

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL SALDANA,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

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Case No. 84029

RESPONDENT'S ANSWERING BRIEF

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

WILLIAM M. WATERS
Nevada Bar #009456
Deputy Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155
(702) 455-4685

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	5
CONCLUSION	7
CERTIFICATE OF COMPLIANCE.....	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

Page Number:

Cases

Anaya v. State,

96 Nev. 119, 122, 606 P.2d 156, 157 (1980)6

Hargrove v. State,

100 Nev. 498, 502, 686 P.2d 222, 225 (1984)5

Jeremias v. State,

134 Nev. 46, 50, 412 P.3d 43, 48-49 (2018)7

Lewis v. State,

90 Nev. 436, 438, 529 P.2d 796, 797 (1974)6

Mann v. State,

118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002)6

McNallen v. State,

91 Nev. 592, 540 P.2d 121 (1975)6

Statutes

NRS 176A.510.....6

NRS 176A.630.....5, 7

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ROUTING STATEMENT

This matter is not presumptively assigned to the Nevada Court of Appeals, as it challenges a court’s revocation of probation. NRAP 17(b).

STATEMENT OF THE ISSUE

1. Whether the district court did not abuse its discretion by revoking Appellant’s probation after he violated its terms.

STATEMENT OF THE CASE

On August 6, 2018, the State charged Daniel Saldana (“Appellant”) by Criminal Complaint with Count 1: Burglary (Category B Felony – NRS 205.060); Count 2: Possession of Document or Personal Identifying Information (Category C Felony – NRS 205.465); and Count 3: Attempt Theft (Category C Felony – NRS 205.0832, 205.0835.4, 193.330). Appellant’s Appendix (“AA”) at 1-2. Pursuant to

negotiations, two counts were dismissed from the Information filed on August 24, 2018. AA at 5-6.

On August 29, 2018, Appellant pled guilty to Burglary. AA at 7-12. The State retained the right to argue sentence but would not oppose probation and an own recognizance release. AA at 7. If Appellant violated the agreement before sentencing, the State would have the full right to argue, including for large habitual offender treatment. AA at 7.

On January 10, 2019, Appellant was sentenced to thirty-six (36) to ninety-six (96) months incarceration, suspended. AA at 48. The terms of probation were listed in court. AA at 48-49. Appellant was admitted to probation and its terms were specified. AA at 15-16. The Judgment of Conviction was filed on January 1, 2019. AA at 17-19. This also specified the terms of probation.

Appellant did not appeal his conviction or file a petition for writ of habeas corpus.

Ten months later, the court issued a bench warrant for Appellant's arrest, as he had violated the terms of probation. AA at 20. The district court reinstated Appellant's probation, with the added condition that he complete a drug court program. AA at 51-52.

Appellant began drug court on February 25, 2021, and was terminated from the program on October 28, 2021. AA at 53, 161-62. The district court revoked

Appellant's probation and imposed his suspended sentence. AA at 181. The Amended Judgment of Conviction was filed December 27, 2021. AA at 41-42.

Appellant filed a Notice of Appeal on December 28, 2021. AA at 44-45.

STATEMENT OF THE FACTS

Appellant used his own name and a false identification card to try to buy a vehicle from Henderson Chevrolet. AA at 1-2.

He entered probation on January 10, 2019. AA at 48-49. A bench warrant issued for his arrest on October 2, 2019, for violating the terms of probation. AA at 20.

While on probation, Appellant was arrested for a felony in California. AA at 87. Defense counsel argued having a stipulated probation violation would motivate Appellant to complete drug court if he were assigned to that. AA at 88. Despite believing "new felonies on probation really should get you provoked," the district court reinstated Appellant to probation on February 23, 2021, with the added condition that he complete drug court. AA at 90-91. The court admitted, "I'm not 100% sure this is the right thing." AA at 95. Appellant said, "I'm not going to let you down." AA at 95.

On July 8, 2021, Appellant failed to attend a required therapy session, blaming his absence on a broken phone. AA at 136. On August 1, 2021, he missed a urinalysis

test. AA at 142. On August 28, 2021, he tested positive for methamphetamine. AA at 161.

On September 2, 2021, Appellant was arrested when a search of his home revealed methamphetamine, marijuana, and drug paraphernalia. AA at 157-59. He was found in possession of fake credit cards and identifications, a license plate, and an iPhone that were not his. AA at 177. Appellant also allowed other drug court participants to use his car, in which they fled from the police. AA at 156, 161. Appellant blamed his troubles on having left Freedom House too early. AA at 160. His attorney requested a higher level of care and in-patient treatment. AA at 161.

At his revocation hearing, the court struggled with Appellant's possession of the forged credit cards. AA at 178. His attorney argued for long-term, in-house rehabilitation so he could receive "actual therapy." AA at 179. The district court said:

Here's the deal sir, you can say "I can't do it." If you want to do it, you can do it. You'll find drugs in prison, I'm sure, if you want to. If you don't, on the other hand, if you want to take advantage of the program and what not, then I think you can do that too. I would also suggest that you reach out to the Hope for Prisoners Program, because I think that when you come out, that might be a good support system for you to break the cycle that you're under. Good luck to you sir.

AA at 181-82.

SUMMARY OF THE ARGUMENT

The district court properly exercised its discretion in revoking Appellant's probation in light of his numerous violations.

ARGUMENT

Appellant asks this Court to reverse the district court's decision to revoke his probation because he believes his constitutional rights were violated when the district court imposed his suspended sentence and required him to serve it. AOB at 7, 9.¹ He asserts the district court had other options than revocation. AOB at 8. He points to the graduated sanctions of NRS 176A.630 to imply the district court should have used them. AOB at 9. He claims the district court engaged in an arbitrary and capricious abuse of its discretion when it revoked Appellant's probation without having a member of the Department of Parole and Probation testify. AOB at 9.

An officer from the Department of Parole and Probation did testify regarding Appellant's probation violations on October 28, 2021. AA at 155. Appellant's complaint that the district court based its decision on verified facts is belied by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at

¹Appellant concludes his Opening Brief by asking that this Court reverse his conviction. AOB at 10. The State assumes this request was made in error, as it is not consistent with the relief requested elsewhere in the Opening Brief, and the instant appeal was noticed as a challenge to the revocation of his probation. Appellant has set forth no basis for this Court to vacate his conviction.

the time the claim was made.” Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

Revocation of probation is within “the trial court's broad discretionary power and such an action will not be disturbed in the absence of a clear showing of abuse of that discretion.” Lewis v. State, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974). An order revoking probation need not be supported by evidence beyond a reasonable doubt. Id. Rather, “[t]he 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.” Id. Due process does require that the revocation “be based upon verified facts.” Anaya v. State, 96 Nev. 119, 122, 606 P.2d 156, 157 (1980). However, “[p]arole and probation revocations are not criminal prosecutions; the full panoply of constitutional protections afforded a criminal defendant does not apply.” Id.

Not only did a probation officer testify as to Appellant’s probation violation, Appellant stipulated to it. AA at 175. Based on his stipulation, the court could reasonably find that his conduct was “not as good as required by the conditions of his probation,” and thus did not abuse its discretion. Lewis, 90 Nev. at 438, 529 P.2d at 797; see also McNallen v. State, 91 Nev. 592, 540 P.2d 121 (1975) (affirming probation revocation for a defendant who did not contest violation).

Graduated sanctions as outlined in NRS 176A.510 are required for technical violations, such as missing a mandatory therapy session. Testing positive for

methamphetamine and having methamphetamine in one's apartment are not technical violations. Not only is Appellant not arguing he was revoked for technical violations, he did not raise this below. Thus, he is not entitled to relief without a demonstration of plain error. Jeremias v. State, 134 Nev. 46, 50, 412 P.3d 43, 48-49 (2018).

Although NRS 176A.630 provides alternatives to probation revocation, including inpatient drug treatment, the district court was not compelled to refer Appellant to such programs. Since Appellant failed in drug court, the district court did not abuse its discretion in not referring Appellant to yet another opportunity.

Given the facts and circumstances of this case, the district court acted reasonably in revoking Appellant's probation.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM Appellant's Amended Judgment of Conviction.

Dated this 4th day of August, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Karen Mishler*

KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney

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 1,416 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 4th day of August, 2022.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Karen Mishler*

KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 4, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

WILLIAM M. WATERS
Deputy Public Defender

KAREN MISHLER
Chief Deputy District Attorney

/s/ E. Davis

Employee, Clark County
District Attorney's Office

KM/Suzanne Rorhus/ed