

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEREMY PAUL BROWN-WHEATON

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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CASE NO: 83896
Elizabeth A. Brown
Clerk of Supreme Court

FAST TRACK RESPONSE

1. **Name of party filing this fast track response:** The State of Nevada
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3. **Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:**

Same as (2) above.

4. **Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal:**

None.

5. **Procedural history.**

On November 19, 2020, appellant Jeremy Brown-Wheaton (hereinafter "Brown-Wheaton") was charged by way of Indictment as follows: Count 1 – Escape

(Category B Felony – NRS 212.090); Count 2 – Break, Injure or Tamper with Motor Vehicle (Category C Felony – NRS 205.274, 193.155); and Count 3 – Battery by Prisoner (Category B Felony – NRS 200.281(2)(F)). I Appellant’s Appendix (hereinafter “AA”) at 1-2. On February 23, 2021, Brown-Wheaton’s Guilty Plea Agreement was filed, wherein he agreed to plead guilty to Harboring Fugitive (Category C Felony – NRS 212.130.1). I AA at 173. Brown-Wheaton’s Judgment of Conviction was filed on May 7, 2021. I AA at 183. Brown-Wheaton was sentenced to a maximum of sixty (60) months and a minimum of twenty-four (24) months in the Nevada Department of Correction. I AA at 183. Brown-Wheaton’s sentence was suspended, and he was placed on probation for an indeterminate period not to exceed twenty-four (24) months. I AA at 183-84.

On September 30, 2021, Parole and Probation (P&P) authored a Non-Technical Violation Report (hereinafter “the Report”) for the district court. I Respondent’s Appendix (hereinafter “RA”) at 1. The Report discussed numerous violations committed by Brown-Wheaton, to include being arrested for misdemeanor domestic battery. I RA at 1-2. On November 4, 2021, Brown-Wheaton appeared before the district court at a probation revocation hearing. II AA at 311. On that day, the district court revoked his probation. II AA at 325-26. On November 10, 2021, the district court filed the Amended Judgment of Conviction. I RA at 4.

On December 2, 2021, Brown-Wheaton filed his Notice of Appeal. I AA at 191.

6. Statement of Facts.

The following facts, which were included in Parole and Probation's Violation Report, summarize Brown-Wheaton's probation violations:

On July 30, 2021, the Las Vegas Metropolitan Police Department was called out for a domestic violence call involving Mr. Brown-Wheaton and the mother of his child Alexis (Lexa) Simpson. Details of the event are as follows: CIU detectives were made aware of a 417 call at 1800 Edmond St K/117 on 7/30/21. The call involved Jeremy Brown-Wheaton (ID# 8399146) as the male half. There was damage to the structure, but officers were not sure about Brown-Wheaton's standing in the apartment and no arrest was made. The female half, Alexis Simpson, had family arrive and help her leave the area. Brown-Wheaton, had another 417 call later that day at 7000 Paradise Rd, #2124, with Simpson. This time Simpson's father alleged Brown-Wheaton had a firearm, but that was not substantiated.

On August 17, 2021, the Division made contact with Mr. Brown-Wheaton and he was advised to stay out of trouble and that if there were to be any further issues revolving around his girlfriend Lexa, that he would not be allowed to reside at his current residence. Mr. Brown-Wheaton was also advised that if he were to violate his probation further, that the Division would be seeking revocation. (Directives and Conduct)

On August 25, 2021, the Division served Mr. Brown-Wheaton with a Temporary Protection Order (T21216128T) and instructed to stay away from Alexis Simpson and to have no contact with her. The effective

until date on the TPO was September 2, 2021. (Directives and Conduct)

On September 26, 2021, Mr. Brown-Wheaton was arrested by LVMPD Officers and charged with Domestic Battery (M). The victim Lexa Simpson (DOB:08/20/96) stated that Mr. Brown-Wheaton forced her to lay with him and she attempted to get away. She alleged that Mr. Brown-Wheaton also used his feet to kick her off the bed, because she was either to lay with him in bed or sleep on the couch. (Laws)

It should be noted, Mr. Brown-Wheaton is currently enrolled in ABC Therapy's Domestic Violence program. However, it was reported that Mr. Brown-Wheaton has missed a total of 10 out of 15 classes, with 3 of those being unexcused. Mr. Brown - Wheaton was due to show for his domestic violence classes on August 27, 2021, September 3, 2021 and September 17, 2021, and failed to do so.

It should also be noted that the undersigned officer has had many conversations with Mr. Brown - Wheaton about his violent tendencies, and each time he has shifted blame and failed to take accountability for any of his actions. He even attempted to downplay his domestic violence charges by saying "You know how it is".

Mr. Brown-Wheaton has failed to begin making monthly supervision fee payments in the amount of \$30.00. The subject is currently in arrears towards this obligation for a total of \$180. (Financial Obligations)

I RA at 1-2.

On November 4, 2021, the district court held a revocation hearing. II AA at 311. At that hearing, Brown-Wheaton made several stipulations. II AA at 314-16. These stipulations included: (1) on July 30, 2021, two 911 calls were made in regards

to his conduct; (2) on August 17th, 2021, his probation officer told him to not have any further issues with his girlfriend; (3) on August 25, 2021, he was served with a temporary protective order; (4) on September 26, 2021, he was arrested for domestic battery and another domestic violence offense; (5) he missed ten out of fifteen classes with three of those being unexcused absences; and (6) he failed to make his monthly payments. II AA at 314-16. The district court found that Brown-Wheaton committed a non-technical violation regarding the domestic battery. II AA at 326. Based on this violation and his history, the district court found that Brown-Wheaton could not be supervised “in any shape or form” and is a danger to the community. II AA at 323. Accordingly, the district court revoked his probation. II AA at 325-26.

7. Issue(s) on appeal.

I. Whether Brown-Wheaton Could Have the Suspended Sentence Imposed Pursuant to NRS 176A.630

II. Whether Brown-Wheaton Had a Meaningful Opportunity to Challenge His Revocation

8. Legal Argument, including authorities:

I. THE DISTRICT COURT PROPERLY REVOKED BROWN-WHEATON’S PROBATION UNDER NRS 176A.630

Brown-Wheaton argues that he should not have been revoked because his arrest for domestic battery constituted a technical violation. Fast Track Statement, at 12-19. NRS 176A.630 provides for gradual responses to *technical* violations. According to the statute,

“Technical violation” means any alleged violation of the conditions of probation 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.

NRS 176A.630(5)(b). However, a district court may revoke a defendant at the first revocation hearing if he has committed domestic battery. NRS 176A.630(1).

Only evidence that a defendant committed a non-technical violation is necessary to revoke probation. Holmes v. State, No. 82452, 2021 WL 5276324, at *1 (Nev. Nov. 10, 2021). In Holmes, the defendant was arrested and charged for a non-technical violation. Id. The defendant’s probation officer testified regarding the

non-technical violation. Id. This Court held that the defendant's arrest constituted a violation of his probation:

The testimony and evidence at the hearing were enough for the court to be reasonable satisfied that appellant had violated a condition of his probation with his arrest for misdemeanor DUI (a violation of NRS 484C.110) and the district court did not abuse its discretion in this regard.

Id.

While Brown-Wheaton did commit several technical violations such as missing his mandated domestic violence classes, failing to make timely payments, and getting into a dispute with the victim, he committed a non-technical violation as established at the revocation hearing. II AA at 326. The district court found that there was enough evidence to support the allegations that Brown-Wheaton committed domestic battery. The court reasoned:

I think in looking at this history, this is clearly someone who has some major impulse control issues, violence issues, when we look at all the domestic batteries, the violation of the temporary orders, battery on a protected person, coercion, and then what we have going after going on here that was see in the report.

The fact of the matter is, is I do not believe that Mr. Brown-Wheaton is supervisable in any shape or form. I think that he's a danger to not only Ms. Simpson but to the community.

...

In regards to the technical violations, I said it excludes absconding the new felony or gross misdemeanor, and certain misdemeanors, battery domestic violence. And that's why I was saying it doesn't say an adjudication. It

talks about just a commission. So I don't agree with you.
I do believe that you can be violated for an arrest.

II AA at 323, 326 (emphasis added).

The district court's interpretation of the law is correct—nowhere in NRS 176A.630 does it say that a non-technical violation must result in the probationer being charged or convicted for the violation to serve as a basis for revocation. Instead, the statute simply requires the commission of new felony or gross misdemeanor. NRS 176A.630(1). The commission of an offense is “[t]he act of doing or perpetrating (as a crime)” Black’s Law Dictionary (11th ed. 2019); See Holmes, at *1. The district court relied on Brown-Wheaton’s admissions when making the determination that he committed a domestic battery. His arrest supplemented by the probation report constituted enough evidence to determine that he committed domestic battery. As such, Brown-Wheaton was properly revoked as it was established he committed a non-technical violation.

Both at the revocation hearing and in the instant appeal, Brown-Wheaton seems to argue that a conviction or charge is necessary to determine whether someone committed an offense. II AA at 320, 325, 58; Fast Track Statement, at 18. “Neither formal charges nor a conviction are required for probation to be revoked under NRS 176A.630(1).” Holmes, at *1. The only consideration that the district court needed to determine is whether Brown-Wheaton *committed* the domestic

battery. Whether he was prosecuted for the offense is not a necessary factor for the district court to revoke his probation.

NRS 176A.630(1) unambiguously states that domestic battery is an offense that can serve as the basis for a revocation of probation. Accordingly, the district court did not err in finding that Brown-Wheaton was eligible for revocation because he committed a non-technical violation. Thus, this Court should affirm the district court's ruling.

II. BROWN-WHEATON HAD A MEANINGFUL OPPORTUNITY TO CHALLENGE HIS 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 v. State, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974).

“The minimal procedures necessary to revoke probation or parole” require a “preliminary inquiry, to determine whether there is probable cause to believe that the probationer violated the conditions of his or her probation,” as well as “notice of the alleged probation violations, an opportunity [for the probationer] to appear and speak on his own behalf and to bring in relevant information, an opportunity to question persons giving adverse information, and written findings by the hearing officer.” Anaya v. State, 96 Nev. 119, 112 606 P .2d 156, 159 (1980) (internal citations omitted). 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, probation revocations are not criminal prosecutions and “the full panoply of constitutional protections afforded defendants in criminal proceedings does not apply.” 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, 96 Nev. at 122, 606 P.2d at 158, “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).

Brown-Wheaton argues that he did not have a meaningful opportunity to challenge his revocation. Fast Track Statement, at 19-25. In doing so, he relies on Anaya, Homes, and Spence v. Superintendent, 219 F.3d 162 (2nd Cir. 2000). Spence is inapplicable to this case as it relates to the United States Court of Appeals for the Second Circuit attempting to determine what constitutes a breach of a plea agreement. While Anaya and Holmes at least relate to revocation proceedings in

Nevada, they involve situations where the facts were contested. As discussed above, the district court relied on Brown-Wheaton admissions which it found was sufficient to revoke his probation. As such, any requirement to prove the violation was moot.

Regardless, the district court held a hearing where Brown-Wheaton could have challenged his revocation. He was given advance notice of the alleged probation violations. Not only did he have the opportunity to appear and speak on his behalf, but Brown-Wheaton did make several arguments to the district court regarding the revocation of his probation. II AA at 319-22, 324-25. Brown-Wheaton chose not to present any evidence at this hearing. He cannot now argue that his failure to present evidence, when given the opportunity to do so, constitutes a violation of his due process rights.

Ultimately, the district court revoked Brown-Wheaton's probation consistent with his due process rights. The district court considered all the evidence and penological interests before revoking Brown-Wheaton's probation pursuant to Black, and therefore did not err in doing so. 471 U.S. at 623, 105 S. Ct. at 2263–64. Accordingly, this Court should affirm the district court's revocation of Brown-Wheaton's probation.

VERIFICATION

1. I hereby certify that this Fast Track Response 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 Fast Track Response has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more, contains 2,703 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 23rd day of March, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ John Afshar*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 23rd day of March, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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