

IN THE SUPREME COURT OF THE STATE OF NEVADA

HARRY MICHAEL BENNETT A/K/A
HARRY BENNETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50735

FILED

NOV 18 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order revoking appellant Harry Michael Bennett's probation. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Bennett was convicted, pursuant to a guilty plea, of one count of sexually motivated coercion. The district court sentenced Bennett to a prison term of 12-48 months, suspended execution of the sentence, and placed him on probation for an indeterminate period not to exceed five years. Bennett did not pursue a direct appeal from the judgment of conviction and sentence.

On April 20, 2007, the State filed a notice of intent to seek revocation of Bennett's probation. The district court conducted a hearing and reinstated Bennett's term of probation. On November 1, 2007, the State filed a second notice of intent to seek revocation of Bennett's probation. The district court conducted a hearing and, on December 4, 2007, entered an order revoking Bennett's probation and imposing the

original prison term with credit for time served. This timely appeal followed.

Bennett contends that the district court abused its discretion by revoking his probation. Specifically, Bennett claims that the rules regarding alcohol use were conflicting and that he was never informed that his probation could be revoked by merely “intending to violate by drinking alcohol.” Bennett also argues that he “was never warned even being drugged against one’s will would warrant revocation. [And that] [h]e was never given meaningful guidance or explanation as to participation in counseling or told that he could be terminated without clear cause and despite unfailing attendance.”

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

We conclude that the district court abused its discretion by revoking Bennett’s probation. Specifically, the district court relied primarily on unsubstantiated and/or insufficient evidence in making its determination.

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

²Id.

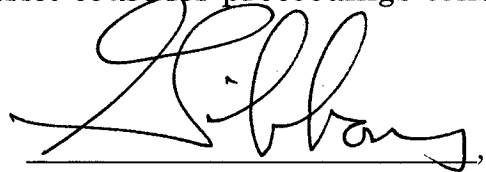
First, evidence that Bennett tested positive for methamphetamine was questioned by his probation officer. At the revocation hearing, Bennett's probation officer, in response to questioning by defense counsel, testified that he believed that Bennett was likely "drugged" and did not ingest drugs either voluntarily or knowingly in light of the extremely high level of methamphetamine found in his blood despite the fact that Bennett tested negative for methamphetamine on 3-4 occasions before and after the date of his positive test. Alternatively, defense counsel argued that "something is probably wrong with the lab" that provided the test results.

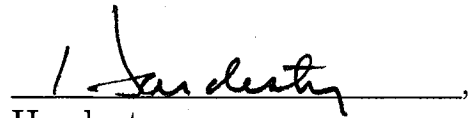
Second, the State failed to establish that Bennett violated the conditions of his probation by drinking alcohol. Although Bennett initially believed he had violated the terms of his probation by sipping champagne at a New Year's Eve party, it was later discovered that it was non-alcoholic sparkling cider. Bennett was prepared to present a witness in support of his contention at the revocation hearing, however, the district court stated, "I don't need to hear about the sparkling cider."

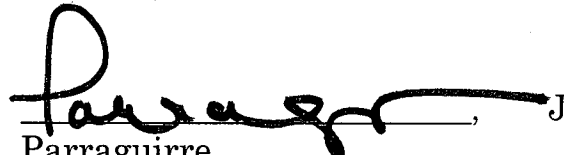
Finally, and most importantly, although the district court noted other alleged infractions that were "small" and "technical," it appears that the court's decision to revoke Bennett's probation was improperly based in large part on the probation officer's unsubstantiated and unqualified opinion that Bennett was a high risk to reoffend, despite a contrary and favorable psychosexual evaluation which resulted in Bennett's probation eligibility. We conclude that the record did not support a finding that Bennett was a high risk to reoffend and that the probation officer's unsubstantiated and unqualified opinion was not a

sufficient reason to revoke his probation. Therefore, we remand this case to the district court for a new revocation hearing. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Douglas W. Herndon, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk