

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO MARIN-SALAZAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48325

FILED

JUL 17 2007

MANETTE M. BLOOM
CLERK OF THE SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court revoking probation. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On October 21, 2004, the district court convicted appellant Mario Marin-Salazar, pursuant to a guilty plea, of one count of trafficking in a controlled substance. The district court sentenced Marin-Salazar to serve a prison term of 10 to 25 years, ordered the sentence to be suspended, and placed Marin-Salazar on probation for a period not to exceed 5 years. Marin-Salazar did not file a direct appeal.

On May 4, 2006, the Division of Parole and Probation filed a violation report, alleging that Marin-Salazar had been arrested by the Reno Police Department after he was discovered driving without a valid driver's license and in the possession of controlled substances and firearms. Thereafter, the district court conducted a probation revocation hearing, revoked Marin-Salazar's probation, and imposed the original sentence with credit for time served.

First, Marin-Salazar contends that the district court abused its discretion by revoking his probation based on the hearsay evidence of a confidential informant's statements to a police officer. Over Marin-

Salazar's objections, Detective Wade Mullen testified that a confidential informant said that Marin-Salazar referred to himself as Gordo, the confidential informant believed that Gordo's real name was Mario, and, when shown a photograph of Marin-Salazar, the confidential informant identified Marin-Salazar as Gordo.

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.¹ 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.² The district court has broad discretion in deciding whether to admit evidence.³ "A statement merely offered to show that the statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted, is admissible as non-hearsay."⁴

Here, the district court correctly determined that the confidential informant's out-of-court statements were not offered for the truth of the matter asserted, but rather to show that the statements were made and that Detective Mullin took action in response to the statements.

¹Lewis v. State, 90 Nev. 436, 529 P.2d 796 (1974).

²Id.

³See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

⁴Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990); see also NRS 51.035.

Moreover, Marin-Salazar has not demonstrated that the district court based its decision to revoke his probation solely on evidence that he was trafficking in controlled substances. The district court specifically found that Marin-Salazar had violated the conditions of his probation by (1) trafficking in controlled substances at the Rincon Latino Club, (2) possessing controlled substances in his vehicle, (3) possessing firearms in his vehicle, and (4) driving his vehicle without a license. Under these circumstances, we conclude that the district court did not err.

Second, Marin-Salazar contends that the district court abused its discretion by revoking his probation based on affidavits from the Washoe County Crime Laboratory. Marin-Salazar specifically claims that he had a due process right to confront and cross-examine the affiants. Marin-Salazar further claims that the State did not present evidence or argument that it was impracticable to have the affiants testify, and it did not provide authority for its assertion that affidavits are "a recognized species of reliable hearsay, admissible at probation revocation hearings."

We have "explicitly held that 'a probationer has a due process right to confront and question witnesses giving adverse information.'"⁵ Accordingly, an affidavit establishing a substantive violation of a probation condition must be excluded unless the affiant is available for questioning or the affidavit falls within some exception to the hearsay rule.⁶ "A statement is not excluded by the hearsay rule if its nature and

⁵Jaeger v. State, 113 Nev. 1275, 1282, 948 P.2d 1185, 1189 (1997) (quoting Anaya v. State, 96 Nev. 119, 123, 606 P.2d 156, 158 (1980)).

⁶See generally NRS 51.035; NRS 51.045(1); NRS 51.065; Anaya, 96 Nev. at 123, 606 P.2d at 158.

the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available."⁷

Here, the affidavits submitted by the criminalist employed by the Washoe County Sheriff's Office Crime Laboratory provided adverse information, which tended to establish that Marin-Salazar substantively violated conditions of his probation. We conclude that the affidavits were improperly admitted because they do not fit within an exception to the hearsay rule and the circumstances under which they were offered do not provide adequate assurances of reliability and accuracy.⁸ However, we note that Marin-Salazar has not demonstrated that the district court based its decision to revoke his probation solely on evidence that he was in possession of controlled substances, and we conclude that the error was harmless given the overwhelming evidence of his other probation violations.

Third, Marin-Salazar contends that he was denied his due process right to appear and speak on his own behalf at the probation revocation hearing.⁹ In anticipation of his criminal trial, Marin-Salazar exercised his Fifth Amendment privilege against self-incrimination at the

⁷NRS 51.075(1).

⁸*Cf. Jaeger*, 113 Nev. at 1282, 948 P.2d at 1189 (concluding that a probation officer's testimony as to the normal procedures followed by the Division of Parole and Probation when testing urine samples "was properly admitted because it was reliable and made under assurances of accuracy not likely not likely to be enhanced by calling the people who actually performed the drug tests").

⁹Marin-Salazar cites to *Anaya*, 96 Nev. at 122, 606 P.2d at 158.

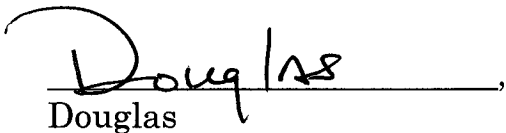
probation revocation hearing and asked the district court to continue the hearing until his trial was resolved. Marin-Salazar claims that the district court's decision to deny his request for a continuance violated his due process right.

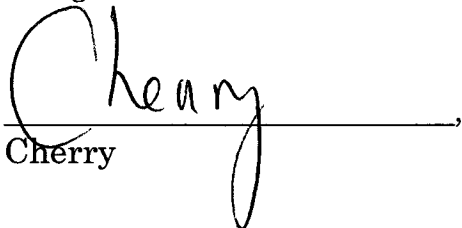
However, requests for continuance are addressed to the sound discretion of the district court,¹⁰ and neither an appellant's due process rights nor public policy are violated when a probation revocation hearing precedes a related criminal trial.¹¹ We note that the district court granted Marin-Salazar's previous requests for continuances, and we conclude that it did not abuse its discretion by denying this request.

Having considered Marin-Salazar's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

¹⁰Cf. Doyle v. State, 104 Nev. 729, 731, 765 P.2d 1156, 1157 (1988).

¹¹Dail v. State, 96 Nev. 435, 437-40, 610 P.2d 1193, 1194-96 (1980).

cc: Hon. Steven P. Elliott, District Judge
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