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SUMMARY  
January 12, 2023

**2023COA3**

**No. 21CA0094, *People v. Karwacki* — Criminal Law —  
Probation — Revocation**

In this probation revocation appeal, a division of the court must decide for the first time whether a district court may sua sponte order a probation department to initiate probation revocation proceedings. The division concludes the district court does not have the power to initiate such proceedings sua sponte under section 16-11-205, C.R.S. 2022, which sets forth the law governing the initiation of probation revocation proceedings. Moreover, the division concludes that initiating such proceedings creates the appearance of partiality and substantially affects the fairness of the probation revocation proceedings.

The division does not reach the defendant's remaining contentions on appeal because it concludes the district court judge created the appearance of partiality and erred by denying the defendant's motion to recuse. Accordingly, the division reverses and remands for further proceedings before a different district court judge.

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Court of Appeals No. 21CA0094  
Arapahoe County District Court No. 17CR3091  
Honorable Ben L. Leutwyler, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Richard Joseph Karwacki,

Defendant-Appellant.

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ORDER REVERSED, SENTENCE VACATED,  
AND CASE REMANDED WITH DIRECTIONS

Division II  
Opinion by JUDGE TAUBMAN\*  
J. Jones and Kuhn, JJ., concur

Announced January 12, 2023

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\*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 Defendant, Richard Joseph Karwacki, appeals the revocation of his probation and his resulting sentence. He contends that the district court erred by (1) creating the appearance of partiality by directing the probation department to move to revoke his probation; (2) exhibiting actual bias; and (3) sentencing him to the maximum aggravated range without a jury finding of extraordinary aggravating circumstances or a knowing, intelligent, and voluntary waiver of the right to a jury finding.

¶ 2 For the first time, a division of this court must determine whether a district court may sua sponte order a probation department to initiate revocation proceedings. Because we conclude a district court does not have the power to initiate such proceedings sua sponte, we reverse and remand for further proceedings. We do not reach Karwacki's contentions regarding actual bias and sentencing because we reverse and remand based on the denial of the motion to recuse.

### I. Background

¶ 3 The district court first sentenced Karwacki in November 2018 to ten years of probation after his conviction on one count of class 4 felony theft. In March 2019, the probation department filed a

revocation complaint alleging that Karwacki had violated the conditions of his probation. The probation department later filed an amended complaint alleging that Karwacki had committed additional violations. The court held a revocation hearing in September 2019, at which Karwacki admitted the probation violations. At that hearing, the victim's bankruptcy attorney stated that Karwacki was lying to the court about attempting to pay back the victim. Karwacki's probation officer further testified that Karwacki was being dishonest with the court and showed "an utter lack of respect for the sentence he was given."

¶ 4 At the September hearing, before ruling, the judge stated the following:

Mr. Karwacki, I am conflicted. There is certainly a part of me that wants [the victim] to receive every bit of repayment that he can, but I'm not naive enough to believe that, frankly, that's going to happen.

Mr. Karwacki, there is a part of me that thinks simply the Department of Corrections is what is appropriate.

That's not what is being asked here. It's not the deal that you have agreed to, and I'm not going to reject this because that's what I think may be appropriate.

I want to give you the opportunity to keep this job and make some payments, but, as I say that out loud, I'm telling myself that that is ridiculous, because you are going to file bankruptcy, which you are absolutely entitled to do, and that's going to put a stop to all payments.

I feel very confident that you are going to manipulate it as much as you are able.

¶ 5 The court then revoked and reinstated ten years of probation with sixty days in the jail weekend program.<sup>1</sup>

¶ 6 In December 2019, the Arapahoe County Sheriff's Department wrote to the court, informing it that Karwacki had been terminated from the jail weekend program as a "no show x4." The court issued an order directing the probation department "to review the attached letter and file a complaint for revocation of probation." The probation department then filed a complaint for revocation of probation, noting the jail weekend program violation but also recognizing that Karwacki was complying with other conditions of his probation.

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<sup>1</sup> The district court later amended the sentence to thirty days in the jail weekend program due to program limitations.

¶ 7 In January 2020, the court held a hearing to address Karwacki's status, and the judge stated the following before continuing the hearing:

[T]he Court's very inclined to revoke probation and sentence the Defendant to prison, because there has been such an established history of not doing anything that the Court ordered. So Mr. Karwacki, that's where I'm at today. That's not a decision I'm making today, but I want you to understand where I'm starting.

. . . .

I am, frankly, torn, because I want restitution paid and I don't believe you're ever going to pay it. So I need something to prove to me that I'm wrong.

¶ 8 In March 2020, the probation department filed an amended complaint for revocation alleging additional probation violations. Karwacki did not appear at the next setting, and the court issued a warrant for his arrest. Karwacki was picked up on the warrant, and, in December 2020, the court held a hearing to address Karwacki's probation revocation.

¶ 9 At the December hearing, the probation officer testified that he did not seek behavioral modification or technical compliance before filing the revocation complaint. The probation officer's testimony

suggests that he did not seek alternative methods to bring Karwacki into compliance with his probationary terms before filing the complaint because of the court's order. Based on this testimony, Karwacki's defense counsel moved for the judge to recuse himself from the case. The judge denied the motion to recuse while acknowledging that he had issued the order directing the probation department to file the revocation complaint. The judge also acknowledged that the probation department was the appropriate entity to seek probation revocation but reasoned the court was allowed to direct it to do so because the probation department "is an arm of the judicial department." The judge did not view his order as taking an active role or indicating any kind of bias. Rather, the judge stated he took "no action, other than an impartial action of — or a neutral action of requiring a [c]omplaint to be filed so that a hearing could be held."

¶ 10 The court found that the People had proved three out of four alleged violations (failing to report to jail, failing to report to a meeting, and failing to disclose employment termination). The district court then revoked Karwacki's probation and sentenced him to twelve years in the custody of the Department of Corrections.

## II. Preservation

¶ 11 The People and Karwacki agree the issue of the judge's appearance of partiality was preserved. A motion to disqualify a judge usually requires a motion supported by affidavits from at least two credible persons not related to the defendant, but that procedure was not followed here. *See* § 16-6-201(3), C.R.S. 2022; Crim. P. 21(b)(1). However, Karwacki's counsel orally moved for the judge to recuse himself when the probation officer testified that he had filed the revocation complaint at the district court's direction; the judge and the People did not dispute the facts; and the judge ruled on the merits of the motion. *See People v. Roehrs*, 2019 COA 31, ¶¶ 13-15, 440 P.3d 1231, 1235-36 (concluding that a motion to recuse is reviewable even though the motion was procedurally deficient when the prosecutor and the judge did not object to the basis or the facts alleged, the judge addressed the motion on its merits, and the judge denied it on the merits); *People in Interest of C.Y.*, 2018 COA 50, ¶¶ 11-12, 417 P.3d 975, 978 (concluding that a legally insufficient motion to recuse is reviewable where the request was based on the record made in open court and the judge ruled on

the oral motion). Thus, we conclude the issue of appearance of partiality was preserved for review.

### III. Standard of Review

¶ 12 We review de novo whether a motion to disqualify raises legally sufficient grounds for disqualification. *People v. Sanders*, 2022 COA 47, ¶ 8, 515 P.3d 167, 171.

### IV. Analysis

¶ 13 Karwacki contends that an erroneous denial of a motion to disqualify for the appearance of partiality is a structural error requiring automatic reversal. The People disagree and contend that any error for appearance of partiality should be reviewed for harmless error. We need not decide whether we should review this issue for structural error because we conclude the district court erred by creating the appearance of partiality and the error was not harmless. “An error is not harmless, as relevant here, if it affected the fairness of the district court’s proceedings.” *People v. Higgins*, 2017 COA 57, ¶ 16, 413 P.3d 298, 301. We reverse if the error substantially affected the fairness of the proceedings. *See Hagos v. People*, 2012 CO 63, ¶ 12, 288 P.3d 116, 119.

## V. The District Court's Actions Created an Appearance of Partiality

¶ 14 Karwacki contends that the district court's order directing the probation department to file a revocation complaint created, at a minimum, the appearance of partiality. The People argue that the court "forwarded" the letter to the probation department and directed the probation department to file a probation revocation complaint because it was the only way to have a hearing and resolve the issue. We disagree with the People and determine that the district court created the appearance of partiality by ordering the probation department to file a revocation complaint and that this error was not harmless because it substantially affected the fairness of Karwacki's probation revocation proceedings.

¶ 15 The Colorado Code of Judicial Conduct states, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." C.J.C. 2.11(A). With the appearance of partiality, a judge may be able to act impartially but is "disqualified nonetheless because a reasonable observer might have doubts about the judge's impartiality." *People in Interest of A.G.*, 262 P.3d 646, 650 (Colo. 2011). Under the

Colorado Code of Judicial Conduct, impartiality requires objectivity and open-mindedness. C.J.C. 2.2 cmt. 1. Although reversal is not mandated in the absence of actual bias or prejudice under *Richardson v. People*, 2020 CO 46, ¶ 39, reversal based on an appearance of partiality “is intended to protect public confidence in the judiciary rather than to protect the individual rights of litigants.” A.G., 262 P.3d at 650.

¶ 16 Even if a judge is convinced of his or her own impartiality, disqualification is nonetheless required if circumstances compromise the appearance of fairness and impartiality, such that the parties and the public are left with substantial doubt as to the ability of the judge to fairly and impartially resolve pending litigation.

¶ 17 *People v. Schupper*, 124 P.3d 856, 858 (Colo. App. 2005), *aff'd*, 157 P.3d 516 (Colo. 2007). It is incumbent on a judge to disqualify himself or herself from proceedings if an appearance of partiality exists. *See In re Estate of Elliott*, 993 P.2d 474, 481 (Colo. 2000).

¶ 18 We have found no case law in Colorado addressing whether a district court may, sua sponte, order a probation department to file a complaint to revoke probation. An Illinois appellate court analyzed a similar issue and determined that “the trial court

committed plain error of constitutional proportions when it ordered that the State file a petition to revoke probation.” *In re J.K.*, 594 N.E.2d 433, 437 (Ill. App. Ct. 1992). In that case, the trial court ordered the State to file a petition to revoke probation because the court was unsure whether it could initiate those proceedings on its own. *Id.* at 435. The Illinois probation revocation statute governing proceedings at that time stated, “If a petition is filed charging a violation of a condition of probation or of conditional discharge, the court shall . . . order the minor to appear . . . .” Ill. Rev. Stat. 1989, ch. 37, ¶ 805-25. Based on this language, the reviewing court concluded the trial court lacked authority under the probation revocation statute to revoke a minor’s probation when a petition had not been filed. *J.K.*, 594 N.E.2d at 436.

¶ 19 Moreover, the appellate court held that nothing in the statute granted the trial court authority to order the district attorney’s office to file a revocation petition. *Id.* The appellate court recognized that “trial judges often increase the fairness of trials and of the administration of justice by making suggestions to the trial counsel. However, the trial court may not order discretionary acts by the prosecutor.” *Id.* at 437. The appellate court ultimately held

that the trial court's order directing the prosecution to file a revocation petition violated, in relevant part, the trial judge's duty of impartiality. *Id.* at 436.

¶ 20 In Colorado, section 16-11-205, C.R.S. 2022, sets forth the law governing initiation of revocation proceedings. As in *J.K.*, we conclude the district court here lacked authority under section 16-11-205, to order the probation department to file a complaint to revoke probation. Section 16-11-205 only authorizes a probation officer to initiate probation revocation proceedings by (1) arresting a defendant; (2) issuing a summons for the defendant to appear before the court to answer charges of violations; or (3) filing a complaint alleging violations. *See* § 16-11-205(1)-(5). The district attorney may also initiate probation revocation proceedings by filing a complaint. *See* § 16-11-205(5). A court may issue a warrant for the arrest of a defendant, but only if a report has been filed by a probation officer or a verified complaint has been submitted that establishes probable cause. *See* § 16-11-205(6). However, as the language of this statute plainly indicates, the institution of a probation revocation proceeding is entrusted to the discretion of the probation officer or the district attorney.

¶ 21 Accordingly, we reject the People’s contention that the district court may direct the probation department to file a revocation complaint simply because the probation department is part of the judicial branch. By ordering the probation department to file the complaint, rather than to simply review the letter alleging violations, the judge created an appearance of partiality. This directive could cause a reasonable observer to have doubts about the judge’s impartiality, believing that he had already determined that Karwacki had violated the conditions of his probation. The People argue that, even if the judge’s order created the appearance of partiality, it does not warrant reversal. We disagree and conclude the People have failed to show that the judge’s error was harmless. *See James v. People*, 2018 CO 72, ¶ 19, 426 P.3d 336, 341 341 (the People bear the burden of proof to show an error, whether constitutional or nonconstitutional, is harmless). The following circumstances demonstrate why the judge’s directive was not harmless under the circumstances presented here.

¶ 22 At the December hearing, the probation officer testified that he had been directly notified by the Arapahoe County Sheriff’s Office that Karwacki was not reporting to the weekend jail program;

however, the probation officer did not file the complaint for revocation based on that notification. Instead, the probation officer testified that he “received notification from the [c]ourt that that was how it wanted the complaint to be filed, and that’s when that process started.”

¶ 23 Moreover, we do not know whether the probation department would have filed an amended complaint to revoke Karwacki’s probation but for the court order directing the probation department to revoke Karwacki’s probation in the first instance. During direct examination, the probation officer testified that he was notified of Karwacki’s failure to appear for the jail weekend program, but before the officer could decide how to proceed, the court ordered the probation department to file the complaint to revoke Karwacki’s probation. The probation officer testified he did not seek other measures to secure Karwacki’s compliance with the conditions of his probation because the probation department “was required . . . to submit” a complaint for revocation of probation by the terms of the court order.

¶ 24 Significantly, in the probation summary and recommendation attached to the complaint, the probation officer noted that Karwacki

had “shown improvement complying with probation in other areas.” The probation officer also noted that Karwacki had “provided financial documentation as directed,” had “set up a monthly payment plan to pay back restitution,” and “remained gainfully employed.” Thus, it is unclear whether the probation officer would have filed a motion to revoke Karwacki’s probation had the judge not ordered the department to do so.

¶ 25 The court did not just forward the letter to the probation department; it ordered the department to take a specific action within its discretionary authority. The court did not take a “neutral action” as it posited, but rather positioned itself to initiate proceedings against Karwacki without prompting by any authorized party. This, in conjunction with other comments the judge made, would cause a reasonable observer to question whether that judge could act with impartiality and an open mind. The appearance of partiality further creates doubt as to the fairness of the judicial proceedings and, thus, the error cannot be deemed harmless. Moreover, the judge’s actions caused actual prejudice to Karwacki, resulting in the revocation of his probation. Accordingly, we conclude that the district court judge should have recused himself

from the case, and we conclude that another judge should be substituted to conduct any further proceedings. *See Elliott*, 993 P.2d at 482 (ordering a substitute judge to conduct any further contempt proceedings on remand because the record raised an appearance of possible bias and prejudice).

## VI. Conclusion

¶ 26 We reverse the revocation order, vacate Karwacki's sentence, and remand for further proceedings before a different judge in accordance with this opinion. On remand, the new judge must determine whether the probation department intends to file a probation revocation motion pursuant to section 16-11-205.

JUDGE J. JONES and JUDGE KUHN concur.