

IN THE SUPREME COURT OF THE STATE OF NEVADA

JONATHAN LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43886

FILED

JAN 19 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court revoking appellant Jonathan Lewis' term of probation. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On August 5, 2002, Lewis was convicted, pursuant to a guilty plea, of one count of transporting a controlled substance. The district court sentenced Lewis to a prison term of 19-48 months, suspended execution of the sentence, and placed Lewis on probation for an indeterminate period not to exceed 2 years.

On October 21, 2003, the State filed a notice of intent to revoke Lewis' probation. A hearing was set for July 1, 2004, however, the State's witness, Lewis' probation officer, did not appear in court despite being subpoenaed. After hearing arguments from counsel and over Lewis' objection, the district court found good cause to grant a continuance. The district court conducted a hearing on July 27, 2004, and Lewis' probation officer again failed to appear, however, another representative from the Division of Parole and Probation (P & P) was present. The district court revoked Lewis' probation and imposed the original sentence to run concurrently with the sentence imposed in an unrelated case in California. Lewis filed a motion to reconsider in the district court, and the State opposed the motion. On September 3, 2004, the district court entered an

order summarily denying Lewis' motion to reconsider. This timely appeal followed.

First, Lewis contends that the district court erred by continuing the initial probation revocation hearing when the probation officer failed to appear. Lewis claims that the State "failed to timely proceed on the revocation petition without any good explanation," and therefore, the revocation of his term of probation "is defective and should be reversed." We disagree with Lewis' contention.

The decision to grant or deny a motion for a continuance is within the sound discretion of the district court.¹ District Court Rule 14(1) provides:

All motions for the continuance of cases shall be made on affidavit except where it shall appear to the court that the moving party did not have time to prepare an affidavit, in which case counsel for the moving party need only be sworn and orally testify to the same factual matters as hereinafter required for an affidavit.

In other words, "[a] sworn oral affidavit is sufficient when the prosecutor is surprised by the absence of a subpoenaed witness and has no time to prepare a written affidavit."² If the prosecutor cannot present his case at the designated time, good cause for the granting of a continuance must be demonstrated.³ In determining whether good cause has been

¹Batson v. State, 113 Nev. 669, 674, 941 P.2d 478, 482 (1997). The district court also retains discretion to sua sponte grant a continuance.

²Joseph John H., a Minor v. State, 113 Nev. 621, 623, 939 P.2d 1056, 1058 (1997).

³Bustos v. Sheriff, 87 Nev. 622, 624, 491 P.2d 1279, 1280 (1971).

demonstrated, the district court must review the totality of the circumstances.⁴ Moreover, this court has stated that even without a formal written or oral motion by a party, it is within the district court's discretion to sua sponte continue a hearing based on the absence of a witness if it finds that good cause exists.⁵

In the instant case, we conclude that the district court did not abuse its discretion in granting the State's oral motion to continue Lewis' probation revocation hearing. Lewis' probation officer was served with a subpoena to appear, and the State received confirmation of service. When the probation officer failed to appear, the prosecutor orally moved, pursuant to Bustos v. Sheriff, for a continuance. The prosecutor was sworn in and testified as follows:

The State is surprised that she [the probation officer] is not here based on the fact that we had a return subpoena and had not received any other information that she couldn't be present. We'd ask your Honor to continue the revocation hearing. This is made not for the purpose of delay but based on the fact the State is surprised she is not present today.

Based on the above, it is apparent that the State did not willfully fail to comply with the procedural rules in order to improperly delay the hearing. Therefore, we conclude that the district court did not err in determining that good cause existed for the granting of the State's Bustos motion for a continuance.

⁴Joseph John H., 113 Nev. at 623, 939 P.2d at 1058 (citing Sheriff v. Terpstra, 111 Nev. 860, 863, 899 P.2d 548, 550 (1995)).

⁵Sparks v. State, 96 Nev. 26, 28, 604 P.2d 802, 804 (1980).

Second, Lewis contends that the district court erred by revoking his term of probation. More specifically, Lewis argues that “[t]here was an appalling lack of any evidence presented” and he was unable to confront the witnesses against him prior to the district court’s determination. We disagree with Lewis’ contention

The decision to revoke probation is within the broad discretion of the district court and will not be disturbed absent a clear showing of abuse.⁶ 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.⁷

In the instant case, Lewis is unable to demonstrate that the district court abused its discretion. Although the State did not present witnesses at the continued revocation hearing, a representative from P & P informed the district court that P & P was opposed to discharging Lewis from probation. Lewis never offered evidence or contested the fact that he violated the terms of his probation by failing to successfully complete the Drug Court program. The district court minutes of May 18, 2004, indicate that Lewis received three bench warrants for failing to appear and comply with the program, and at a later proceeding in the district court, defense counsel conceded that Lewis had been terminated from Drug Court.

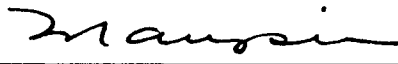
⁶Lewis v. State, 90 Nev. 436, 529 P.2d 796 (1974).

⁷Id.

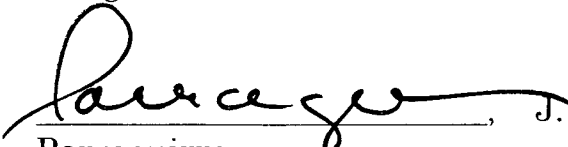
Accordingly, we conclude that the district court acted within its discretion when it revoked Lewis' probation.⁸

Having considered Lewis' contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Michael A. Cherry, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁸See generally McNallen v. State, 91 Nev. 592, 540 P.2d 121 (1975) (revocation of probation affirmed where violation by probationer not refuted).