IN THE SUPREME COURT OF THE STATE OF NEVADA

MARVIN E. WALTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51563

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court revoking probation. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On May 4, 2004, the district court convicted appellant Marvin Walton, pursuant to a guilty plea, of one count of attempted lewdness with a child under the age of 14 years. The district court sentenced Walton to a prison term of 48 to 120 months, suspended execution of the sentence, and placed Walton on probation for a period not to exceed five years. Walton did not file a direct appeal. On April 15, 2008, following a probation revocation hearing, the district court revoked Walton's probation and imposed the original sentence with credit for time served. This timely appeal followed.

Due Process Rights

Walton contends that he was denied his due process right to a fair probation revocation hearing. Walton specifically claims that he was deprived of the opportunity to confront and question the author of a report giving adverse information about him and that the report and multiple hearsay testimony regarding the report were improperly admitted into

evidence. Walton asserts that (1) Investigator Chris DeFonseka's report and Probation Officer Karl Christopherson's hearsay testimony were offered to establish a substantive probation violation – the possession of inappropriate sexually explicit material; (2) the State made no attempt to secure Investigator DeFonseka's testimony and made no record that it would experience undue hardship by securing the investigator's presence at the hearing; and (3) he had no means of challenging the investigator's qualifications, the investigator's methodology, the chain of custody of the evidence that was examined, and the accuracy of the facts contained in the investigator's report.

"[A] probationer has a due process right to confront and question witnesses giving adverse information at the formal revocation hearing." Anaya v. State, 96 Nev. 119, 123, 606 P.2d 156, 158 (1980). To determine whether the admission of hearsay evidence violates the probationer's right to confrontation, the district court "must exercise its sound discretion after carefully considering the respective interests of the probationer and the State, the purpose for which the evidence is offered, and the nature and quality of that evidence." Id. at 125, 606 P.2d at 160. The improper admission of hearsay evidence is subject to harmless error analysis. Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993).

Here, the challenged report and testimony directly implicated Walton's constitutionally protected liberty interest because they were offered into evidence to establish a substantive probation violation. Officer Christopherson testified that the report summarized the Nevada Cyber Crimes Task Force's analysis of Walton's computer, the report was authored by Investigator DeFonseka, Investigator DeFonseka was trained to conduct forensic searches on computers, Officer Christopherson was

unable to analyze the computer himself, and he learned of the report's findings when he received the report – after Walton had been arrested for violating the conditions of his probation. Investigator DeFonseka did not testify at the hearing, the State did not offer an explanation for his absence, and Walton did not have any means of testing the accuracy or reliability of the facts contained in the report or Officer Christopherson's recollection of the facts.

We note that Walton's liberty interest is substantial and the State's interest in admitting multiple hearsay testimony rather than more reliable evidence is slight, and we conclude that Walton's due process right to confront and question witnesses presenting adverse information was violated by the admission of the hearsay evidence. However, the nonhearsay evidence presented at the hearing was substantial and sufficient to conclusively prove that Walton violated the conditions of his probation by possessing inappropriate sexually explicit material, possessing an electronic device capable of accessing the Internet, and accessing the Internet without approval. Accordingly, we conclude that the error was harmless.

Preliminary Inquiry

Walton contends that he was denied his right to counsel and his right to a preliminary inquiry. Walton claims that (1) he specifically requested that his attorney be present at his preliminary inquiry and Probation Officer Kevin Blankenship ignored his request; (2) after independently invoking his right to counsel, he could not knowingly and intelligently waive his right to a preliminary inquiry without the assistance of his counsel; and (3) his waiver of the right to a preliminary inquiry was coercive because it was induced by Officer Blankenship's false

statements and it was obtained while he was incarcerated in the county jail.

A probationer has a due process right to a preliminary inquiry to determine whether there is probable cause to believe that he violated the conditions of his probation, he has a statutory right to be represented by counsel at the preliminary inquiry, and he is entitled to enter into agreements that waive his fundamental rights. See NRS 176A.580(1); NRS 176A.600(2)(b); Krauss v. State, 116 Nev. 307, 310, 998 P.2d 163, 165 (2000); Anaya, 96 Nev. at 122, 606 P.2d at 158.

Here, the district court heard testimony that when Officer Blankenship notified Walton of the preliminary inquiry, Walton indicated that he wanted his counsel at the inquiry; Officer Blankenship told Walton that he would get to court faster if he waived the preliminary inquiry; and Officer Blankenship had Walton sign a waiver of the preliminary inquiry. The district court found that Walton knowingly and intelligently waived his right to have counsel present at the preliminary inquiry when he waived his right to the preliminary inquiry. Walton has not demonstrated that the district court's factual finding is not supported by substantial evidence or is clearly wrong. Moreover, Walton has failed to show that he was prejudiced by the absence of a preliminary inquiry. Prior to entering the order revoking Walton's probation, the district court conducted a revocation hearing, during which Walton was represented by counsel and had a meaningful opportunity to respond to the allegations in the violation report, present witnesses, and cross-examine the State's witnesses. Under these circumstances, we conclude that Walton's contention is without merit.

Probationer's Conduct

Walton contends that the facts adduced at the probation revocation hearing do not demonstrate that he violated the conditions of his probation. Walton specifically claims that the conditions of his probation were vague because they allowed individual probation officers to define pornography or sexually explicit material and therefore failed to guard against the arbitrary deprivation of his liberty interests. As required by NRS 176A.410(1)(o), the district court ordered Walton "[n]ot to possess any sexually explicit material that is deemed inappropriate by the parole and probation officer assigned to the defendant."

We have previously held "that NRS 176.410 is neither unconstitutionally vague, nor overbroad." Mangarella v. State, 117 Nev. 130, 137-38, 17 P.3d 989, 994 (2001). Moreover, we note that the district court heard testimony that Walton was told that "he could not possess any pornography whatsoever" and, during a subsequent search of his residence, probation officers found a video camera that contained a video recording of him engaging in sexual activities with a female and dated Craigslist printouts depicting females dressed in lingerie offering their sexual services for a fee. We conclude that Walton had fair notice that possession of these materials was prohibited and that the district court could reasonably find from this testimony, and other testimony presented during the hearing, that Walton's conduct was not as good as required by the conditions of his probation. See id. at 136, 17 P.3d at 993 (acknowledging that "[a] vague law is one which fails to provide persons of ordinary intelligence with fair notice of what conduct is prohibited and also fails to provide law enforcement officials with adequate guidelines to

prevent discriminatory enforcement") (internal quotation marks and citation omitted); Lewis v. State, 90 Nev. 436, 529 P.2d 796 (1974).

Having considered Walton's contentions and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, J.

Douglas, J.

Pickering, J.

cc: Hon. Jackie Glass, District Judge
William B. Terry, Chartered
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk