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6 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

NO. 29,656

10 **BRYAN WORTHINGTON,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY**

13 **Thomas A. Rutledge, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 for Appellee

17 Hugh W. Dangler, Chief Public Defender

18 Will O'Connell, Assistant Appellate Defender

19 Santa Fe, NM

20 for Appellant

21 **MEMORANDUM OPINION**

22 **WECHSLER, Judge.**

1 Defendant Bryan¹ Worthington appeals the district court order revoking his
2 probation. This Court filed a calendar notice proposing summary affirmance.
3 Defendant filed a memorandum in opposition to proposed summary affirmance, which
4 we have given due consideration. We affirm the district court.

5 **DENIAL OF RECUSAL OF JUDGE**

6 Defendant asserts that Judge Thomas Rutledge should have recused himself
7 because Defendant served in the National Guard under him. Defendant served in the
8 National Guard from 2002 to 2005. Defendant acknowledges that this issue was not
9 preserved at the revocation hearing. [DS 6] Accordingly, we do not consider this
10 issue. *See* Rule 12-216(A) NMRA.

11 Although we decline to reach the merits of this issue, we observe that
12 Defendant should have become aware of Judge Rutledge’s involvement in the case as
13 early as January 6, 2009, when he was notified of the hearing before Judge Rutledge
14 scheduled for March 6. [RP 142] Defendant did not object then or at any time before
15 or during the hearing eventually held on May 4, 2009. [RP 177] Defendant does not
16 describe the nature of his service “directly under” the judge or allege that the judge
17 gave any indication that he remembered Defendant. [DS 6] A defendant cannot
18 reasonably expect a second chance at a favorable ruling from a second judge after

¹Sometimes spelled “Brian” in the record. “Bryan” appears to be correct based on his signature. [See, e.g., RP 19, 121, 124]

1 losing his gamble that the first judge might rule favorably. *See* Rule 5-106(A) NMRA
2 (providing that “[a] party may not excuse a judge after the party has requested that
3 judge to perform any discretionary act”).

4 **CALCULATION OF REMAINING SENTENCE**

5 Defendant asserts that the order revoking probation incorrectly calculated the
6 time remaining on his sentence. Although this issue was also not preserved at the
7 revocation hearing, “[a]n unauthorized sentence may be corrected at any time.” *State*
8 *v. Ingram*, 1998-NMCA-177, ¶ 19, 126 N.M. 426, 970 P.2d 1151. If a court
9 incorrectly calculates the time remaining on an otherwise legal sentence, the incorrect
10 result is an unauthorized sentence. *See id.*

11 Defendant asserts that “he was told by prison officials that he had twenty-two
12 months left on his sentence, but the order states he had twenty-six months left.” [DS
13 6] Defendant does not inform us when the prison officials provided this information.
14 He also does not point out, nor does our own review of the record reveal, where the
15 order on appeal indicates that he had twenty-six months left. He does not explain why
16 he believes the prison officials’ calculation to be correct. Where the docketing
17 statement does not provide all the facts material to resolution of an issue, affirmance
18 of the result below is appropriate. *See State v. Chamberlain*, 109 N.M. 173, 176-77,
19 783 P.2d 483, 486-87 (Ct. App. 1989). There is a presumption of correctness in the

1 rulings or decisions of the district court, and the party claiming error bears the burden
2 of showing such error. *State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981
3 P.2d 1211. Accordingly, we affirm the district court.

4 **PLACE OF IMPRISONMENT**

5 Defendant argues that it was improper to require him to serve time in the
6 Department of Corrections on misdemeanor charges. [DS 6] We deem this issue
7 moot.

8 The order revoking probation provides that “Defendant shall serve three
9 hundred sixty-four (364) days of this sentence in the custody of the Eddy County
10 Detention Center. The remainder of . . . Defendant’s sentence . . . shall be
11 suspended.” [RP 169] This order modified the magistrate court sentence, which had
12 required Defendant to be imprisoned for the entire remainder of his sentence, to be
13 served in either the Eddy County Detention Center or the New Mexico Department
14 of Corrections. [RP 136] Defendant was incarcerated in the state correctional facility
15 in Hagerman, New Mexico for some time between the magistrate court order and the
16 district court order. [See RP 149-52] Defendant currently appears to be incarcerated
17 in the Eddy County Detention Center.

18 Defendant’s incarceration both before and after the district court order accords
19 with New Mexico statutes addressing the place of imprisonment for persons sentenced

1 to incarceration:

2 Persons sentenced to imprisonment for a term of one year or more shall
3 be imprisoned in a corrections facility designated by the corrections
4 department, unless a new trial is granted or a portion of the sentence is
5 suspended so as to provide for imprisonment for not more than eighteen
6 months; then the imprisonment may be in such place of incarceration,
7 other than a corrections facility under the jurisdiction of the corrections
8 department, as the sentencing judge, in his discretion, may prescribe.

9 NMSA 1978, § 31-20-2(A) (1993). Defendant, whose sentence currently “is
10 suspended so as to provide for imprisonment for not more than eighteen months,” is
11 incarcerated in a facility “other than a corrections facility under the jurisdiction of the
12 corrections department.” *Id.* The Eddy County Detention Center is thus an
13 appropriate place of imprisonment. Before the district court order superseded the
14 magistrate court order, Defendant was “sentenced to imprisonment for a term of one
15 year or more”; namely, for the remainder of his three year and two hundred seventy
16 day sentence. *Id.* Before the district court order, none of Defendant’s sentence “[was]
17 suspended so as to provide for imprisonment for not more than eighteen months.” *Id.*
18 Thus, at that time, a Department of Corrections facility was an appropriate place of
19 imprisonment, and in any event, Defendant is no longer incarcerated there. We find
20 no error in the determination of Defendant’s place of imprisonment.

21 **SUFFICIENCY OF EVIDENCE OF PROBATION VIOLATION**

22 Defendant alleges that the State offered no proof that he had violated his

1 probation. [DS 6-7] Specifically, he alleges that an officer was allowed to testify that
2 he had conducted a visit to Defendant's home and had found a bottle of Jim Beam or
3 Seagrams² whiskey, possession of which would violate Defendant's conditions of
4 probation. [Id.] Defendant testified at the hearing that the bottle actually contained
5 iced tea. [Id.] He argues that the contents of the bottle were not tested and the bottle
6 was not introduced at the hearing. [Id.]

7 Admission of the officer's testimony was apparently not objected to at the
8 hearing.

9 To preserve a question for review it must appear that a ruling or
10 decision by the district court was fairly invoked, but formal exceptions
11 are not required, nor is it necessary to file a motion for a new trial to
12 preserve questions for review. Further, if a party has no opportunity to
13 object to a ruling or order at the time it is made, the absence of an
14 objection does not thereafter prejudice the party.

15 Rule 12-216(A). Accordingly, we do not review the specific question of the
16 admissibility of the officer's testimony that he found a bottle containing whiskey.

17 Defendant's assertion in the docketing statement that the State "offered no
18 proof that he violated his probation" [DS 6] potentially raises an issue of whether the
19 evidence was sufficient. "[T]his Court may review the sufficiency of the evidence to
20 support a conviction, even though raised for the first time on appeal, because it

²The docketing statement identifies the bottle as Jim Beam, but the memorandum in opposition and the report of violation identify it as Seagram's. [DS 7, MIO 4, RP 112]

1 involves a question of fundamental error or the fundamental rights of the defendant.”
2 *State v. Vallejos*, 2000-NMCA-075, ¶ 29, 129 N.M. 424, 9 P.3d 668. “[T]he proof of
3 a [probation] violation need not be beyond a reasonable doubt, but need only establish
4 the violation to a reasonable certainty and satisfy the conscience of the court as to the
5 truth of the violation.” *State v. Galaz*, 2003-NMCA-076, ¶ 7, 133 N.M. 794, 70 P.3d
6 784.

7 Taken at face value, Defendant’s testimony that the liquid was tea was
8 uncontradicted, as the officer acknowledged that he had never smelled or tested it,
9 even after Defendant had informed him at the scene that the liquid was tea. [MIO 2]

10 A trial court is not required to accept uncontradicted testimony as true if
11 (1) the witness is shown to be unworthy of belief, or (2) his testimony is
12 equivocal or contains inherent improbabilities, or (3) concerns a
13 transaction surrounded by suspicious circumstances, or (4) is
14 contradicted, or subjected to reasonable doubt as to its truth or veracity,
15 by legitimate inferences drawn from the facts and circumstances of the
16 case.

17 *State v. Lovato*, 112 N.M. 517, 521, 817 P.2d 251, 255 (Ct. App. 1991). The district
18 court had ample basis to apply at least the second and fourth of these factors to the
19 question of what the whiskey bottle contained. The district court could have
20 concluded that it was inherently improbable that a person under a condition of
21 probation that he not possess alcohol and that he submit to home visits would store
22 iced tea in a whiskey bottle. The probation officer could reasonably infer from the

1 circumstances that the whiskey bottle contained exactly what the label said.
2 Accordingly, sufficient evidence existed to support revocation of Defendant's
3 probation.

4 For the reasons stated above, we affirm the revocation of Defendant's
5 probation.

6 **IT IS SO ORDERED.**

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8

JAMES J. WECHSLER, Judge

9 **WE CONCUR:**

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ROBERT E. ROBLES, Judge

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TIMOTHY L. GARCIA, Judge