

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MONTE MCDANIEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71142

FILED

MAY 17 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Monte McDaniel appeals from an order of the district court revoking probation and an amended judgment of conviction. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

McDaniel first argues the district court abused its discretion by increasing McDaniel's sentence after initially pronouncing a shorter sentence. McDaniel asserts the district court lacked the authority to modify a sentence after it orally pronounced the initial sentence. McDaniel also asserts the district court should have punished McDaniel's in-court conduct with contempt, rather than increasing McDaniel's prison term. We conclude McDaniel is not entitled to relief.

The district court initially sentenced McDaniel to a prison term of 24 to 60 months, suspended the sentence, and placed McDaniel on probation. Subsequently, the district court revoked McDaniel's probation and orally modified McDaniel's sentence to a prison term of 12 to 60 months. After a brief break, the district court recalled the matter and was informed McDaniel had just called his probation officer a "bitch." McDaniel denied it, but multiple persons informed the district court they heard McDaniel use the explicative. The district court then concluded,

based on the nature of the case and McDaniel's conduct, imposition of the original prison term of 24 to 60 months was warranted.

The district court had the authority to alter its oral modification of McDaniel's sentence and cause the original sentence to be executed because it had not yet entered a written judgment of conviction modifying the sentence. *See Miller v. Hayes*, 95 Nev. 927, 929, 604 P.2d 117, 118 (1979) (stating a district court's oral sentencing pronouncement is not final and may be modified before a written order is filed); *see also* NRS 176A.630(4), (5). Further, the district court has wide discretion in its sentencing decision. *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). McDaniel does not demonstrate the district court's sentencing decision was supported only by impalpable or highly suspect evidence. *See Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). In addition, McDaniel's sentence fell within the parameters of the relevant statutes. *See* NRS 193.130(2)(c); NRS 202.350(2). Therefore, we conclude the district court did not abuse its discretion when sentencing McDaniel.

Second, McDaniel argues the increase of his sentence violated his due process rights. McDaniel asserts he did not have notice that the use of an explicative could result in a revocation of his probation or a lengthier sentence and he was not given an opportunity to dispute the allegation he called his probation officer an explicative.


McDaniel did not object to the alteration of his sentence on due process grounds during the hearing before the district court. Accordingly, McDaniel is not entitled to relief absent a demonstration of plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). "In conducting plain error review, we must examine whether there was error, whether the error was plain or clear, and whether the error

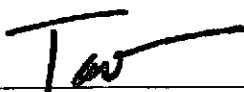
affected the defendant's substantial rights." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal quotation marks omitted). "[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice." *Id.*

The record reveals the district court did not revoke McDaniel's probation due to the explicative; that occurred prior to McDaniel's statement. Moreover, McDaniel does not demonstrate he was required to receive a specific notice that inappropriate in-court conduct would have adverse consequences. In addition, while the district court did not permit McDaniel to question the persons who asserted they heard his comment, the district court permitted McDaniel to dispute their version of the event, but the district court did not believe McDaniel's denial. Accordingly, we conclude McDaniel has not demonstrated error affecting his substantial rights and therefore has not shown plain error. *See United States v. Olano*, 507 U.S. 725, 734 (1993) (An error that affects substantial rights is one that "affected the outcome of the district court proceedings.").

Having concluded McDaniel is not entitled to relief, we

ORDER the order revoking probation and amended judgment of conviction AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. William D. Kephart, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk