

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEITH ARLANDO BURWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78365-COA

FILED

AUG 12 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Keith Arlando Burwell appeals from an order for revocation of probation and amended judgment of conviction. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Burwell was convicted pursuant to a guilty plea of ownership or possession of a firearm by a prohibited person and was sentenced to serve 28 to 72 months in prison. The sentence was suspended and Burwell was placed on probation for a fixed term of five years. At sentencing, the district court informed Burwell of his intention to revoke Burwell's probation for even a minor violation of his probation conditions.

Several months after Burwell was sentenced, he was alleged to have committed at least two probation violations: being arrested on new charges and absconding.¹ At the probation revocation hearing, Burwell admitted probable cause had been found that he had committed new crimes and that he had been bound over to the district court after a preliminary hearing on those new charges. He also admitted he failed to meet with his probation officer when requested and he gave parole and probation an

¹Burwell's violation report is not included in the record.

incorrect phone number. He disputed the claim that he gave a false address to parole and probation. The district court, relying on Burwell's admissions, did not take any other evidence or testimony at the hearing, revoked Burwell's probation, and imposed the underlying sentence.

On appeal, Burwell claims the district court violated his due process rights when it failed to take testimony and did not give Burwell the opportunity to rebut or mitigate the allegations against him. Burwell did not object at the hearing; therefore, he is not entitled to relief absent a demonstration of plain error. *See Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49 (2018). To demonstrate plain error, he must show "(1) there was error; (2) the error is plain, meaning that it is clear under the current law from a casual inspection of the record; and (3) the error affected [his] substantial rights." *Id.* at 50, 412 P.3d at 48 (internal quotation marks omitted).

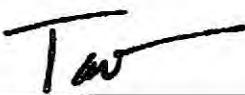
First, Burwell fails to demonstrate plain error regarding not taking testimony at the hearing, because Burwell admitted to the conduct underlying the violations. *See McNallen v. State*, 91 Nev. 592, 592-93, 540 P.2d 121, 121 (1975) (affirming revocation of probation where probationer did not refute violation). Second, while the district court should have allowed Burwell to present mitigating evidence, *see Anaya v. State*, 96 Nev. 119, 124, 606 P.2d 156, 159 (1980) (a probationer has the right "to show mitigating circumstances"), Burwell fails to show this error affected his substantial rights. Burwell admitted to the conduct underlying the violations and he fails to allege what mitigation evidence he would have presented had he been given the opportunity. Therefore, Burwell fails to demonstrate he is entitled to relief on this claim.

Burwell also claims the district court erred by informing him that his testimony regarding his new crimes could be used against him at trial. Specifically, he claims that the Nevada Supreme Court's decision in *Cooper v. State*, 134 Nev. 399, 405, 422 P.3d 722, 728 (2018), prevented the use of his testimony at a future trial. Burwell did not object to the district court's statement; therefore, we review this claim for plain error. See *Jeremias*, 134 Nev. at 52, 412 P.3d at 49. While the *Cooper* Court held that testimony from a probation revocation hearing cannot be used in the State's case-in-chief at trial, it also held that the testimony can be used to impeach or rebut. 134 Nev. at 405, 422 P.3d at 728. While the district court should have more fully informed Burwell in accordance with *Cooper*, we conclude Burwell fails to demonstrate the district court's statement was plain error or that it affected his substantial rights. See *Jeremias*, 134 Nev. at 50, 412 P.3d at 48. Accordingly, we conclude Burwell is not entitled to relief on this claim.

Burwell also claims the district court abused its discretion by not specifying that Burwell's behavior was not as good as required by the conditions of probation. See *Lewis v. State*, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974). While the district court did not use this phrase at the revocation hearing, the fact that the district court revoked Burwell's probation necessarily means the district court found that his conduct on probation was not as good as required by the conditions of probation. Given the violations alleged and Burwell's admissions, we conclude the district court did not abuse its discretion by revoking Burwell's probation. *Id.* Accordingly, we

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 8
Monique A. McNeill
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk