he struck her in the face." The district court then noted that in the new assault case: "the Defendant again struck [his girlfriend] in the face causing injuries apparent in the photos. It is a particularly serious violation, both of the law and probation, to commit a serious assault upon the same victim a probationer previously assaulted."

Brown argues that, in his guilty-plea colloquy, he only admitted that he pushed his girlfriend in the chest with his hand hard enough for her to fall backward onto the bed and that he never admitted that he struck her in the face. Brown maintains that the district

court’s statement that he struck his girlfriend in the face during the assault in the conviction case was based only on an unproven allegation in the state’s criminal complaint and cannot be relied on by the district court as support for the revocation decision.

This court reviews de novo whether the district court made all required findings for probation revocation.⁵ *Id.* A district court is allowed “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. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005) (quotation omitted).

Brown relies on a recent opinion by this court to support his argument. *Rosendahl v. State*, 955 N.W.2d 294, 302 (Minn. App. 2021). In *Rosendahl*, we concluded that “in determining the accuracy of a guilty plea, the reviewing court does not consider allegations in the complaint unless the truthfulness and accuracy of the allegations have been expressly admitted to by the defendant.” *Id.* Here, however, we are not determining whether Brown’s guilty plea was accurate but whether the district court erred in its determination supporting the revocation of Brown’s probation.

Moreover, even if we were to apply the standard from *Rosendahl*, we are not persuaded that the revocation determination would constitute an abuse of discretion. The state maintains that it is the similarity in the *nature* of the two offenses that was important to the district court—the fact that both offenses involved domestic assaults against the very

⁵ *State v. Austin* established that “before probation be revoked, the court must 1) designate the specific condition or conditions that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that need for confinement outweighs the policies favoring probation.” 295 N.W.2d 246, 250 (Minn. 1980).

same victim. And we agree. The district court stressed in its conclusion that Brown's new offense was "a particularly serious violation," involving the very same victim, with injuries "apparent in the photos." We, therefore, conclude that the district court's decision to revoke Brown's probation was not against logic and the facts in the record, and was not an abuse of discretion.

Affirmed.