FILED
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ELIZABETH A. BROWN
CLERK OF SUPREME COURT

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MATTHEW K. BAISE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 91947-COA

ORDER VACATING ORDER FOR REVOCATION OF PROBATION AND AMENDED JUDGMENT OF CONVICTION AND REMANDING

Matthew K. Baise appeals from an order for revocation of probation and amended judgment of conviction. Eighth Judicial District Court, Clark County; Hon. Erika L. Mendoza, Judge.

Baise argues the district court violated his right to due process by revoking his probation based solely on hearsay testimony and without the opportunity to confront the primary source of the allegations against him. A district court may revoke probation without graduated sanctions if it "finds that the probationer committed a violation of a condition of probation that is not a technical violation." NRS 176A.630(1)(a); *see Lewis v. State*, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974) (providing that 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). A nontechnical violation of probation includes the commission of a new felony or gross misdemeanor or certain enumerated offenses. *See* NRS 176A.510(8)(c). 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. *Lewis*, 90 Nev. at 438, 529 P.2d at 797.

The admissibility of evidence at a probation revocation hearing is not governed by the statutory rules of evidence, *see* NRS 47.020(3)(c), but rather by a due process balancing standard, *see Anaya v. State*, 96 Nev. 119, 123, 606 P.2d 156, 158 (1980). Due process requires a probationer be able "to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). When determining whether evidence is admissible at a probation revocation hearing, "the trial 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." *Anaya*, 96 Nev. at 125, 606 P.2d at 160.

A district court determines the process due a probationer "by balancing the strength of the probationer's interest in confronting and cross-examining the primary sources of the information being used against him against the very practical difficulty of securing the live testimony of actual witnesses to his alleged violation or to his character while on probation." *Id.* at 123, 606 P.2d at 158. A probationer's interest in questioning the source of the information is stronger where the evidence is being used for a substantive violation of the conditions of probation. *Id.* However, not every use of hearsay evidence, if reliable, violates due process. *Id.*

In this case, a nontechnical violation report alleged that Baise: failed to comply with terms listed in the interstate compact application;

submitted a urine screen that tested positive for marijuana, cocaine, and MDMA; admitted to daily marijuana use; told his New York supervising officer that he would obtain a medical marijuana card but failed to provide proof that he had obtained one; failed to obtain a substance abuse evaluation; failed to report; left a voicemail at a behavioral health treatment clinic (United Helpers) in which he threatened to return to the clinic with a knife and stab his assigned counselor if he had to see that counselor again; was discharged from United Helpers as a result of his threat of violence; reported to the New York probation officer and, when the two were addressing Baise's discharge from United Helpers, Baise failed to take responsibility for his actions and instead blamed United Helpers; was deemed a threat to the community and not considered a viable candidate for community-based supervision by the New York supervising agent; demonstrated a pattern of noncompliance resulting in Baise's New York probation being revoked and the closure of the interstate compact; had been sentenced to less than a year of incarceration due to the revocation of Baise's New York probation; had outstanding warrants in Alabama that predated the instant case; was in arrears for fees; and failed to provide proof of employment. The report also noted Nevada was required to issue a warrant as a result of Baise's violation of probation reported by New York.

The record does not reflect that Baise stipulated to the allegations contained in the nontechnical violation report, and the district court held a revocation hearing during which Baise challenged the evidence the State presented against him. The State's sole witness at the revocation hearing was the author of the nontechnical violation report, Interstate Compact Specialist

Y. Arellano. Arellano testified that her job was to monitor individuals who committed offenses in Nevada but resided outside of the state. Arellano explained that Baise was on an interstate compact with New York and she was charged with communicating with Baise's supervising officer in New York. Arellano testified that she authored the violation report that contained the allegations recounted above.

Arellano's testimony largely paralleled the allegations contained in the violation report. Arellano testified that Baise had not been complying with the interstate compact agreement; tested positive for marijuana, cocaine and MDMA; admitted to using marijuana; stated he intended to get a medical marijuana card but did not provide proof of one; failed to report to a substance abuse evaluation; threatened to stab a counselor at the behavioral health clinic he attended; was discharged from that program; was deemed no longer to be a viable candidate for probation and put up for revocation by his New York supervising officer; had his interstate compact closed in New York; was terminated from his New York probation and was incarcerated as a result; had an outstanding warrant in Alabama; had not provided proof of employment; had not paid any court fees; and had a warrant as a result of the interstate compact being closed. On cross-examination, Arellano testified that she received the information contained in the violation report from Baise's New York supervising officer, that she did not physically see the results of the urine screen, that she did not speak with the counselor about the threat incident, and that she had not spoken with Baise while he was in New York or after he was returned to Nevada. Arellano further testified that Baise was not arrested as a result of the threat incident and that no report was generated in relation

to the incident other than a letter from United Helpers. In addition, Arellano testified that she was not aware that Baise had completed a substance abuse evaluation or that he started outpatient addiction treatment. Neither the letter from United Helpers nor the voicemail allegedly left there were admitted into evidence. Instead, the only evidence offered by the State was Arellano's testimony.

Following the close of evidence, Baise argued that the district court could not revoke his probation based on "two levels of hearsay" and that the allegations amounted only to technical violations. The district court did not address Baise's hearsay argument but questioned whether it was "a technical violation to threaten to stab someone," ultimately citing this incident as part of its decision to revoke Baise's probation. In addition to this incident, the district court noted that Baise had been required to "follow all rules and regulations of probation, as well as the laws of any state" and had a positive urine screen. The court also noted that Baise had been "kicked out of a treatment program" and "did not provide proof of employment," pay court fees, or "get the evaluation as ordered." When Baise's counsel asked the district court to articulate the nontechnical violation or violations it was finding to support its revocation decision, the district court responded:

> Well, there's numerous violations, some may be technical in and of themselves, but there's other ones that would support a violation—a revocation . . . Well, we have the drugs, so he's positive for drugs, which means he possessed the drugs. He had the warrants. He failed to get the evaluation as ordered. He made a threat on someone's life, that's pretty much non-technical. And then he didn't pay all the other, you know, fees, the counseling, etcetera [sic], so.

On appeal, the State argues that Baise's actions related to the counselor constituted harassment in violation of NRS 200.571 and thus the district court properly revoked Baise's probation based on a nontechnical violation. *See* NRS 176A.510(8)(c)(V) (providing that harassment pursuant to NRS 200.571 is a nontechnical violation of probation). Neither the State nor the district court articulated in the proceedings below the specific subsection of NRS 176A.510 that Baise violated warranting revocation without graduated sanctions. The State primarily argued below that Baise should be revoked from probation because he had been revoked from his probation in New York and thus failed to abide by the terms of his interstate compact and was in "warrant status." It is unclear that these other allegations argued by the State constitute nontechnical violations of probation. *See* NRS 176A.510(8)(c).

Regardless, Arellano's testimony regarding Baise's voicemail was offered to prove Baise committed a substantive violation of probation but amounted to nothing more than a summary of the violation report she authored. Arellano testified that the facts regarding the voicemail contained in her report were relayed to her, and her testimony demonstrates that she was not present during the incident and did not possess first-hand knowledge of it. Based on this, Baise lacked the "means of testing the accuracy or reliability of the facts" contained in the nontechnical violation report. *Anaya*, 96 Nev. at 125, 606 P.2d at 159. Despite Baise's substantial interest in confronting the primary source of the factual allegations against him where the information was used to support a substantive violation of Baise's probation, there is no indication in the record that the district court engaged in the due process balancing required by *Anaya* or that the district court found good cause for not

allowing Baise to confront the primary source of the information. Rather, the State's unqualified argument that hearsay is permissible in probation revocation proceedings paired with the district court's failure to address Baise's hearsay argument demonstrate that Baise's due process rights were not protected, particularly where Arellano's testimony is used by the State on appeal to argue a substantive, nontechnical violation of probation that was not specifically referenced below. Therefore, we conclude that the district court abused its discretion by relying solely on Arellano's testimony to revoke Baise's probation without conducting the required due process balancing test.

The State also argues on appeal that Baise committed a nontechnical violation of his probation by possessing controlled substances, a felony, because he tested positive for marijuana, cocaine, and MDMA. We agree with Baise that allowing a district court to infer a new felony or gross misdemeanor crime of possession every time a probationer failed a drug test would undermine the legislative intent behind the graduated sanctions scheme. *See* NRS 176A.510(1)(a) (describing the "failure to refrain from the use of alcohol or controlled substances" as a technical violation and one of "the most common violations" of probation); NRS 176A.630(6)(b) (describing "[t]esting positive on a drug or alcohol test" as an act by a probationer that "must not, by itself, be used as the only basis for the revocation of probation").

In addition, the violation report did not allege Baise committed a nontechnical violation of his probation by committing the new offense of possessing controlled substances. *See Anaya*, 96 Nev. at 122, 606 P.2d at 158 (explaining that minimum due process requires, among other things, notice of the alleged probation violations). Accordingly, to the extent the district court

revoked Baise's probation based on his use of controlled substances, we conclude the district court abused its discretion.

For the foregoing reasons, we vacate the order for revocation of probation and amended judgment of conviction and remand this matter for a new probation revocation hearing. Thereafter, the district court may either reinstate Baise's probation or enter a new order for revocation of probation and amended judgment of conviction. Accordingly, we

ORDER the order for revocation of probation and amended judgment of conviction VACATED AND REMAND this matter to the district court for proceedings consistent with this order.

Bulla, C.J.

Gibbons, J.

Westbrook, J.

cc: Hon. Erika L. Mendoza, District Judge
Attorney General/Carson City
Clark County District Attorney
Special Public Defender
The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, District Court Clerk