

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN RODNEY ORTH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40532

**FILED**

MAR 05 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying appellant Sean Rodney Orth's post-conviction petition for a writ of habeas corpus.

On October 27, 1998, Orth was convicted, pursuant to a guilty plea, of one count of possession of a short-barreled gun. The district court sentenced Orth to serve a prison term of 12 to 34 months, and then suspended execution of the sentence, placing Orth on probation for a period not to exceed 3 years. On February 27, 2001, the district court revoked Orth's probation. Orth did not appeal from the judgment of conviction or from the order revoking probation.

On July 3, 2001, Orth filed a proper person post-conviction petition for a writ of habeas corpus, alleging violations of his due process rights. The State moved to dismiss the petition, contending that the grounds raised in the petition could have been raised on appeal from the order revoking Orth's probation. The district court appointed counsel to represent Orth. Counsel supplemented the petition, alleging that Orth's

claims should be considered on the merits pursuant to Lozada v. State<sup>1</sup> because Orth's counsel during the revocation proceeding was ineffective for failing to appeal the revocation order. After conducting an evidentiary hearing, the district court found that Orth was entitled to the Lozada remedy, declined to dismiss the petition, and allowed counsel to file another supplement to the petition.<sup>2</sup> After conducting an evidentiary hearing on the merits of Orth's claims, the district court denied the petition.

Orth contends that the district court erred in denying his petition because he was denied his right to a preliminary inquiry, pursuant to NRS 176A.580, and his right to confront witnesses at the inquiry, pursuant to NRS 176A.600. The district court rejected Orth's contention, finding that Orth was not entitled to a preliminary inquiry. Alternatively, the district court ruled that even assuming that Orth was entitled to a preliminary inquiry, Orth failed to establish prejudice warranting reversal of the order revoking probation in light of the fact that the district court conducted a full and fair evidentiary hearing prior to revoking his probation.

We have reviewed the record and conclude that the district court did not err in denying the petition.<sup>3</sup> Orth failed to demonstrate that

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<sup>1</sup>110 Nev. 349, 871 P.2d 944 (1994).

<sup>2</sup>We express no opinion as to whether the district court correctly determined that this court's holding in Lozada was applicable to the facts of this case.

<sup>3</sup>See Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994).

he was entitled to a preliminary inquiry. The February 27, 2001, proceeding wherein the district court ordered the revocation of Orth's probation was a continuation of the prior revocation proceeding, conducted on December 15, 2000. The district court's decision to continue the December hearing so that Orth could attend drug treatment did not result in the reinstatement of Orth's probation.<sup>4</sup>

Nonetheless, even assuming Orth had the right to a preliminary inquiry, Orth failed to show he was prejudiced by the deprivation of that right thereby warranting reversal of the district court order revoking probation.<sup>5</sup> Prior to the revocation of Orth's probation, Orth was afforded a full and fair revocation hearing wherein he was given a meaningful opportunity to respond to the allegations in the violation report, to present witness testimony, and to cross-examine the State's witnesses. At the revocation hearing, the State presented sufficient evidence that Orth violated the terms of his probation. Therefore, the


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<sup>4</sup>See NRS 176A.580 (providing that, generally, a probationer in custody for a violation of a condition of his probation is entitled to a preliminary inquiry before a hearings officer to determine whether there is probable cause to believe he has committed a violation).

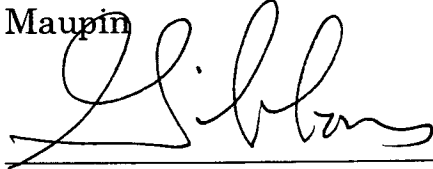
<sup>5</sup>See Collins v. Turner, 599 F.2d 657 (5th Cir. 1979); People v. Knowles, 362 N.E.2d 1087 (Ill. App. Ct. 1977); Wilson v. State, 403 N.E.2d 1104 (Ind. Ct. App. 1980); People v. Blakely, 233 N.W.2d 523 (Mich. Ct. App. 1975); Ewing v. Wyrick, 535 S.W.2d 442 (Mo. 1976); Howie v. Commonwealth, 283 S.E.2d 197 (Va. 1981); see also Hyler v. State, 98 Nev. 47, 639 P.2d 560 (1982) (concluding that minimal procedural safeguards for a revocation proceeding included that, prior to revocation, the probationer had the right to confront the State's witnesses against him).

district court acted well within its discretion in revoking Orth's probation.<sup>6</sup> Accordingly, having considered Orth's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. James W. Hardesty, District Judge  
Scott W. Edwards  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>6</sup>See Lewis v. State, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974) (recognizing that the decision to revoke probation is within the sound discretion of the district court and need only be supported by evidence that reasonably satisfies the district court that the probationer's conduct was not as good as required by the conditions of probation).