IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRE THOMAS ELWIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87011

ORDER OF AFFIRMANCE

This is an appeal from a district court order revoking probation and an amended judgment of conviction. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Before addressing the issues appellant Andre Thomas Elwin raises on appeal, we first address the State's argument that we lack jurisdiction over this appeal because it was not timely filed. An appellant must file a notice of appeal within 30 days after entry of the challenged order. NRAP 4(b)(1)(A). The district court order revoking probation was filed on June 15, 2023. Elwin had until Monday, July 17, 2023, to file a notice of appeal. *See* NRAP 26(a)(1)(C) (extending a deadline that would otherwise fall on a Saturday or Sunday). The postmark on the envelope that contained Elwin's pro se notice of appeal, which was mailed from High Desert State Prison, is dated July 16, 2023. The notice of appeal was thus timely filed. *See Kellogg v. J. Commc'ns*, 108 Nev. 474, 477, 835 P.2d 12, 13 (1992) ("[A] proper person notice of appeal is filed on the date of delivery to a prison official."). Having concluded that Elwin timely filed the notice of appeal, we turn to his arguments.

Elwin first argues that the district court illegally sentenced him to a term of two to five years for a category D felony and that the judgment of conviction should thus be vacated. Elwin correctly observes that the

original sentence the district court imposed for resisting a public officer with use of a deadly weapon exceeded the statutory maximum. *See* NRS 193.130(2)(d) (providing that a category D felony shall be punished by a minimum term of not less than one year and a maximum term of not more than four years); NRS 199.280(2) (providing that resisting a public officer with use of a dangerous weapon is a category D felony). When the district court revoked probation, however, it modified the sentence to a term of one to four years. The modified sentence thus comports with the statutory limits. As the defect has been corrected in the amended judgment of conviction, we conclude that no further relief is warranted.

Elwin next argues that the district court illegally imposed a five-year probationary term. In support, Elwin relies on a statutory amendment that took effect shortly before the judgment of conviction was filed but after Elwin had been sentenced. That amendment limited the maximum term of probation for a category D felony to two years. 2019 Nev. Stat., ch. 633, § 34, at 4399 (amending NRS 176A.500). We conclude that the district court did not err.

As a general rule, "the proper penalty is the penalty in effect at the time of the commission of the offense and not the penalty in effect at the time of sentencing." *State v. Second Jud. Dist. Ct. (Pullin)*, 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). Relatedly, "changes in statutes are presumed to operate prospectively absent clear legislative intent to apply a statute retroactively." *Castillo v. State*, 110 Nev. 535, 540, 874 P.2d 1252, 1256 (1994), *disapproved of on other grounds by Wood v. State*, 111 Nev. 428, 892 P.2d 944 (1995). The relevant statutory amendment had an effective date of July 1, 2020. 2019 Nev. Stat., ch. 633, § 137(2), at 4488. The Legislature subsequently changed the effective date so that the

amended provision applies to offenses committed before July 1, 2020, but only if the offender is sentenced on or after July 1, 2020. 2020 Nev. Stat., ch. 4, § 8, at 72. The amending statutes do not indicate a legislative intent that the change to the maximum period of probation would apply retroactively to a sentence imposed before July 1, 2020, for an offense committed before July 1, 2020. Elwin pleaded guilty to an offense committed on June 12, 2019, and was sentenced on June 8, 2020. Accordingly, we conclude that the amended version of NRS 176A.500 did not apply. Because the version of the statute in effect at the commission of the offense and at sentencing allowed for a five-year probationary period, we conclude that no relief is warranted.

Elwin next argues that the district court abused its discretion in revoking probation because the State did not produce verified facts establishing the probation violation and his performance on probation was otherwise excellent. We review the district court's decision to revoke probation for an abuse of discretion. *Lewis v. State*, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974). "Due process requires, at a minimum, that a revocation be based upon 'verified facts' so that 'the exercise of discretion will be informed by an accurate knowledge of the (probationer's) behavior.'" *Anaya v. State*, 96 Nev. 119, 122, 606 P.2d 156, 157 (1980) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972)). Elwin stipulated at the revocation hearing that he violated the conditions of probation when he was bound over for trial on new felony charges. Given that Elwin admitted the violation, the district court had a sufficient basis to conclude that Elwin's conduct had "not been as good as required by the conditions of probation." *Lewis*, 90 Nev. at 438, 529 P.2d at 797; *see also McNallen v. State*, 91 Nev. 592, 592-93, 540 P.2d 121, 121 (1975) (affirming a revocation of probation

where the probationer did not refute the violation). We therefore conclude that Elwin has not shown that the district court abused its discretion in this regard.

Having concluded that Elwin has not shown that relief is warranted, we

ORDER the order for revocation of probation and amended judgment of conviction AFFIRMED.

Stiglich, J.
Stiglich

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

cc: Hon. Ronald J. Israel, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk