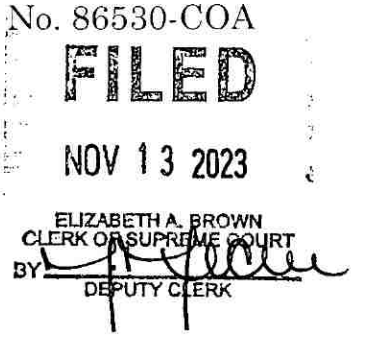
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALVIN CRAIG CALLOWAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86530-COA



ORDER VACATING AMENDED JUDGMENT OF CONVICTION AND REMANDING

Alvin Craig Calloway appeals from an order for revocation of probation and amended judgment of conviction. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Calloway argues the district court erred by revoking his probation without first finding that he committed a nontechnical violation of the conditions of his probation pursuant to NRS 176A.630(1). The distinction between technical and nontechnical violations only came about when the Legislature amended NRS 176A.630 in 2019 to require the use of graduated sanctions if a probationer commits technical violations of the conditions of his probation but to allow a district court to revoke probation without first applying a system of graduated sanctions in certain circumstances (i.e., nontechnical violations). *See* 2019 Nev. Stat., ch. 633, § 35, at 4401-03. Calloway fails to demonstrate the 2019 statutory amendments apply to him.

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"Parole and probation revocations are not criminal prosecutions." *Anaya v. State*, 96 Nev. 119, 122, 606 P.2d 156, 157 (1980). Rather, "[r]evocation of parole or probation is regarded as reinstatement of the sentence for the underlying crime, not as punishment for the conduct leading to the revocation." *United States v. Brown*, 59 F.3d 102, 104 (9th Cir. 1995). That is, probation revocation proceedings are part of the penalty for the underlying crime. *See Johnson v. United States*, 529 U.S. 694, 701 (2000) ("[P]ostrevocation penalties relate to the original offense."). And "[i]t is well established that under Nevada law, 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 Judicial Dist. Court (Pullin)*, 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008).

The statutory amendments had an effective date of July 1, 2020. *See* 2019 Nev. Stat., ch. 633, § 35, at 4401-03; § 137, at 4488. Because the Legislature gave no indication that it intended the amendments to apply retroactively, the amendments apply only to probationers who committed their offenses on or after July 1, 2020. Calloway committed his offense in 2018. Accordingly, he is not entitled to the application of the statutory amendments requiring the finding of a nontechnical violation prior to probation revocation. Therefore, we conclude Calloway is not entitled to relief for any failure of the district court to adhere to the statutory amendments.

Calloway also argues that the district court violated his right to due process by revoking his probation despite its failure to make a specific finding regarding whether his conduct was not as good as required by the

conditions of his probation. Probationers are entitled to "a written statement by the factfinders as to the evidence relied on and reasons for revoking probation." *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (internal parenthesis and quotation marks omitted). Transcribed oral findings ordinarily satisfy this requirement, so long as the oral findings make the basis of the revocation and the evidence relied upon sufficiently clear. *See United States v. Sesma-Hernandez*, 253 F.3d 403, 405-06 (9th Cir. 2001).

The probation violation report alleged Calloway violated the conditions of his probation by failing to comply with the law in an incident involving his sister and to provide proof of his compliance with special condition number 5, which required him to get a mental health, anger management, and impulse control evaluation and to attend counseling as deemed appropriate. Evidence regarding both of those alleged violations was presented at the evidentiary hearing. However, the district court appeared to find that insufficient evidence supported a finding that Calloway violated the law in the incident involving his sister. And the district court made no finding regarding special condition number 5. Instead, the district court appeared to revoke Calloway's probation based on its lack of "confidence in safety to the community." Under these circumstances, we conclude the district court's oral statements are insufficient to clearly identify the violation or violations relied upon to revoke Calloway's probation. Therefore, we vacate the amended judgment of conviction and remand to the district court to make specific findings and either reinstate Calloway's probation or enter a new order for revocation of

probation and amended judgment of conviction. For the foregoing reasons, 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.[1]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

[1]Both the State and Calloway have filed appendices that contain documents which are not part of the record below. However, this court's review is limited to the record made in and considered by the district court. *See Rippo v. State*, 134 Nev. 411, 429, 423 P.3d 1084, 1102 (2018) (providing that "appellate counsel could not have expanded the record before this court to include evidence that was not part of the trial record"); *Carson Ready Mix, Inc. v. First Nat. Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (providing that this court lacks the "power to look outside of the record of a case" and "cannot consider matters not properly appearing in the record on appeal"). Therefore, we decline to consider these documents.

cc: Hon. Jacqueline M. Bluth, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk