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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0596
A13-0600

State of Minnesota,
Respondent,

vs.

Natosha Marie Dyre,
Appellant.

Filed May 5, 2014
Affirmed
Connolly, Judge

Stearns County District Court
File No. 73-CR-12-6416

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Carl Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sean M. McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Connolly, Judge; and Smith, Judge.

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

CONNOLLY, Judge

Appellant appeals from the revocation of her probation for a 2006 felony sale of drugs in a school zone conviction, and from her convictions of domestic assault by strangulation and driving while intoxicated, arguing that (1) the district court judge was not impartial; (2) the evidence does not show that the need for confinement outweighed the policies favoring probation; and (3) the district court did not make the required findings before revoking probation. We affirm.

FACTS

On March 7, 2006, appellant Natosha Marie Dyre sold 0.2 grams of crack cocaine to a confidential informant in the parking lot of a gas station located 144 feet from an elementary school. On September 4, 2007, she pleaded guilty to controlled substance crime in the second degree. The district court granted a downward-dispositional departure, sentenced her to 57 months in prison, and stayed execution of the sentence, placing her on probation for 25 years. The conditions of her probation included abstaining from the use of all nonprescription mood-altering chemicals (including alcohol), remaining law abiding, and submitting to random urinalysis.

On March 2, 2007, Dyre attempted to obtain Percocet using a fraudulent prescription. On March 28, 2008, she pleaded guilty to an attempt to procure a controlled substance by fraud or deceit, a fifth-degree controlled-substance crime. The district court stayed imposition of sentence and placed her on ten years' probation.

On August 23, 2008, Dyre used a credit card to make nearly $600 in purchases, without permission from the card-holder to do so. On October 17, 2008, Dyre admitted to violating her probation by consuming alcohol and abusing prescription drugs in August 2008. Her probation was reinstated. On May 8, 2009, Dyre entered an *Alford* plea to financial transaction card fraud. The district court stayed imposition of sentence for five years.

Dyre successfully completed drug court on January 8, 2010. On November 10, 2010, she admitted to consuming alcohol and ecstasy in March 2010, and to consuming alcohol on July 1, 2010. She was found to be in violation of her probation and ordered to serve 90 days in jail.

On July 5, 2012, Dyre consumed so much alcohol that she blacked out. She testified that she did not remember everything that happened, but confirmed that the police report would state that she "slapped [her then eleven-year-old] daughter in the cheek and then grabbed her from behind and choked her." She also confirmed that the report would state that she "pulled her [daughter's] hair and got[] on top of her, then choked her again," and that "at the conclusion [Dyre] slapped her and threw a television," which struck her daughter in the foot. Dyre testified that she had no reason to dispute this report. After the assault, she was stopped by police and arrested for driving while intoxicated.

On November 1, 2012, Dyre pleaded guilty to domestic assault by strangulation and driving while intoxicated. She admitted that she violated her probation by failing to abstain from mood-altering chemicals and failing to remain law abiding. On January 7,

2013, the district court revoked Dyre's probation and executed her sentences of 57 months in prison for the second-degree controlled substance offense, 13 months for the fifth-degree controlled-substance offense, and 15 months for the financial-transaction card fraud, to run concurrently. In anticipation of this appeal, the district court stayed execution of the sentences for the assault and driving-while-intoxicated offenses.

Dyre appeals her assault and DWI convictions, and the order revoking her probation. On her motion, this court consolidated the appeals.

D E C I S I O N

I.

Dyre argues that the district court judge deprived her of her right to an impartial fact-finder and violated the Minnesota Code of Judicial Conduct by "systematically and serially insert[ing] herself into Stearns County Child Protection proceedings involving Ms. Dyre and Ms. Dyre's family." The constitutional right to a fair trial includes the right to an impartial judge and trier of fact. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). Because Dyre has raised this issue for the first time on appeal, the plain-error standard applies. *See State v. Schlienz*, 774 N.W.2d 361, 365 (Minn. 2009) (applying plain-error standard where defendant raised impartiality issue for the first time on appeal).

Under the plain-error standard, an appellant must establish "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). And, because the issue of judicial impartiality was not raised during the probation-revocation proceedings, reversal requires a demonstration of actual bias. *See*

State v. Moss, 269 N.W.2d 732, 734-35 (Minn. 1978) (recognizing that when a defendant proceeds to trial and sentencing without raising an impartiality issue, reversal is appropriate only if the defendant demonstrates actual bias); *State v. Plantin*, 682 N.W.2d 653, 663 (Minn. App. 2004) ("After a defendant submits to trial before a judge without objecting to the judge on the basis of bias, we will reverse the defendant's conviction only if the defendant can show actual bias in the proceedings."), *review denied* (Minn. Sept. 29, 2004).

We presume that a judge has discharged his or her judicial duties properly. *McKenzie*, 583 N.W.2d at 747. But the judge must be "fair to both sides" and "refrain from remarks which might injure either of the parties to the litigation." *Schlienz*, 774 N.W.2d at 367 (quotation omitted). "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Minn. Code Jud. Conduct Rule 2.11(A). "Impartiality" is defined as 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." Terminology, Code of Judicial Conduct.

Before August 27, 2012, Dyre appeared before several different district court judges. At the omnibus waiver and probation-violation hearing on that date, however, a single judge was assigned all of Dyre's outstanding files. Dyre argues that this judge demonstrated a lack of impartiality through (1) her statements criticizing Stearns County Human Services for failing to file a child-in-need-of-protection-or-services (CHIPS)

petition with respect to Dyre's children based on the domestic-assault charge, and (2) her independent contact with the county attorney's office and human services.

The record shows that the judge made a series of comments concerning Dyre's children and Dyre's interactions with social services. During the August 27 hearing, Dyre's attorney asked the judge to allow Dyre to have supervised visitation with her children, based on the recommendation of Dyre's case worker. The judge agreed, on the conditions that the visits were supervised and that the case worker send the judge a letter confirming that recommendation. It does not appear that the judge ever received this letter.

On November 1, 2012, Dyre appeared for a plea and probation-violation hearing. After her testimony, the judge inquired: "Is . . . there an open child protection file?" Dyre's attorney stated that the file had been closed on October 23. The judge suggested that Dyre might be a candidate for Family Dependency Treatment Court (FDTC) rather than revocation, but the county attorney did not believe that Dyre would be eligible without an open human-services file.

The judge responded that, given the domestic assault guilty plea, she found it "curious" that there was no open file and wondered why FDTC would not be an appropriate option. The judge stated that she was "certainly perplexed that the County isn't involved in some shape or fashion." The judge then requested that child protection look into the case as part of the presentence investigation and "determine whether or not [Dyre is] eligible . . . for FDTC. It might be a way for her to avoid going to prison and

teach her some skills to parent her children." The judge commented that it was "extraordinary" for her to have to ask for this screening in a criminal case.

At the end of the hearing, Dyre's attorney again requested that the district court lift the no-contact order barring Dyre from unsupervised visitation with her children. The judge denied the request, explaining that she would wait for human services to "decide whether or not an open CHIPS case is appropriate and whether or not she's an appropriate candidate for Family Dependency Treatment Court."

On December 12, 2012, Dyre appeared in court to discuss a letter she had sent to the judge indicating that her children were living with her. The judge explained that the children could not live with Dyre, even if another adult was present at all times, and that the no-contact order would continue until the district court received a written statement from human services.

The judge then expressed her disappointment with human services' handling of the matter, stating that "from what I've seen it doesn't appear that I agree with what they decided either. But that's not my decision." The judge explained that, given the nature of the charge and the guilty plea, the victim would not typically be allowed to live with the defendant until after "the victim's needs have been met" and the defendant "has moved forward and is progressing in some type of programming."

The judge continued:

> I guess I'd like to hear from probation as to what their thoughts are but not just piggyback on what Social Services have done. I am a little concerned. I am not real happy with—you know, I know [Dyre] is currently pregnant. She pled guilty to domestic assault by strangulation of her minor

> child and Social Services just closes their file. That just is—it seems just unreal to me.
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> . . . .
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> I find that just unbelievable that they say they really don't have anything when she's pled guilty to domestic assault by strangulation. What more could they ask? I mean, they have a criminal guilty plea. That's a lot more than they get in most cases. It just kind of blows my mind. . . .

Addressing the county attorney, the judge stated:

> Do we even know are there—you indicated that there are some services in place. I mean, I don't even know what those services are. How do I know that this victim isn't going to be revictimized? What are the safeguards for this victim when she's now living with [Dyre] and [Dyre] is her mother? Who is there to protect the child? I don't know.
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> At this point I am going to continue the order as previously noted, that she is not to have any contact with the child unless it's supervised visits and it's authorized by [h]uman [s]ervices. And I understand, [Dyre's attorney has] indicated that they closed their file so therefore—but I want a specific letter outlining what they think is appropriate. You know what the Court's concern is . . . .
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> . . . .
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> . . . I would expect that [s]ocial [s]ervices would have been the agency to protect the child and instead they are saying, no, the mother is. The mother is the one who perpetrated the strangulation on the child. That just kind of boggles my mind.

Dyre's sentencing hearing was held on January 3, 2013. Following arguments and a statement from Dyre, the judge said that, although she understood Dyre had had a difficult childhood,

> [t]he problem I have is with your own children. They don't—if I can have anything to do with how they are raised, I want to try and make some kind of an impact. Not just me personally but the whole system. If I could go back in time and prevent what happened to you from happening I certainly would but I can't. The only tool I have at this point is to make sure your children are safe. When you are using your children aren't safe. It's been shown by the fact that you've been charged and now pled guilty to domestic assault by strangulation. It looks to this [c]ourt that the underlying problem that you have throughout all of your criminal history is chemicals.

The district court found that probation violations had occurred, and were intentional and inexcusable, noting that Dyre had been given "many, many chances and chemicals are still the underlying problem." The district court concluded that the *Austin* factors had been met.

At Dyre's request, the district court continued sentencing to January 7, 2013, so that Dyre could get her affairs in order. At that hearing, Dyre's attorney raised the issue of a December 14, 2012 e-mail sent by the judge's law clerk and forwarded to the parties. The e-mail asked to set up a meeting between the judge, the juvenile division chief of the Stearns County Attorney's Office, and the director of the Stearns County Human Services Family and Children Services division. The e-mail outlines Dyre's case and states that the judge was "baffled" by the decision not to file a CHIPS petition. It requests a meeting "to discuss this issue and hopefully gain a better understanding of what goes into the decisions of opening or not opening a CHIPS file and how this decision came about."

The judge explained that

> yes, the [c]ourt was concerned by the fact that they did not open a CHIPS case. Because I've taken a strong interest in juvenile cases. . . . So my concern is that when I heard that they're not willing—that they don't think there is enough, even though she's pled guilty to domestic assault by strangulation of her own 11-year-old daughter, that's not enough, that sends all sorts of bells and whistles off in my mind. Here they're trying to get in to help children who are witnesses to domestic violence yet when a child is the victim, child protection is not willing to get involved, and the [c]ourt just has some real strong concerns about that.
>
> I have asked to meet with the attorney in charge of their juvenile program . . . and . . . the woman at Social Services in charge of that child protection unit. That meeting has not occurred. . . . It's not necessary to talk in specifics about this case but just in general as to how they can hold any credibility if they're not willing to take a child who is a victim in a domestic assault and yet they want to come in and help children who are witnesses. To me that just does not make any sense and I wanted to get some clarification.

Dyre characterizes these statements as advocacy, and asserts that the judge revoked Dyre's probation to "guarantee that [Dyre] would be separated from her children." In particular, Dyre focuses on the statement that "[t]he only tool I have at this point is to make sure your children are safe." She concedes that, "[t]his relentless barrage of personal attacks might be excusable simply as commentary on the offense committed by the defendant." But Dyre argues that "considered together with [the judge's] willingness to completely ignore the unanimous professional judgments of a [c]hild [p]rotection [s]ocial [w]orker, a [g]uardian [a]d [l]item and five probation agents, it is clear evidence of bias." We disagree.

The judge's statements make it clear that she did not understand or agree with the decision by Stearns County Human Services to close Dyre's file and not to bring a CHIPS petition.[1] However, in context, it is far from plain that the judge made the decision to revoke Dyre's probation as a way to compensate for what she saw as that agency's failure to act. The comments were directed at the actions of human services, not at Dyre herself. The judge expressed sympathy for Dyre's position, noted that the underlying problem was Dyre's chemical addictions, suggested Family Dependency Treatment Court as an alternative to revocation, and conducted multiple hearings to allow Dyre to present her case.

Dyre concedes that declining to follow the suggestions of probation experts and human services does not mean that a judge is not acting impartially. The record indicates that the judge listened to and considered the suggestions from probation and human services, but ultimately disagreed with those recommendations for a variety of reasons. In particular, the judge noted that Dyre had been given many opportunities to succeed—including enrollment in and completion of a highly intensive drug court program—but had repeatedly relapsed and committed additional felonies due to her issues with addiction.

The issue of Dyre's children was central to the discussion at the hearings because of both the nature of the domestic assault charge and Dyre's requests for visitation with her children and misunderstanding of the requirements of the no-contact order. The record does not indicate that the judge was so opposed to allowing Dyre access to her

[1] We also find that decision baffling.

children as to keep Dyre separated from them by revoking her probation. The judge indicated more than once that she was open to allowing supervised visitation, but, at least as of the December 12 hearing, had not received a letter from human services authorizing those visits.

Dyre also argues that the judge's e-mail to social services and the county attorney's office shows actual bias because it (1) constitutes an inappropriate ex parte communication and (2) "changed the nature of [the judge's] role in the case" by turning the judge into an advocate for Dyre's children. Although it might have been more appropriate for the judge to delay contacting social services until Dyre's proceedings were concluded, the e-mail does not support the conclusion that the judge was biased.

First, even if the e-mail constituted an ex parte communication with the county, it is not the kind of contact that indicates a bias for or against a party, or results in an injury to either of the parties.[2] Unlike in the ex parte communication in *Schlienz*, the e-mail did not suggest how the county should proceed on Dyre's case. *See* 774 N.W.2d at 369 (concluding that the district court judge should have disqualified himself following an ex parte communication with the prosecutor suggesting how to handle a motion). And the e-mail did not provide any information that the county and Dyre did not already possess. It merely repeated that the judge was unhappy with human services' handling of the situation and requested a meeting to discuss *human services'*—not the prosecutor's—handling of this case and similar cases.

[2] We do not believe it was ex parte since it was shared with Dyre's trial counsel.

Second, because the requested meeting did not take place until after sentencing, it could not have led the judge to rely on facts outside of the record or otherwise contributed to her decision to revoke Dyre's probation. Thus, Dyre's reliance on *State v. Dorsey* is misplaced because *Dorsey* is distinguishable. *See* 701 N.W.2d 238, 251-52 (Minn. 2005) (concluding that the judge was not impartial when she questioned a witness's veracity, conducted research into an element of the witness's testimony, shared her findings with the parties, and relied in part on them in her order). Given the nature of Dyre's offense, the judge's statements regarding the safety of Dyre's children did not indicate that she was abandoning her neutral position. Rather, this was an appropriate concern given the broader discussion of whether it was appropriate to revoke Dyre's probation.

Because the judge's conduct did not rise to the level of actual bias and the judge did not plainly err in her handling of this case, Dyre's impartiality challenge must fail.

II.

Dyre argues that the district court's revocation of her probation must be reversed because the district court "never actually found that the need for confinement outweighed the policies favoring probation." Whether the district court made the required findings to revoke probation is a question of law we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). Before revoking probation, the district 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 policies

favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). The first two factors are not at issue here.

In evaluating the third *Austin* factor, the district court should consider whether "(i) confinement is necessary to protect the public from further criminal activity; or (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked." *Id.* at 251. "The requirement that courts make findings under the *Austin* factors assures that district court judges will create thorough, fact-specific records setting forth their reasons for revoking probation." *Modtland*, 695 N.W.2d at 608.

Dyre asserts that the district court "only stated, twice, that 'the *Austin* factors had been met.'" This conclusion is not supported by the record. The district court made detailed findings concerning the seriousness of Dyre's underlying offense, the subsequent felonies, Dyre's treatment history and chemical addiction, and the danger to the public—specifically to her children—from her failure to abstain. And it discussed Dyre's participation in drug court, noting that it is a "highly intensive" program and that "I don't know how much more supervision is possible." These findings support the conclusion that confinement was necessary to protect the public from further criminal activity.

III.

Finally, Dyre argues that the record does not support the district court's decision to revoke her probation. "The trial 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." *Austin*, 295 N.W.2d at 249-50. "When determining if revocation is appropriate, courts must balance the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety, and base their decisions on sound judgment and not just their will." *Modtland*, 695 N.W.2d at 606-07 (quotation omitted). The district court's decision to revoke probation "cannot be a reflexive reaction to an accumulation of technical violations but requires a showing that the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Austin*, 295 N.W.2d at 251 (quotations omitted).

Dyre argues that she has been and continues to engage in treatment and that she has the support of her probation officer, who testified that she is "trying to actively make changes in her life." She argues that, although she has accumulated a number of violations over her six years of probation, these offenses largely related to her addiction issues and were, with one exception, nonviolent. And she points to the probation officer's statements that imprisonment may not be an effective deterrent for addicts and may even be detrimental to her treatment.

These arguments second-guess the district court's reasoning, but do not show that the district court's reasoning was an abuse of discretion. As discussed above, the district court found that Dyre had been given "many, many chances and chemicals are still the underlying problem." It found that she had already completed the "highly intensive" drug court program and had continued to reoffend. And it found that she was a danger to others when she fails to abstain.

We commend Dyre for maintaining extended periods of sobriety and recognize her struggle with the tragedy of addiction. Between the 2006 conviction and her most recent violations, however, she accumulated two additional felony convictions and two probation violations for failure to abstain. And her most recent offenses included a violent offense against her own daughter while under the influence of alcohol.

Dyre's conviction of second-degree controlled substance crime had an offense level of eight and a presumptive sentence of 48 month committed. "Less judicial forbearance is urged for persons who were convicted of a more severe offense or who had a longer criminal history." Minn. Sent. Guidelines 3.B (2012). T he district court did not abuse its discretion in concluding that sufficient evidence supported revocation.

Affirmed.