The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
February 24, 2022

2022COA24

No. 19CA2314, *People v. O'Day* — Constitutional Law — Fifth Amendment — Right Against Self-Incrimination

A division of the court of appeals holds that the district court did not violate a defendant's Fifth Amendment privilege against self-incrimination by requiring him to answer questions in a deferred judgment and probation revocation hearing. The questions — whether he had been charged with and convicted of crimes in another case — did not call for answers that could be used as evidence of guilt in this case or which could provide evidence of guilt in another pending or future criminal case.

COLORADO COURT OF APPEALS **2022COA24**

Court of Appeals No. 19CA2314
Weld County District Court No. 17CR1952
Honorable Julie C. Hoskins, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Austin Matthew O'Day,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division III
Opinion by JUDGE J. JONES
Lipinsky and Gomez, JJ., concur

Announced February 24, 2022

Philip J. Weiser, Attorney General, Katharine J. Gillespie, Assistant Attorney General Fellow, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Heather N. Wong, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Austin Matthew O'Day, appeals the district court's judgment of conviction entered following revocation of his deferred judgment and probation. He contends that the district court erred by compelling him to provide allegedly incriminating testimony — that he had been charged with and convicted of crimes in another case — at his revocation hearing in violation of his Fifth Amendment right to remain silent. We conclude, however, that the district court didn't violate O'Day's right against self-incrimination because his answers to the questions at issue weren't incriminating within the meaning of the Fifth Amendment. Accordingly, we affirm.[1]

I. Background

¶ 2 This case stems from a storage unit burglary. The People charged O'Day with second degree burglary and vehicular eluding. He pleaded guilty to (1) vehicular eluding in exchange for a two-year deferred judgment and sentence and (2) criminal mischief in exchange for a supervised probation sentence.

---

[1] O'Day raised two other issues in his opening brief, but, as a result of resentencing during the pendency of this appeal, those issues are moot.

¶ 3 About nine months later, the probation department sought to revoke O'Day's deferred judgment and probation after he allegedly violated various conditions of both.[2] By the time of the revocation hearing, the department relied on a single violation: failure to abide by state law. As to that alleged violation, the revocation complaint read as follows:

> Austin Oday [sic] has violated Standard Condition No. 1 of the Terms and Conditions which provides, "I will abide by all local, state, and federal laws and will report any contact with law enforcement to my probation officer."
>
> The defendant violated this condition in that on or about 5/11/2019 the defendant was arrested by the Adams County Sheriff (11CN19008035B) for the following offenses: Obstructing a Peace Officer (M2), Possession Controlled Substance (DF5), Unlawful Distribution of Controlled Substance (DF2), Resisting Arrest (M2), Unlawfully Carry a

---

[2] Section 18-1.3-102(1), C.R.S. 2021, allows a district court to defer entering a defendant's judgment of conviction and sentence on his guilty plea for up to four years. *See Finney v. People*, 2014 CO 38, ¶ 14 ("Like probation, a deferred judgment is a privilege . . . that ultimately may result in dismissal of the charges against him or her." (quoting *People v. Manzanares*, 85 P.3d 604, 607 (Colo. App. 2003))). In exchange for the continuance, the defendant stipulates to probation-like conditions of supervision. *Id.*; *see* § 18-1.3-102(2). And just like probation, a defendant's deferred judgment may be revoked if he violates any of the accompanying stipulated conditions thereon. *Finney*, ¶ 14.

> Concealed Firearm (M2) and Possession Weapon by a Previous Offender (F5), offense occurring on 5/11/2019. The defendant is currently set to appear for a Preliminary Hearing on 6/5/2019 at 9:00am in Adams County case, 19CR1906.

¶ 4 At the revocation hearing, the prosecutor called O'Day to testify as the department's only witness. During direct examination, O'Day confirmed that he had signed the terms and conditions of his probation. Then the prosecutor asked O'Day, "While you were on probation here in Weld County, were you charged with any new offenses?" Defense counsel objected, asserting O'Day's Fifth Amendment right against self-incrimination. The district court overruled the objection, explaining that the prosecutor wasn't asking for incriminating answers, just whether O'Day had been charged. O'Day said, "I was charged."

¶ 5 The prosecutor later asked, "So Mr. Oday [sic], we were just talking about the case in Adams County. Did you ultimately end up entering pleas of guilty in that case on August 5th of 2019?" Again, defense counsel objected, advised O'Day to assert his privilege against self-incrimination, and argued that although the court could draw negative inferences from O'Day's invocation of his

right to remain silent, the court couldn't compel O'Day to answer the questions. The court disagreed:

> The specific question is whether he entered a plea of guilty, not whether he committed the underlying allegations. And so, to the extent that he would seek to withdraw that guilty plea in that case and otherwise exercise his right to remain silent, in that case, as to the underlying allegations, this question does not . . . affect that, so I am overruling the objection.

O'Day answered that he had pleaded guilty in the Adams County case.

¶ 6 The prosecutor asked O'Day whether he had signed a petition to plead guilty in the Adams County case. O'Day confirmed that he had. Defense counsel renewed the previous objection, but the court overruled it. O'Day said he had signed a plea agreement.

¶ 7 The prosecutor then asked O'Day whether he had pleaded guilty to two specific charges (possession with intent to distribute and possession of a weapon by a previous offender) in the Adams County case. Defense counsel renewed the previous objection, and the court overruled it. O'Day confirmed that he had pleaded guilty to those charges.

¶ 8 Last, the prosecutor asked O'Day to confirm that his plea agreement in the Adams County case could subject him to extraordinary aggravating circumstances given his felony probation in this case (i.e., Weld County case number 17CR1952). Defense counsel objected based on relevance and renewed the previous Fifth Amendment objection. But the district court overruled both objections because the question was relevant to establish that O'Day committed the new offenses while on probation in this case. O'Day confirmed this aspect of his plea.

¶ 9 The district court found that the People had proved, beyond a reasonable doubt, that O'Day had violated the terms of his deferred judgment and probation. The court revoked O'Day's deferred judgment and sentence on the vehicular eluding charge and resentenced him to eighteen months in community corrections to run consecutively with the sentence in the Adams County case. As for the criminal mischief charge, the court sentenced O'Day to 291 days in Weld County jail with credit for time served of 291 days. However, the original mittimus inadvertently showed that O'Day

had been resentenced to eighteen months in community corrections on the criminal mischief charge.[3]

II. Self-Incrimination

¶ 10 O'Day contends that the district court erred by compelling him to provide incriminating testimony at his revocation hearing in violation of his privilege against self-incrimination.

A. Standard of Review and Applicable Law

¶ 11 We review de novo whether a district court violated a defendant's privilege against self-incrimination. *People v. Roberson*, 2016 CO 36, ¶ 20; *People v. Ruch*, 2016 CO 35, ¶ 19.

¶ 12 The Fifth Amendment allows a defendant to refuse to testify against himself in a criminal trial and "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Ruch*, ¶ 20 (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). Incriminating testimony means "answers that would themselves support a conviction [and] those

---

[3] The court later ordered the community corrections sentence to run concurrently with the sentence in the Adams County case and corrected the mittimus.

that would furnish a link in the chain of evidence needed to prosecute the accused." *Roberson*, ¶ 23 (citing *Ohio v. Reiner*, 532 U.S. 17, 20 (2001)); *accord People v. Razatos*, 699 P.2d 970, 976 (Colo. 1985). Testimony is deemed compelled in violation of the Fifth Amendment when the state threatens to impose severe sanctions on a witness unless the constitutional privilege is waived or imposes "substantial penalties" on a witness who invokes his right not to testify. *Roberson*, ¶ 31 (*Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977)).

¶ 13 But during a revocation hearing, a defendant-probationer isn't entitled to the full range of constitutional guarantees afforded to a defendant in a criminal prosecution who faces substantive criminal charges. *Finney v. People*, 2014 CO 38, ¶¶ 26-27; *see Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). This distinction stems from the nature of the revocation proceedings. The purpose of a probation revocation hearing is to consider the defendant's conduct after having been convicted of a crime and "to assess the correctness of the original sentence." *Byrd v. People*, 58 P.3d 50, 55 (Colo. 2002). In such a hearing, "[a] state may require a probationer to appear and discuss matters that affect his probationary status." *Minnesota*

v. Murphy, 465 U.S. 420, 435 (1984). The prosecution may call a defendant as a witness at his revocation hearing, and if he refuses to answer questions by invoking his privilege against self-incrimination, his silence may be used against him. *Finney*, ¶ 27; *Byrd*, 58 P.3d at 56-57; *People v. Timoshchuk*, 2018 COA 153, ¶ 16; *see also* 6 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 26.10(c), at 1155 (4th ed. 2015).

¶ 14 Thus, a defendant's privilege against self-incrimination isn't implicated when he is asked questions to determine whether he violated the conditions of his probation, *Murphy*, 465 U.S. at 435 n.7; *id.* at 441 (Marshall, J., dissenting), unless the answers could be used against him in a retrial of the underlying case or in a separate criminal proceeding, *Murphy*, 465 U.S. at 435 (majority opinion); *Roberson*, ¶¶ 25-26 (answers to questions about viewing child pornography were incriminating because they could be used in the underlying case in the event the underlying conviction, which was on appeal, was reversed and there was a retrial and because they could be used for a separate prosecution).

B. Analysis

¶ 15 O'Day argues the district court violated his right against self-incrimination by compelling him to answer whether, while on probation, he had been charged with new offenses and had pleaded guilty to those charges. Specifically, O'Day says that by admitting to his guilty pleas, his answers were "obviously" incriminating for the purpose of the revocation hearing.[4]

¶ 16 We conclude, however, that the district court didn't violate O'Day's privilege against self-incrimination because the answers he provided at his revocation hearing weren't incriminating, for two reasons.[5]

¶ 17 First, a revocation hearing isn't considered a stage of a criminal prosecution, and, unlike in *Roberson*, O'Day's answers to the questions weren't relevant to any issue of guilt in this case. *See Murphy*, 465 U.S. at 435 n.7; *Gagnon v. Scarpelli*, 411 U.S. 778,

---

[4] We consider the revocation of the deferred judgment and sentence and the revocation of probation together because the analysis is the same for both. *See Finney*, ¶ 14 (equating probation to a deferred judgment because both may be revoked).

[5] Because we conclude that O'Day's answers weren't incriminating under the Fifth Amendment, we don't need to address whether his testimony was compelled.

782 (1973); *see also Byrd*, 58 P.3d at 55 (probation revocation hearings are different from criminal trials in purpose, procedure, and the rights afforded to the accused). To the extent O'Day's answers caused the court to revoke his deferred judgment and sentence in this case, that alone didn't implicate the Fifth Amendment. *See Murphy*, 465 U.S. at 435 n.7 (the privilege against self-incrimination isn't available to a defendant-probationer on the ground that answering questions might reveal a violation of his probation); *see also State v. Sites*, 437 N.W.2d 166, 168 (Neb. 1989) (the defendant-probationer's right to remain silent wasn't violated by being compelled to admit his noncompliance with his probation order to attend therapy and Alcoholics Anonymous meetings); *Wilson v. State*, 621 P.2d 1173, 1175 (Okla. Crim. App. 1980) (the defendant's constitutional privilege against self-incrimination wasn't violated when he was compelled to testify at his revocation hearing that he violated the conditions of his suspended sentence; a suspended sentence revocation hearing isn't considered a criminal prosecution under the Fifth Amendment).

¶ 18 Second, there was no other pending case against O'Day in which his answers could be used against him and, again unlike in

Roberson, his answers didn't subject him to any threat of future prosecution in another case. *See Murphy*, 465 U.S. at 435 ("The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution."); *Ruch*, ¶ 20; *see also People v. Neckopulos*, 672 N.E.2d 757, 761-62 (Ill. App. Ct. 1996) (no Fifth Amendment violation where the prosecutor's questions to the defendant were relevant to determine whether she violated her probation and proper because they "posed no realistic threat of incrimination in a separate criminal proceeding" (quoting *Murphy*, 465 U.S. at 437 n.7)); *Gyles v. State*, 901 P.2d 1143, 1148 (Alaska Ct. App. 1995) (the privilege against self-incrimination isn't available to a probationer when there is no real or substantial hazard of incrimination). Rather, his answers revealed conduct for which he had already been prosecuted and the resulting consequences.

¶ 19 In sum, we see no error.

III. Conclusion

¶ 20 The judgment is affirmed.

JUDGE LIPINSKY and JUDGE GOMEZ concur.