IN THE SUPREME COURT OF THE STATE OF NEVADA

DORIAN CULLEN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 83208

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

DORIAN CULLEN, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 83208

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ROUTING STATEMENT

This matter may be assigned to the Nevada Court of Appeals as an appeal from a judgment of conviction based upon a plea of guilty pursuant to NRAP 17(b)(1).

STATEMENT OF THE ISSUES

1. The district court properly accepted Cullen's admitted non-technical violation as a basis to revoke his probation.
2. The district court did not improperly pre-judge Cullen's revocation.

STATEMENT OF THE FACTS

On October 18, 2020, Appellant Dorian Cullen ("Cullen") pleaded guilty to Count 1 – Battery By Strangulation (Category C Felony – NRS 200.481) and Count 2 - Battery Constituting Domestic Violence (Misdemeanor – NRS 200.485(1)(A),

200.481(1)(A), 33.018). AA 1. On March 3, 2021, Cullen appeared for sentencing. AA 23. At sentencing, the district court relied on the following facts from Cullen's PSI:

> On September 3, 2020, officers responded to a family disturbance call in reference to the victim, a pregnant female, being in pain and out of breath. Upon arrival, officers made contact with the victim who reported she had a verbal argument with the father of her children, the defendant, Dorian Cullen, and he was extremely upset with her. The victim further stated she tried to walk away from the situation and Cullen wrapped his arm around her neck and put her in a choke hold, which prevented her from breathing. The victim felt she was going to die because she could not breath and she started seeing black dots. Cullen choked the victim three times prior to her being able to break free to call the police. The victim was transported to the hospital to treat her injuries. When questioned, Cullen denied strangling the victim.

PSI at 5.[1] At sentencing the court noted that it had originally planned to sentence Cullen to prison, but had changed its mind following the presentation of mitigating evidence:

> So let me tell you, when I first read this file, this sentencing memorandum that your attorney filed with all the completion of everything you've been doing, before I read that I was going to send you to prison. After reading all of the steps that you have taken to better yourself and better the environment in which your children are going to hopefully one day when it's appropriate be brought back into, I'm not going to send you to prison I'm gonna give you the opportunity of probation.

[1] The State has contemporaneously filed a Motion to Transmit PSI with its Answering Brief.

AA 29. The court further admonished Cullen that if he appeared before the court with another non-technical violation or with any type of violence, he would be sent to prison:

> But I do need you to know, because it's always important to me that you and I are on the same level, if there's any type of violence, if you're not treating those children the way they should be treating [sic], if you're having contact with the mother, or if there are other non-technical violations, I will send you to prison because of just this -- this history, the fact that you've been given drug counseling before, you've failed at probation, failed at parole. I'm willing to work with you as long as you're willing to work with me, okay?

AA 29–30. Cullen was sentenced to nineteen (19) to sixty (60) months in the Nevada Department of Corrections as to Count 1, and credit for time served as to Count 2. AA 30. That sentence was suspended, and he was placed on probation for an indeterminate period not to exceed thirty-six (36) months. Id. Cullen's Judgment of Conviction was filed on April 6, 2021. AA 36.

On May 27, 2021, Cullen was arrested for possession of a controlled substance, violation of instructional driver's permit, and driving under the influence. AA 46. On June 7, 2021, Cullen appeared before the district court again for a revocation hearing. AA 46. The court stated that it had previously admonished Cullen that he was receiving one chance at probation and that if he appeared before the court again, he would be going to prison. AA 45.

Cullen stipulated to the non-technical violation and arrest and argued for reinstatement. AA 45. Following argument, Cullen's probation was revoked. AA 50. When revoking Cullen, the court stated in relevant part:

> I do appreciate your advocacy on Mr. Cullen's behalf Ms. Minichini, but one thing I am, is I am true to my word. And when I tell someone they get one chance, they do get one chance. I agree that recovery is a journey 100% and we often work with people throughout that journey. **Relapse is one thing. Relapse and getting in your car and getting arrested for a DUI and putting other people in harm's way is completely something else.** So at this point in time the defendant's probation is revoked.

Id. (emphasis added). Cullen's Amended Judgment of Conviction was filed on June 10, 2021. AA 51. On July 8, 2021, Cullen filed a timely Notice of Appeal. AA 54. On November 5, 2021, Cullen filed his Opening Brief. The State responds as follows.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's decision to revoke Cullen's probation. Cullen first argues that the district court erred because his arrest for misdemeanor DUI without charges having been filed did not constitute a non-technical violation pursuant to NRS 176A.510. Thus, the district court erred when it revoked Cullen's probation without the use of graduated sanctions. Because Cullen failed to raise this issue below, it is subject to plain error review. Jeremias v. State, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). However, Cullen cannot demonstrate plain

error because the district court properly relied on Cullen's arrest and stipulation to the non-technical violation as a basis for revocation. Lewis v. State, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974) (Evidence supporting a decision to revoke probation must merely be sufficient to reasonably satisfy the district court that the conduct of the probationer was not as good as required by the conditions of probation.). Accordingly, this claim should be denied.

Second, Cullen argues that the district court improperly pre-judged Cullen's revocation based on comments the court made about having put Cullen on a "list" after admonishing him that he would go to prison if he appeared before the court again. However, there is nothing improper about a court admonishing a defendant that he or she will get only one chance at probation. Cullen fails to explain how the district court's making note of the fact that he had been previously admonished somehow makes this improper or violates his due process rights. For the following reasons, the district court's revocation of Cullen's probation should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

District courts have wide discretion in probation revocation decisions. Hyler v. State, 98 Nev. 47, 49, 639 P.2d 560, 561 (1982). A district court's revocation decision will not be disturbed absent a clearly shown abuse of discretion. Lewis, 90 Nev. at 438, 529 P.2d at 797.

A revocation hearing has two distinct parts. Gagnon v. Scarpelli, 411 U.S. 778, 784, 93 S. Ct. 1756, 1760 (1973). The first part is "wholly retrospective," determining whether the probationer has in fact violated a term or terms of probation. Id. at 784, 93 S. Ct. at 1760–61. The second part requires a finding that the probationer has violated his terms, at which point the court determines whether to revoke probation and commit the probationer to prison, or to take alternate steps. Id. at 784, 93 S. Ct. at 1761. In determining this, the court's primary focus is on protecting society and maximizing chances of rehabilitation. Id.

While a defendant maintains his right to due process and minimal procedural safeguards, "the full panoply of constitutional protections afforded defendants in criminal proceedings does not apply to probation revocation proceedings." Morrissey v. Brewer, 408 U.S. 471, 480, 92 S. Ct. 2593, 2599 (1972). A probationer must be given advance notice of the alleged violations as well as the opportunity to obtain counsel, speak on his own behalf, bring in relevant information, and cross-examine adverse witnesses. NRS 176A.600; Morrissey, 408 U.S. at 488, 92 S. Ct. at 2603. Pursuant to Anaya v. State, 96 Nev. 119, 122, 606 P.2d 156, 158 (1980), "the probationer is entitled to a formal revocation hearing . . . at which the same rights attach, before a 'neutral and detached' hearing body. The function of the final hearing is to determine not only whether the alleged violations actually occurred, but

whether 'the facts as determined warrant revocation.'" (quoting Morrissey, 408 at 488, 92 S. Ct. at 2603).

Consistent with Morrissey, "[e]vidence beyond a reasonable doubt is not required to support a court's discretionary order revoking probation. The evidence and facts must reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation." Lewis, 90 Nev. at 438, 529 P.2d at 797. However, "[d]ue process requires, at a minimum, that a revocation be based upon 'verified facts' so that 'the exercise of discretion will be informed by an accurate knowledge of the [probationer's] behavior.'" Anaya, 96 Nev. at 122, 606 P.2d at 157 (quoting Morrissey, 408 U.S. at 484, 92 S. Ct. at 2593).

Moreover, unrefuted or stipulated facts and violations are sufficient for the court to determine that the probationer violated probation. McNallen v. State, 91 Nev. 592, 592–93, 540 P.2d 121, 121 (1975).

Further, "revocation must reflect a 'considered judgment' that probation is no longer appropriate to satisfy the State's legitimate penological interests." Black v. Romano, 471 U.S. 606, 623, 105 S. Ct. 2254, 2263-64 (1985).

II. THE DISTRICT COURT PROPERLY ACCEPTED CULLEN'S ADMITTED VIOLATION AS A BASIS TO REVOKE PROBATION

Pursuant to NRS 176A.510(6), "[t]he Division may not seek revocation of probation or parole for a technical violation of the conditions of probation or parole

until all graduated sanctions have been exhausted." NRS 176A.510(7)(c) defines a "technical violation" as follows:

> (c) "Technical violation" means any alleged violation of the conditions of probation or parole that does not constitute absconding and is not the commission of a:
>
> (1) New felony or gross misdemeanor;
>
> (2) Battery which constitutes domestic violence pursuant to NRS 200.485;
>
> (3) Violation of NRS 484C.110 or 484C.120;
>
> (4) Crime of violence as defined in NRS 200.408 that is punishable as a misdemeanor;
>
> (5) Harassment pursuant to NRS 200.571 or stalking or aggravated stalking pursuant to NRS 200.575;
>
> (6) Violation of a temporary or extended order for protection against domestic violence issued pursuant to NRS 33.017 to 33.100, inclusive, a restraining order or injunction that is in the nature of a temporary or extended order for protection against domestic violence issued in an action or proceeding brought pursuant to title 11 of NRS, a temporary or extended order for protection against stalking, aggravated stalking or harassment issued pursuant to NRS 200.591 or a temporary or extended order for protection against sexual assault pursuant to NRS 200.378; or
>
> (7) Violation of a stay away order involving a natural person who is the victim of the crime for which the supervised person is being supervised.
>
> The term does not include termination from a specialty court program.

Here, Cullen contends that his arrest for the misdemeanor offense of Driving Under the Influence, without any charges having been filed, was not a non-technical violation for purposes of NRS 176A.510. Opening Brief at 9. Thus, the district court erred when it revoked Cullen's probation without the use of graduated sanctions. Id.

Specifically, Cullen claims that the statute requires the "commission of" a new offense, and that an arrest alone does not constitute the "commission of" prohibited conduct. Id. Because Cullen failed to raise this issue below, it is subject to plain error review.

"The failure to preserve an error . . . forfeits the right to assert it on appeal." Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); Jeremias v. State, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). "Before this court will correct a forfeited error, an appellant must demonstrate that: (1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." Jeremias, 134 Nev. at 50, 412 P.3d at 48.

Here, Cullen cannot demonstrate that the district court committed plain error when it revoked his probation without the use of graduated sanctions. Unrefuted or stipulated facts and violations are sufficient for the court to determine that the probationer violated probation. See McNallen v. State, 91 at 592–93, 540 P.2d at 121. Further, "conviction is not a precondition to probation revocation." Dail v. State, 96 Nev. 435, 440, 610 P.2d 1193, 1196 (1980). In this case, Cullen had been arrested for misdemeanor DUI and he expressly admitted to the non-technical violation on the record. See AA 45. All Driving Under the Influence offenses are a violation of NRS 484C.110, with graduated penalties as dictated by NRS 484C.410.

Violation of NRS 484C.110 is not a technical violation. NRS 176A.510(7)(c) (3). Only technical violations require the use of graduated sanctions – non-technical violations do not. NRS 176A.510(1); (3); (7)(c)(1)-(7). Moreover, Cullen and Cullen's counsel admitted on the record that Cullen had experienced a "set back" with his drug use. AA 47–49. This was sufficient to reasonably satisfy the district court that the conduct of Cullen was not as good as required by the conditions of probation. See Lewis, 90 Nev. at 438, 529 P.2d at 797.

Cullen argues that an arrest alone does not constitute the commission of an offense constituting a non-technical violation. Opening Brief at 13. However, the district court did not rely on Cullen's arrest alone, rather it relied on his stipulation to the non-technical violation. AA 45. Cullen's contention that a district court may not accept a probationer's stipulation to a non-technical violation during a revocation proceeding defies common sense and would create an unnecessary waste of judicial resources. See Dail v. State, 96 Nev. at 440, 610 P.2d at 1196. Accordingly, the district court did not commit plain error when it revoked Cullen's probation without the use of graduated sanctions and Cullen's claim should be denied.

III. THE DISTRICT COURT DID NOT IMPROPERLY PRE-JUDGE CULLEN'S REVOCATION

District courts have wide discretion in probation revocation decisions. Hyler v. State, 98 Nev. 47, 49, 639 P.2d 560, 561 (1982). A district court's revocation decision will not be disturbed absent a clearly shown abuse of discretion. Lewis, 90

Nev. at 438, 529 at 797. [R]emarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence. Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

Here, the district court admonished Cullen at sentencing that if he appeared before the court again, his probation would be revoked:

> But I do need you to know, because it's always important to me that you and I are on the same level, if there's any type of violence, if you're not treating those children the way they should be treating [sic], if you're having contact with the mother, or if there are other non-technical violations, I will send you to prison because of just this -- this history, the fact that you've been given drug counseling before, you've failed at probation, failed at parole. I'm willing to work with you as long as you're willing to work with me, okay?

AA 29–30. Cullen concedes that such generalized warnings at sentencing are proper in order to impress on the defendant the seriousness of the offense and importance of complying with probation. Opening Brief at 16. Thus, it is unclear why Cullen believes that it is improper for the court to make note of probationers that it has so admonished.

The court noted at sentencing that it was willing to give the defendant an opportunity on probation after considering his mitigating evidence at sentencing. AA 29-30. The court specifically put defendant on notice of the types of things that would make the court reconsider its decision, including the commission of a non-

technical violation. Id. The record indicates that the court was inclined to give Cullen prison initially but decided to give him a chance at probation. Id.

Defendant wasted that chance by committing a DUI. The district court merely imposed the sentence it stated it would at sentencing. Id. The court did not need to pre-judge *whether there was a violation* because Cullen stipulated to the non-technical violation. AA 45. And the court was quite clear, well in advance, about what would happen *if* there was a non-technical violation. AA 29–30. There is nothing improper in either of those things.

Courts are given wide latitude to manage their caseload, and sometimes, as in this case, are enticed to give a defendant probation when they originally feel prison would be more effective. Keeping a note of those borderline cases, especially when it is made quite clear right up front that there was no tolerance for violations, is not improper, and curtailing that discretion just makes it less likely that courts will take a chance on borderline cases in the first instance.

Further, there is nothing in the record to indicate that the court had improperly "closed his or her mind to the presentation of all the evidence" or had any personal feelings of animosity towards Cullen. See Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). The court listened the arguments made by Cullen and Cullen's counsel and indicated that it may have been willing to work with Cullen had his violation merely been a relapse. See AA 50. However, a main consideration

for the court was the fact that Cullen had endangered other members of the community:

> I agree that recovery is a journey 100% and we often work with people throughout that journey. Relapse is one thing. Relapse and getting in your car and getting arrested for a DUI and putting other people in harm's way is completely something else. So at this point in time the defendant's probation is revoked.

Id. Thus, the record indicates that the court's decision was the result of a considered judgment that "probation [was] no longer appropriate to satisfy the State's legitimate penological interests." See Black v. Romano, 471 U.S. 606, 623, 105 S. Ct. 2254, 2264, 85 L. Ed. 2d 636 (1985). Defendant waived his opportunity to challenge whether a non-technical violation had occurred, and did present argument as to why, despite the violation, he should not be revoked. That is all that due process requires. Accordingly, this claim should be denied.

CONCLUSION

Wherefore, the State respectfully requests that the district court's decision to revoke Cullen's probation be AFFIRMED.

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Dated this 3rd day of December, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 3,086 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of December, 2021.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 3, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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