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State v. Malone

Minnesota Supreme Court

963 N.W.2d 453 | A19-1559 / A19-1560 | August 25, 2021

IN THIS EDITION

Court syllabus and complete opinion

Disqualification and remedy

Dissent and judicial footnotes

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Independent edition prepared October 29, 2026

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STATE OF MINNESOTA

IN SUPREME COURT

A19-1559

A19-1560

Court of Appeals

Moore, III, J.

Dissenting, McKeig, J., Gildea, C.J.

State of Minnesota,

Respondent,

vs.

Filed: August 25, 2021

Office of Appellate Courts

Robert Brady Malone,

Appellant.

_____

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

David L. Hanson, Beltrami County Attorney, Bemidji, Minnesota, for respondent.

Rodd A. Tschida, Minneapolis, Minnesota, for appellant.

_____

SYLLABUS

1. A defendant does not need to challenge the denial of a request to disqualify a district court judge for cause under Minnesota Rule of Criminal Procedure 26.03, subdivision 14(3), in a petition for a writ of prohibition to preserve the issue for appeal.

2. The district court judge was disqualified from presiding over appellant's case under Minnesota Rule of Criminal Procedure 26.03, subdivision 14(3), because the judge's impartiality was reasonably called into question by the judge's investigation into facts not

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in the record, announcement to the parties of the findings of that investigation, and reliance on those findings in ruling on appellant's pretrial motion.

3. Under the facts of this case, reversal of appellant's conviction and a remand for a new hearing is warranted to preserve the public's confidence in our judicial system.

Reversed and remanded.

OPINION

MOORE, III, Justice.

This appeal requires us to consider whether certain actions of the district court judge presiding in the prosecution of appellant Robert Brady Malone, who was charged with violating a Domestic Abuse No Contact Order (DANCO), reasonably caused the judge's impartiality to be questioned. If the judge's impartiality could reasonably be questioned, the judge was disqualified, under Minnesota Code of Judicial Conduct Rule 2.11(A), and also prohibited, under Minnesota Rule of Criminal Procedure 26.03, subdivision 14(3), from presiding over Malone's case. The court of appeals determined that the judge was not disqualified. We conclude that the judge's conduct during a pretrial proceeding reasonably caused the judge's impartiality to be questioned and that Minn. R. Crim. P. 26.03, subd. 14(3), was, therefore, violated when the judge continued to preside over Malone's case. We further conclude that, under the facts of this case, reversal of Malone's conviction for violating a DANCO and a remand for a new hearing are required to preserve the public's confidence in the judicial system. Thus, we reverse the court of appeals and remand to the district court for further proceedings consistent with this opinion.

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FACTS

In June 2018, Robert Brady Malone was charged with domestic assault for an incident involving his wife. At Malone's first appearance, the Beltrami County District Court issued a pretrial DANCO against him.[1] The pretrial DANCO, which was served personally on Malone in court, prohibited him from, among other things, having contact with the victim.

At a July 2018 hearing, with counsel present, Malone pleaded guilty to an amended charge of disorderly conduct. During the sentencing hearing, Malone requested that the pretrial DANCO not be continued during probation, but the judge denied the request.[2] The judge sentenced Malone to serve 90 days jail time but stayed execution of that sentence and placed Malone on probation for a term of 1 year. The conditions of Malone's probation required that he comply with a probationary DANCO and successfully complete the Beltrami County Batterers Intervention Program. On this occasion, however, the probationary DANCO was not served on Malone in the courtroom. Rather, the judge

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signed the probationary DANCO a couple days after the sentencing hearing, and a few days later signed an amended probationary DANCO that contained identical terms but corrected the victim's address.

In November 2018, at a probationary review hearing, the judge expressed dissatisfaction and frustration with Malone's attitude and behavior towards his probation officer as described in a probation report. The judge stated:

> [I]f I am going to continue to fight you on some of these issues, and if you continue to show an intimidating attitude towards your female probation officer, I am just going to lock you up for the 90 days. . . . [I]f I see this kind of attitude and this kind of behavior continue, I am just going to pull the plug on you.

On January 13, 2019, an officer pulled Malone over for a driving infraction; Malone's wife was in the car at the time of the stop. As a result, Malone was charged under Minn. Stat. § 629.75, subd. 2(b) (2020), which makes it a misdemeanor offense for "a person who knows of the existence of a domestic abuse no contact order issued against the person" to violate that order.

At the initial hearing on this new charge, Malone also made his first appearance on a probation violation report filed in the disorderly conduct matter, which accused Malone of failing to remain law abiding by allegedly violating the DANCO. The judge stated that he had read the police report supporting the DANCO violation charge and that he also knew about a sentence Malone's wife received a week earlier for a separate charge. Specifically, he noted that it was "disappointing" that she was "violating this Court's Order, allegedly – helping [Malone] violate it" a week after receiving a "break" in her own case. At a subsequent hearing, Malone again sought to have the probationary DANCO lifted in

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the disorderly conduct case. The judge declined to vacate the DANCO. Malone pleaded not guilty on the DANCO violation charge, and a jury trial was scheduled for February 26, 2019.

On the morning of trial, the judge first addressed several outstanding motions, including motions in limine from each party and a motion to dismiss for lack of probable cause filed by Malone. The State's motion in limine sought permission to admit certified copies of several documents from Malone's disorderly conduct case, including the transcript from the sentencing hearing, the pretrial DANCO issued at arraignment, the probationary DANCO and the amended probationary DANCO issued after sentencing, the notice of court filing for the amended DANCO,[3] and a probation agreement signed by Malone in September 2018. The probation agreement listed "[c]omply with Domestic Abuse No Contact Order (DANCO)" as a condition of Malone's probation.

In the motion to dismiss for lack of probable cause, Malone argued that the State's evidence was insufficient to prove a required element of the DANCO violation charge: namely, that Malone had knowledge of the probationary DANCO at the time of the January 2019 traffic stop.[4] During the hearing on this motion, Malone testified about his confusion

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regarding the terms of the pretrial DANCO, and he claimed that he never received a written copy of either of the probationary DANCOs.

After Malone's testimony, the judge expressed concern that Malone had not been truthful. The judge stated, "[i]t is the procedures in Beltrami County District Court, as I assume it is elsewhere, that the sentencing domestic abuse no-contact orders are not only e-filed on any attorney that might be representing the defendant, but they are also mailed separately to the defendant." The judge also said that "if you want, at some point, the clerk to testify to that regard, perhaps the State is going to need to do that. But that is always done." Additionally, the judge stated that "[w]e do have evidence that his attorney opened up the e-filing of the post-sentencing DANCO. So for Dr. Malone to . . . testify, under oath, that he did not receive those DANCOs, I quite honestly do not find the least bit credible. And I am really concerned."

After that exchange, the judge asked Malone's counsel whether:

> [W]e [should] have the clerk testify . . . to rebut what I think might have been perjured testimony by your client? . . . [M]y clerk can testify what our procedures are. . . . [The probationary DANCOs] would have been mailed, guaranteed, 100 percent. And if you want to hear the clerk testify about that under oath, we'll call her up.

The judge insisted that "[Malone] got [the probationary DANCOs] because they were mailed to him directly by court administration. That is the way it's done." After receiving

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evidence and hearing the parties' arguments, the judge denied the motion to dismiss on the record.[5]

The judge then addressed the motions in limine. At that point, the State stated—for the first time—that it may "amend its witness list to include the clerk of court regarding the mailing of domestic abuse no contact orders." Up until that point, the State had, on three separate occasions, expressed an intent to call only one witness—the officer who conducted the traffic stop in January 2019.

After a recess, Malone made a motion to remove the judge for bias, arguing that the judge had claimed knowledge of a disputed fact—the probationary DANCO service procedures by court administration in Beltrami County—and had contacted a potential witness from court administration who the State might subpoena to testify regarding these service procedures. Malone also asserted that the judge had investigated the audio recording from Malone's arraignment on the domestic assault offense, when the pretrial DANCO was issued. When prompted for input on Malone's motion, the State expressed

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to the court that the case "may be a bit cleaner, procedurally" if tried before a different judge.

The judge flatly denied contacting any potential witness, but admitted knowing that an attorney with Beltrami County had been inquiring about the availability of a court clerk to testify and that the court's clerk had reported to the judge that the State Court Administrator's Office advised that a court clerk would not be able to testify. A prosecutor assisting on the case mentioned that the Beltrami County Court Administrator had stated that she had "contact over the phone" with the judge. The judge expressly denied this contact; the judge's court clerk, however, admitted having discussed with the Court Administrator and other court clerks who might be able to testify about the district court's service procedures. The judge also rejected the characterization that the judge was trying to procure a witness for the State.

The trial was postponed, and arrangements were made for the Assistant Chief Judge to hear Malone's motion to remove the judge.[6] Malone filed an affidavit and exhibits in support of the motion. The filing renewed Malone's claims of bias and partiality during the February 26 hearing and also argued that there was a history of bias based on comments made by the judge in prior hearings. Among the exhibits were copies of e-mails and

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internal instant messages between court personnel exchanged on the day of the anticipated trial, February 26, 2019.

One exhibit shows an internal instant message conversation between the judge and the judge's court clerk, indicating that at 10:11 a.m. the judge asked, "Do you mail the DANCO's directly to the defendant, or to their attorneys?" The court clerk responded that she would check on the service information contained in the filing system, but that a paper copy would have been mailed to Malone. The judge wrote back, "that's what I want to know. Would the document be mailed directly to the defendant?" The court clerk replied, "Yes." The judge responded by asking "100" and the court clerk stated, "E-served on his attorney." The judge once again asked, "100% sure? mailed to him directly?" And the court clerk responded, "yes. We mail the sentencing order and DANCO to the Defendant. Always."

Another exhibit shows an internal exchange between the judge's court clerk and a court operations associate with Beltrami County Court Administration about the judge's question concerning service of Malone's DANCOs. The court clerk sent a message at 10:11 a.m. asking the operations associate to check the eFiling system to see if the sentencing order and probationary DANCO were sent to Malone's counsel. The operations associate wrote back that his counsel "got it and DID open it." The operations associate then e-mailed the court clerk a screenshot containing information from the eFiling system showing that Malone's counsel was served with the DANCO notice, and the status appears to show that it was opened. At 10:18 a.m. the court clerk forwarded this e-mail to the judge, writing, "FYI – this shows that his attorney . . . received the DANCO after

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sentencing. He opened it up on 8/31/2019 at 8:24 a.m. AND we would have mailed a paper copy to the Defendant."

Another set of exhibits documents an exchange of e-mails between the judge's court clerk and the Beltrami County Court Administrator. During the ongoing motion hearing, they appear to be discussing who would be able to testify from Court Administration about the DANCO service procedures. At 10:45 a.m. the court clerk e-mailed the Court Administrator that the defense was claiming "that Mr. Malone had not seen a copy of the DANCO or an Amended DANCO that was issued after his sentencing. It sounds like the State may want myself or another Court Clerk to testify as to what our procedures are here in Beltrami County."

Then, around 12:06 p.m., the other court clerk who was initially identified as the person who would testify for the State about the county's service procedures emailed the judge's court clerk to inform her that she could not testify. In response, the judge's court clerk wrote, "I told the judge it was going to be you – I'll let [the judge] know that may not happen." The other clerk replied, "Hold off on speaking with the judge, [the Court Administrator] was going to e-mail [the judge] regarding something?"

A final exchange shows that the judge's court clerk sent a message to the Beltrami County Court Administrator at 12:21 p.m., saying, "Judge wants you to call [D.F., an attorney with the county] and give him a heads up on this. They may want to discuss this over the lunch break." The Court

Administrator replied "[D.F.]?" To which the court clerk said "[The judge is] wondering if we are subpoena'd? Would someone have to then? Yes

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– [D.F.]. . . . [R.T.] is the Attorney in here – but [D.F.] was working on getting a Clerk to testify – that's why the Judge said to give him a heads up."

The Assistant Chief Judge held a hearing on Malone's motion to disqualify and denied the motion.[7] The Assistant Chief Judge's memorandum noted that she found no evidence that the judge possessed "personal knowledge" about Malone, as that phrase is defined in *State v. Dorsey*, 701 N.W.2d 238, 247 (Minn. 2005), such that he was disqualified under Minn. R. Jud. Conduct 2.11(A)(1). The Assistant Chief Judge also disagreed with Malone's allegations that the judge had conducted an improper investigation into facts outside of the record that produced evidence favorable to the State. The Assistant Chief Judge believed that the transcript showed that the judge "*already knew* of the court administration process." The Assistant Chief Judge further concluded that there was insufficient evidence that the judge communicated with the Court Administrator to procure her as a witness for the State. Finally, the Assistant Chief Judge found that Malone's additional claims of bias at earlier hearings were waived because Malone proceeded with the judge as the trial judge after these earlier instances of alleged bias occurred; and, even if not waived, she concluded that the evidence did not support a finding of bias.

Resuming preparations for trial on the DANCO violation charge, the State amended its witness list to include Malone's probation officer as a second witness. On August 14,

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2019, the judge presided over Malone's jury trial. The State called the probation officer, who testified about various conversations she had with Malone. The testimony, according to the State, provided circumstantial evidence showing Malone's knowledge of the probationary DANCO.[8] The jury returned a verdict of guilty.

At the sentencing hearing for this conviction, the judge also addressed Malone's probation violation in the disorderly conduct case that resulted from his new conviction for violating the probationary DANCO. For the probation violation, the judge reinstated probation, imposed a 15-day jail term, and ordered Malone discharged from probation after fully serving that term. The judge also imposed a consecutive, 15-day jail sentence for the DANCO violation conviction. The judge vacated the DANCO at that time.

Shortly thereafter, Malone filed a notice of appeal challenging his DANCO violation conviction and a separate notice of appeal challenging the probation revocation decision in the disorderly conduct case. The court of appeals consolidated the appeals. Malone argued, in part, that he was entitled to a new trial in the DANCO case because the judge was disqualified to preside over his case.[9]

The court of appeals affirmed, concluding that any investigation by the judge of facts outside the record was not grounds for disqualification because the controlling

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precedent, *State v. Dorsey*, 701 N.W.2d 238 (Minn. 2005), was specific to trials where a judge serves as the factfinder, rather than a jury. *State v. Malone*, A19-1559, A19-1560, 2020 WL 5110299, at *8 (Minn. App. Aug. 31, 2020). And even if the judge's investigation was improper, the court determined that it was cured by the jury's role as the factfinder. *Id.* The court also found that Malone's allegation that the judge attempted to procure a witness for the State was not supported by the record. *Id.* at *9. Finally, the court concluded that there was no history of bias in Malone's earlier hearings and that, even if there was, no authority required reversal of a jury's conviction based on incidents of alleged bias occurring at hearings prior to the trial. *Id.* at *9–10.

Malone sought review of several issues; we granted review of only the following: whether the judge was disqualified by the Code of Judicial Conduct from presiding over Malone's DANCO violation case.

ANALYSIS

The question before us is whether Malone is entitled to a new trial in his DANCO violation case because the judge was disqualified from presiding over the case.[10] The governing rule states that "[a] judge must not preside at a trial or other proceeding if

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disqualified under the Code of Judicial Conduct." Minn. R. Crim. P. 26.03, subd. 14(3). Rule 2.11(A) of the Minnesota Code of Judicial Conduct, in turn, provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." The Rule outlines five specific instances where a judge is disqualified, including instances in which the judge has "personal knowledge of facts that are in dispute." Minn. R. Jud. Conduct 2.11(A)(1). In addition, "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply." Minn. R. Jud. Conduct 2.11 cmt [1]. Impartiality means an "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, Minnesota Code of Judicial Conduct.

The State contends that we should not address the merits of Malone's judicial disqualification arguments because he used the wrong procedure to challenge the denial of his motion to disqualify the judge. According to the State, Malone was required to file a petition for a writ of prohibition to challenge the denial of his motion to disqualify the judge. We will first consider the State's procedural argument. We then consider whether the judge's conduct resulted in the judge's disqualification and, if so, whether Malone is entitled to any relief.

I.

A motion to remove a judge from a criminal proceeding is governed by the Minnesota Rules of Criminal Procedure. *In re Jacobs*, 802 N.W.2d 748, 751 (Minn. 2011).

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Under Minn. R. Crim. P. 26.03, subd. 14(4), a party is entitled to one peremptory removal of a judge so long as it complies with certain procedural requirements. On the other hand, a motion made under Minn. R. Crim. P. 26.03, subd. 14(3), is considered removal of a judge "for cause" and is not subject to the same procedural requirements as peremptory removal.

To obtain review of an order denying the peremptory removal of a judge, the moving party must file a petition for a writ of prohibition seeking interlocutory review following the adverse ruling. *State v. Dahlin*, 753 N.W.2d 300, 303–04 (Minn. 2008). A party that waits until the conclusion of the proceedings to appeal the denial of the motion will forfeit review of the removal issue. *See id.* at 304–05. The objective of this requirement is to avoid wasted time, resources, and effort by the parties and the court. *Smith v. Tuman*, 114 N.W.2d 73, 77 (Minn. 1962).

We held in *State v. Finch*, however, that a petition for a writ of prohibition is *not required* to obtain appellate review of a motion to remove a district court judge for cause. 865 N.W.2d 696, 701 (Minn. 2015). We explained that "[t]here are important distinctions between a peremptory removal and removal for cause," such that the two different types of removal motions should be governed by different appellate procedures. *Id.* The motion to remove in *Finch* was made to disqualify a judge from presiding over a probation revocation hearing. *Id.* at 699–700.

The State contends that Malone forfeited his right to appellate review of the denial of his motion to remove the judge because Malone did not file a writ of prohibition following the adverse ruling on that motion. The State argues that our decision in *Finch*

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should be limited to motions seeking for cause removal in the postconviction probation revocation context because it is less burdensome to conduct a second probation revocation hearing than to conduct a second trial. The State also claims that the same justifications for requiring a writ of prohibition for appellate review of peremptory removal motions also justify requiring such a writ for review of for-cause removal motions in any context except postconviction probation hearings.

We are not persuaded by the State's argument that *Finch* should be limited to only postconviction probation hearings, and we reject such a narrow reading of that decision. We explained in *Finch* that there are sound reasons to treat review of denied motions for peremptory removal and for-cause removal differently, and those reasons are not dependent on *when* the motion to remove for cause is made. *See* 865 N.W.2d at 701. We conclude that *Finch* controls on this issue and, therefore, that Malone was not required to seek a writ of prohibition to obtain review of the denial of the motion to disqualify the judge who presided over his case.

II.

Having concluded Malone used an appropriate procedure to challenge the denial of his motion to disqualify the judge, we turn next to whether the judge was disqualified. Under Minnesota Code of Judicial Conduct Rule 2.11(A), a judge is disqualified from presiding over "any proceeding" in which the judge's impartiality might reasonably be questioned. The Code does not provide any exceptions to this rule. *State v. Dorsey*, 701 N.W.2d 238, 248 (Minn. 2005). Whether a judge has violated the Code of Judicial Conduct is a question of law that we review de novo. *Id.* at 246.

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Whether a judge's impartiality may reasonably be questioned is an objective consideration that evaluates whether "a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." *Jacobs*, 802 N.W.2d at 753. "A 'reasonable examiner' . . . is 'an objective, unbiased layperson with full knowledge of the facts and circumstances.'" *State v. Pratt*, 813 N.W.2d 868, 876 n.8 (Minn. 2012) (quoting *Jacobs*, 802 N.W.2d at 753).

We begin with a "presumption that a judge has discharged his or her duties properly." *State v. Schlienz*, 774 N.W.2d 361, 366 (Minn. 2009). To remain impartial, judges should avoid the appearance of impropriety and act to assure that parties have no reason to think their case is not being handled fairly. *State v. Munt*, 831 N.W.2d 569, 580 (Minn. 2013). A judge must not act as counsel for a party to the litigation. *Hansen v. St. Paul City Ry. Co.*, 43 N.W.2d 260, 264 (Minn. 1950). Judges "must maintain the integrity of the adversary system at *all stages* of the proceedings." *Schlienz*, 774 N.W.2d at 367 (emphasis added).

Malone argues that the judge's conduct at the pretrial hearing on his motion to dismiss and other circumstances related to this hearing raise a reasonable question as to the judge's impartiality. Malone points to the judge's investigation into the service procedures used by court administration in Beltrami County district court service procedures, the judge's communication to the parties of the conclusions drawn from that investigation, the judge's suggestion that the State might want to consider calling a second witness to testify as to the service procedures, the judge's reliance on these conclusions in ruling on Malone's motion to dismiss for lack of probable cause, and the communications passing through the

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judge's chambers about the identity of a potential witness. Because a reasonable examiner reviewing these actions would question the judge's impartiality, Malone contends that the judge was disqualified under Rule 2.11(A).[11] We agree.

Although judges are presumed to have the ability to set aside extra-record knowledge and make decisions based solely on the merits of a case, our precedent makes clear that the "source" of this knowledge "could create a reasonable question regarding the judge's impartiality." *Dorsey*, 701 N.W.2d at 248 (emphasis omitted). In *Dorsey*, the judge during a bench trial independently investigated a fact not introduced into evidence and then announced the results of the investigation to counsel, effectively introducing "a material fact that was favorable to the state—and that the state had not yet introduced." 701 N.W.2d at 251. We concluded that "when a judge possesses

extra-record knowledge that is prejudicial to a defendant in a criminal trial, the judge may not disclose that knowledge" but must either "disqualify herself or set the knowledge aside." *Id.* at 252.

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We identified a similar concern in *State v. Schlienz*, when the judge engaged in conduct that seemed to favor one side in a criminal case. 774 N.W.2d at 367–69. There, the judge, in an ex parte conversation, told the prosecutor to be prepared to respond to an anticipated motion from Schlienz to withdraw his guilty pleas and the judge also suggested specific arguments the prosecutor could make in objecting to the motion. *Id.* We concluded that the conversation, "at a minimum, reasonably called the judge's impartiality into question" because the judge initiated the conversation and suggested specific objections that the prosecutor could make to an anticipated motion. *Id.* at 367.

Here, the State characterizes the judge's investigation into Beltrami County District Court's service procedures as confirming information the judge already knew. But the record shows that the judge had to ask the judge's court clerk how service is done and whether DANCOs are sent to defendants "100%" of the time, which demonstrates that the judge *did not know* that DANCOs not served in the courtroom are always mailed directly to defendants by court administration. In response to this prompting, the court clerk looked into the service procedures, confirming with a court operations associate that DANCOs are always served by mail to a defendant and asking what information was available in the eFiling system regarding service of the DANCO on Malone's counsel.[12] The court clerk

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reported this information back to the judge and provided the judge with a screenshot of the service information from the eFiling system.

The judge then proceeded to announce these findings to the parties and suggested that the State might need to have a court clerk testify regarding the service procedures. Additionally, it is evident that the judge relied on the announced findings in ruling on Malone's motion to dismiss for lack of probable cause.[13] The judge's comments were favorable only to the State and introduced information pertaining to Malone's knowledge that the State had not yet submitted. Finally, it seems evident that the judge's statements as to service prompted the State to add to its intended strategy for proving Malone's knowledge.[14]

We, therefore, conclude that the judge's conduct would lead a reasonable examiner to question the judge's impartiality because the judge investigated a fact not introduced into evidence, announced the findings from that investigation to the parties, relied on those

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findings in rejecting Malone's motion to dismiss, suggested that the State might want to consider calling a second witness to testify against Malone, and had communications passing through the judge's chambers as to the identity of a potential witness. Of added importance here is the fact that the judge's investigation revolved around an essential element of the crime—Malone's knowledge of the probationary DANCO—that was the State's burden to prove. Thus, the judge was disqualified under Minn. R. Jud. Conduct 2.11(A) and violated Minn. R. Crim. P. 26.03, subd. 14(3), by presiding over Malone's trial.[15]

In reaching this conclusion, we disagree with the court of appeals' conclusion that the error was harmless because the judge did not sit as the factfinder at Malone's trial. We reject any implication that our opinion in *Dorsey* supports a conclusion that a jury trial necessarily cures the error of a judge presiding over a case from which that judge is disqualified. Further, nothing about our decision in *Dorsey* suggested that it should be strictly limited to cases in which the judge sits as the factfinder.

We also note that the court of appeals misinterpreted our decision in *State v. Mouelle*, 922 N.W.2d 706 (Minn. 2019). In *Mouelle*, the defendant argued that the district court judge was required to recuse under the Code of Judicial Conduct when the judge learned, during an ex parte conversation with defense counsel, that the defendant might commit perjury. 922 N.W.2d at 712. We concluded that the defendant failed to establish

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an appearance of judicial partiality and identified several facts relevant to our consideration. *Id.* at 714. Among these was the fact that "the jury—the fact finder here— was never exposed to the concerns" that the defendant might perjure himself. *Id.*

In deciding Malone's appeal, the court of appeals cited the above language from *Mouelle* for the notion that a jury trial could impact the relief a defendant is entitled to when a disqualified judge presides over a case. *Malone*, 2020 WL 5110299, at *8 (noting that "even if we assume the district court impermissibly investigated a fact during the pretrial hearing," the judge "did not act as the finder of fact" but rather "sat only as the referee of the trial proceedings, while the jury acted as the finder of fact."). But that reading of *Mouelle* ignores the fact that we did not address the issue of whether the existence of a jury trial impacted the relief a defendant is entitled to *when* a judge whose impartiality could reasonably be questioned presides over a case. Rather, our decision in *Mouelle* concerned whether the defendant had established that the judge's impartiality could reasonably be questioned. And the fact that the judge in *Mouelle* kept the concern of perjury away from the jury was evidence that the judge set the information aside and properly executed her duties; or, in other words, that there was no partiality.

Here, however, substantial evidence shows that the judge did not set aside the knowledge about probationary DANCO service procedures used by Beltrami County District Court. Therefore, the question that we did not address in *Mouelle* is now squarely before us: whether a jury trial cures the error of a district court judge presiding over proceedings from which the judge is disqualified.

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The answer to this question is no. "Justice requires that the judicial process be fair and that it appear to be fair; it necessarily follows that a presiding judge must be impartial and must appear to be impartial." *Pratt*, 813 N.W.2d at 878. Minnesota Rule of Criminal Procedure 26.03, subdivision 14(3), provides that a judge "must not preside at a trial or *other proceedings* if disqualified under the Code of Judicial Conduct." (Emphasis added.) And Rule 2.11(A) of the Code of Judicial Conduct requires judges to disqualify themselves from *any proceeding* in which their impartiality can reasonably be questioned. Given the breadth of Rule 2.11(A), we reject the notion that a jury trial can cure the error of a judge who presides over a trial in violation of Minn. R. Crim. P. 26.03, subd. 14(3), because the judge was disqualified.

Last, Malone contends that the judge's conduct over the course of several hearings amounted to actual bias in violation of Malone's right to an impartial judge.[16] We disagree. Criminal defendants are constitutionally entitled to a neutral tribunal. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). But a judge's comments that constitute "a valid observation based on the history of the case" rather than "prejudgment on the merits of the underlying charges" do not amount to actual bias. *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008). And warnings to probationers that "a violation of probation can have serious

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ramifications" does not imply prejudgment of a probation revocation proceeding. *Finch*, 865 N.W.2d at 705 n.6. "The fact that a judge is familiar with a defendant is not an affirmative showing of prejudice." *State v. Yeager*, 399 N.W.2d 648, 652 (Minn. App. 1987). Because "[t]here is the presumption that a judge has discharged his or her duties properly," *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006), a party faces a heavy burden to show a judge is biased.

Malone essentially argues that the judge was biased against him because the judge was familiar with Malone as a result of the preexisting disorderly conduct case and Malone's status as a probationer, including his court-ordered involvement in the Beltrami County Batterers Intervention Program. But the judge's comments were largely observations that Malone's conduct was not heading in the right direction and a warning that there would be probation ramifications if Malone did not comply with the conditions of his probation. A district court judge is not prohibited from expressing a frank opinion to a probationer about that person's compliance—or lack thereof—with probation conditions. *See Finch*, 865 N.W.2d at 705 n.6; *see also State v. Karmoeddien*, No. A16- 0813, 2017 WL 164431, at *3 (Minn. App. Jan. 17, 2017) (concluding that comments similar to those in this case regarding a felony DWI probationer's situation and history of prior criminal offenses involving alcohol did not suggest an inability to impartially conduct subsequent revocation proceedings).

This leeway is particularly important in the context of a problem-solving court, with components such as the Beltrami County Batterers Intervention Program, where district court judges are expected to express candid, case-related, and appropriate opinions and

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commentary to participants without fear of accusations of bias. *See Karmoeddien*, 2017 WL 164431, at *3 (describing the comments at issue as the court's "candid assessment of the gravity of Karmoeddien's situation"). We do not expect district court judges evaluating probationers to confine themselves to rote, colorless, or anodyne comments that would utterly fail to facilitate the purposes of probation. But a district court judge who becomes directly involved in the case beyond the role of an impartial decision-maker and objective observer, even if not actually biased, may nevertheless be disqualified if the judge's impartiality may be reasonably questioned.

In this case, the judge never said or demonstrated that he had prejudged the merits of a pending or future probation revocation motion. The comments were, instead, a permissible warning to Malone about the ramifications that could result if he did not comply with the probation conditions. That Malone, who had multiple criminal cases pending at the same time, appeared before the same district court judge, is routine and unremarkable. The judge's familiarity with Malone and his behavior does not show actual bias, and we conclude that, on the facts before us, Malone failed to meet the heavy burden of establishing actual bias.

Although Malone failed to show actual bias, we hold that the judge's impartiality was reasonably called into question because of the judge's conduct at the pretrial hearing in the DANCO violation case. We therefore conclude that under those circumstances, the

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judge was disqualified from presiding over Malone's case under Minn. R. Jud. Conduct 2.11(A).[17] We next consider what, if any, relief Malone is entitled to.

III.

Where a defendant's claim is that a judge is disqualified because of a reasonable question of impartiality—rather than actual bias—we have held that reversal is not automatic. *Powell v. Anderson*, 660 N.W.2d 107, 120 (Minn. 2003); *see also Mouelle*, 922 N.W.2d at 713 ("[W]e have never held that reversal is automatic when a party succeeds in raising a reasonable question about the judge's impartiality."). Generally, a three-factor test is used to determine whether reversal is warranted when judicial impartiality is reasonably questioned. *Powell*, 660 N.W.2d at 120–21; *see also Mouelle*, 922 N.W.2d at 713 (applying the test adopted in *Powell*). The test considers " '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.' " *Powell*, 660 N.W.2d at 121 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)). Even when impartiality is reasonably questioned, however, we have on occasion concluded that reversal is necessary on the sole basis that the question of impartiality arises from some affirmative act by the court that risks undermining the

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public's confidence in the fairness of the judicial process so significantly that express consideration of the other two factors is unnecessary.[18] *See, e.g.*, *Pratt*, 813 N.W.2d at 878.

In *Pratt*, for example, we concluded that the facts and circumstances of the case would cause a reasonable examiner to question the judge's impartiality and that the judge was, therefore, disqualified under Rule 2.11(A). *Id.* But we then determined that reversal was required "to ensure the integrity and fairness of the judicial process" because "a presiding judge must be impartial and must appear to be impartial." *Id.* We concluded that the public cannot have confidence in a system that permits a judge to preside over a jury trial when one of the parties has retained that judge as an expert in a separate matter. *Id.* Although we noted that Pratt was entitled to a new trial under the *Liljeberg* factors, *id.* at 878 n.9, we did not consider the other two factors in the three-factor test because the weight of a single factor—the risk of undermining the public's confidence in the judicial process— was so significant that reversal was the only reasonable result, *see id.* at 878.[19]

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Similarly, here, we conclude that the result of the judge's affirmative actions of investigating the service procedures, announcing those findings to the parties,[20] and relying on those findings when ruling on a motion so significantly risks undermining the public's confidence in the fairness of our judicial system that we must reverse.[21] "[T]o perform its high function in the best way justice must satisfy the appearance of justice." *Liljeberg*, 486 U.S. at 864 (citation omitted) (internal quotation marks omitted). With regard to our criminal justice system in particular, public confidence is critically important. *See Pratt*, 813 N.W.2d at 878 (noting the importance of public confidence that a case is "decided with the highest traditions of the judiciary"); *Dorsey*, 701 N.W.2d at 251 (relying on the "bedrock principle in our criminal justice system" that prohibits judges from investigating facts in a criminal case).

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The Supreme Court characterized the need for the administration of justice to "reasonably appear to be disinterested as well as to be so in fact" as "[t]he guiding consideration" in applying the *Liljeberg* factors. *Liljeberg*, 486 U.S. at 869–70 (quoting *Pub. Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466–67 (1952) (Frankfurter, J., in chambers)). And "[t]he citizens of Minnesota rely on [us] to be vigilant in making sure that all cases will be decided in accordance with the highest traditions of the judiciary." *Pratt*, 813 N.W.2d at 879 (Dietzen, J., concurring). For our legal system to maintain the confidence of the public, and for the public to accept and abide by judicial decisions, the judicial branch must aspire to and exemplify both the reality and appearance of justice in every case. *See Pratt,* 813 N.W.2d at 878; *see also Troxel v. State*, 875 N.W.2d 302, 320 (Minn. 2016) (Lillehaug, J., dissenting). Therefore, the risk of undermining the public's confidence in the judiciary is the predominating factor in determining the relief warranted here.

Thus, we reverse and remand to the district court to vacate Malone's conviction for violating a DANCO. On remand, Malone is entitled to a new hearing on his pretrial motion to dismiss for lack of probable cause before a new district court judge, and if the new judge denies that motion, Malone is entitled to a new trial.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand for further proceedings consistent with this opinion.

Reversed and remanded.

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D I S S E N T

MCKEIG, Justice (dissenting).

I agree with the court's conclusion that the judge's conduct here does not constitute actual bias. However, even assuming without deciding that the judge did engage in conduct that gave rise to a reasonable question as to his impartiality, reversal is still not warranted. Therefore, I would affirm the decision of the court of appeals.

As the court correctly notes, under Rule 2.11(A) of the Minnesota Code of Judicial Conduct, a judge is disqualified when their impartiality might reasonably be questioned. Yet not every case that involves judicial misconduct requires a new trial. *Powell v. Anderson*, 660 N.W.2d 107, 120 (Minn. 2003). The proper remedy for a disqualification based on impartiality depends on the consideration of three factors: (1) the risk of injustice to the parties in the particular case; (2) the risk that denial of relief will produce injustice in other cases; and (3) the risk of undermining the public's confidence in the judicial process. *See id.* at 120–21 (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)).

The majority concludes that the third factor—the risk of undermining the public's confidence in the judicial process—is "so significant" that it alone warrants reversal of Malone's conviction. I disagree. The risk of undermining the public's confidence in the fairness of our judicial process is not as severe as the majority makes it out to be, and when the other two factors are also considered, the totality of the factors weigh against reversing Malone's conviction.

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Concerning the first factor, the risk of injustice to the parties, Malone alleges that the judge's investigation was the decisive factor in his ruling on the motion to dismiss for lack of probable cause. But Malone's motion to dismiss was unlikely to be granted even if considered by a different judge with no knowledge of the service procedures used by Beltrami County District Court. *See State v. Rud*, 359 N.W.2d 573, 579 (Minn. 1984) ("[P]roduction of exonerating evidence by a defendant at the probable cause hearing does not justify the dismissal of the charges if the record establishes that the prosecutor possessed substantial evidence that will be admissible at trial and that would justify denial of a motion for a directed verdict of acquittal."). In sum, setting aside the evidence relating to the service procedures that arose from the judge's inquiries, the record contains ample evidence to require Malone to stand trial on his DANCO violation. The risk of injustice to the parties in this particular case is extremely low and weighs against reversal.

Concerning the second factor, there is little risk that denying relief will produce injustice in other cases. There is little evidence that reversal here would have any "prophylactic value" in future cases. *State v. Pratt*, 813 N.W.2d 868, 878 (Minn. 2012). We presume that judges "will set aside collateral knowledge and approach cases with a neutral and objective disposition." *State v. Dorsey*, 701 N.W.2d 238, 248–49 (Minn. 2005) (citation omitted) (internal quotation marks omitted). Because

of this presumption and the unique circumstances of this case, the judge's conduct here is not likely to be the same or replicated in subsequent proceedings. Therefore, the second factor also weighs against reversal.

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In reaching its decision to reverse, the majority relies on *State v. Pratt*, 813 N.W.2d 868 (Minn. 2012). In my view, *Pratt* is inapposite because the judicial conduct in that case was far more egregious than the conduct at issue here. In *Pratt*, the disqualification arose from a judge agreeing to serve as an expert witness for the prosecution in an unrelated case. *Id.* at 872. Here, the judge was not professionally involved in another matter with one of the parties. Instead, the judge simply confirmed the service procedures in the county. This was something that he reasonably could have known, even if he did not know whether service occurred via the standard procedure in this instance. Although the judge communicated his findings directly to the parties, he did so to *both* parties and not to one party or the other. Assuming without deciding, that the judge's actions here give rise to reasonable questioning of the court's impartiality, reversal is not automatic. *State v. Mouelle*, 922 N.W.2d 706, 713 (Minn. 2019).

For these reasons, I respectfully dissent. I would affirm the decision of the court of appeals.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice McKeig.

Court's footnotes

Footnote 1 / source PDF page 3

1 A DANCO is an order that may be issued by a court against a defendant in a criminal proceeding involving four different types of domestic violence-related offenses. *See* Minn. Stat. § 629.75, subd. 1(a) (2020). A court may issue the order as a pretrial order before final disposition of the underlying criminal case ("pretrial" DANCO) or as a postconviction probationary order ("probationary" DANCO). *See id.*, subd. 1(b).

Footnote 2 / source PDF page 3

2 The district court judge who presided at sentencing was the same judge who issued the pretrial DANCO at Malone's initial appearance. Beginning with sentencing, the same judge presided over the remainder of Malone's disorderly conduct case. This same district court judge also presided over Malone's subsequent criminal case charging him with violating the probationary DANCO. For this opinion, "the judge" refers to the judge that presided over the proceedings at issue in this appeal.

Footnote 3 / source PDF page 5

3 The notice represented that a copy of the amended DANCO was sent to both Malone and the attorney serving as his counsel at the time.

Footnote 4 / source PDF page 5

4 *See* Minn. Stat. § 629.75, subd. 2(b) ("Except as otherwise provided in paragraphs (c) and (d), a person who *knows of the existence of a domestic abuse no contact order* issued against the person and violates the order is guilty of a misdemeanor." (emphasis added)).

Footnote 5 / source PDF page 7

5 The State offered evidence in response to the motion to dismiss for lack of probable cause. Before Malone took the stand, the State noted that the transcript from the sentencing hearing includes "Comply with the conditions of a Probationary Domestic Abuse No- Contact Order" as a condition of probation. On cross-examination, the State also questioned Malone about the exchange during his sentencing hearing when his attorney sought dismissal of the pretrial DANCO and the judge denied the request on the record; the State then offered the sentencing transcript into evidence. The State argued this exchange in the transcript supported its claim that Malone knew that he was subject to a probationary DANCO at the time of the alleged violation.

Footnote 6 / source PDF page 8

6 The judge at the time of this motion was the Chief Judge of the Ninth Judicial District, wherein Beltrami County is located, requiring the Assistant Chief Judge to hear and determine the motion. *See* Minn. R. Crim. P. 26.01, subd. 14(3).

Footnote 7 / source PDF page 11

7 The judge submitted correspondence with some attachments for the Assistant Chief Judge's consideration in deciding the motion. Malone objected to this submission. The Assistant Chief Judge sustained Malone's objection.

Footnote 8 / source PDF page 12

8 The State also introduced as exhibits the pretrial DANCO, the transcript from sentencing on the disorderly conduct offense, the amended probationary DANCO, the Notice of Filing of that amended probationary DANCO, and Malone's September 2018 signed probation agreement. All these exhibits were identified as intended exhibits in the State's amended motion in limine, filed before the February 26, 2019 pretrial hearing.

Footnote 9 / source PDF page 12–13

9 At the court of appeals, Malone further argued that his DANCO charge should have been dismissed because of a due process violation and for lack of probable cause, there was insufficient evidence to sustain his conviction for violating the DANCO, and the probation violation decision in his disorderly conduct case should be reversed because it was based on his improper DANCO conviction. *State v. Malone*, Nos. A19-1559, A19- 1560, 2020 WL 5110299, at *6–7, *10–11 (Minn. App. Aug. 31, 2020). The court of appeals rejected all these arguments. *Id*. None of these issues are before us.

Footnote 10 / source PDF page 13

10 Malone's arguments before our court about the judge's disqualification are limited to his DANCO violation case. He has not asked us for any relief regarding the probation revocation decision in his disorderly conduct case.

Footnote 11 / source PDF page 18

11 Malone also argues that the judge had "personal knowledge" of facts in dispute and was, therefore, also disqualified under the more specific provision of Minn. R. Jud. Conduct 2.11(A)(1). For Rule 2.11(A)(1), "personal knowledge" is defined rather narrowly, as knowledge that "arises out of a judge's private, individual connection to particular facts." *Dorsey*, 701 N.W.2d at 247. This definition *excludes* information that judges, as members of the judiciary and as citizens, are "routinely exposed to" and that they acquire throughout their day-to-day life. *Id.* at 246. The information at issue here is not the kind of "personal knowledge" that we defined in *Dorsey*. Whatever knowledge the judge had regarding the service procedures used by court administration in Beltrami County is the kind of knowledge that judges routinely acquire during their day-to-day work as a judge. Additionally, any information the judge knew about Malone and his history with the court and probation system was also information that the judge had acquired as a judge. The judge was, therefore, not disqualified under the more specific provision of Rule 2.11(A)(1).

Footnote 12 / source PDF page 19–20

12 As Malone points out, Rule 2.12(A) mandates that "[a] judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code." Minn. R. Jud. Conduct 2.12. Comment [1] further provides: A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge's direction or control. A judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge. Minn. R. Jud. Conduct 2.12. cmt.

Footnote 13 / source PDF page 20

13 The judge did not point to any other evidence to support Malone's knowledge of the DANCO and focused solely on what the judge claimed was "always done" by Beltrami County District Court.

Footnote 14 / source PDF page 20

14 Though the State all along intended to introduce a number of certified documents in support of its argument that Malone knew of the DANCO, before the judge's comments as to the service procedures of the Beltrami County District Court, the State consistently stated that it would call only one witness. Only after the exchange between the judge and Malone's counsel did the State say that it might call a second witness.

Footnote 15 / source PDF page 21

15 Though not material to our decision on the merits, we note the State's concession during the pretrial hearing that the judge should not proceed with the case.

Footnote 16 / source PDF page 23

16 Specifically, Malone points to the judge's statements at a probationary review hearing in the disorderly conduct case that if Malone's attitude did not change the judge would lock him up for the 90 days, even though there was no pending probation violation, and that he would "pull the plug" on Malone. Malone also identifies the judge's comments at the initial hearing on his DANCO violation offense regarding the judge's knowledge of the police report and the separate criminal case of Malone's wife.

Footnote 17 / source PDF page 26

17 We acknowledge once again the reality that as an appellate court "we have the advantage of evaluating a static, unchanging record in determining how circumstances like the one at hand should have been handled." *Dorsey*, 701 N.W.2d at 250 n.7. We also recognize the challenges that district court judges encounter when the same party comes before them in multiple cases and sometimes in the context of a problem-solving court such as the Batterers Intervention Program here. We are mindful of these dynamic circumstances in reaching our decision here, and our analysis of the factors involved is not intended to chastise or impugn the reputations of any of the district court judges involved.

Footnote 18 / source PDF page 27

18 In these previous cases we have not, however, rejected the three-factor *Liljeberg* test, and we intend no such implication here. We simply find one factor so weighty that the consideration of the other two factors is unnecessary.

Footnote 19 / source PDF page 27–28

19 The dissent suggests that our emphasis on the public confidence factor here is overstated because the judicial conduct in *Pratt* was "far more egregious" than the conduct at issue here. We agree that the conduct in *Pratt* was more egregious, but egregiousness is not the standard, and *Pratt* does not set the bar for permissible judicial conduct. The dissent's argument misses the point of the high standard of impartiality that we demand and the public expects. *See Jones v. Jones*, 64 N.W.2d 508, 516 (Minn. 1954); Minn. Code of Judicial Conduct 1.2 (requiring judges "to act at all times in a manner that promotes public confidence" in the integrity of the judiciary). Although "there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance," *Liljeberg,* 486 U.S. at 862, this is not a case of incidental judicial conduct. As we emphasized in *Schlienz,* "[t]he presence of an impartial judge is critical to ensure the fairness of the judicial process. There can be no fair proceeding, nor can the proceeding have any integrity, when the decision maker's impartiality has been reasonably called into question." 774 N.W.2d at 369.

Footnote 20 / source PDF page 28

20 The dissent implies that this case is different from *Pratt* because the judge announced the findings to both parties, but fails to explain how this announcement changes the risk of undermining the public's confidence in the judiciary.

Footnote 21 / source PDF page 28

21 The dissent argues that the first *Liljeberg* factor—the risk of injustice to the parties—weighs against Malone because the judge's investigation was not likely the decisive factor in denying Malone's motion to dismiss. While our decision is grounded on the risk of undermining public confidence in the judiciary, we note that the dissent's consideration of the risk of injustice to Malone fails to engage with the potential impact that the judge's conduct may have had on how the State presented its case at Malone's trial. Our primary concern in *Schlienz* was not the ex parte nature of the judge's comments but, rather, that the judge's statements "suggested arguments that were helpful to the State that the State may not have considered and had not yet made" and "benefited the State by giving the State a roadmap." 774 N.W.2d at 369.