IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RANDY EARL SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85986-COA

ORDER OF AFFIRMANCE

Randy Earl Smith appeals from a judgment of conviction, entered pursuant to an *Alford*[1] plea, of attempted sexual assault. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Smith argues that the district court plainly erred by imposing several of the probation conditions because they either improperly delegate judicial authority to the Division of Parole and Probation (Division) or are overbroad. As Smith concedes he did not object below to the probation conditions imposed and that plain error review is applicable, we review his claims under that standard. *See Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015) (stating "all unpreserved errors are to be reviewed for plain error without regard as to whether they are of constitutional dimension"). To demonstrate plain error, an appellant must show that: "(1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a

[1]*North Carolina v. Alford*, 400 U.S. 25 (1970).

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'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49. It is the appellant's burden to prove plain error. *See Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005).

First, Smith challenges probation conditions 3 and 4, and sex offender conditions 1(f) and 1(g), each of which requires Smith to submit to certain testing as required by the Division.[2] He argues that the conditions, and the statutes the conditions are derived from, improperly delegate judicial authority to the Division because they allow the Division to determine whether a condition will be satisfied rather than where or when a condition will be satisfied. In support of this argument, Smith relies on the United States Court of Appeals cases *United States v. Nishida*, 53 F.4th 1144 (9th Cir. 2022), and *United States v. Stephens*, 424 F.3d 876 (9th Cir. 2005).

In *Nishida*, the Ninth Circuit determined that the district court erred in imposing a condition of supervised release that allowed a probation officer to determine whether the defendant would have to participate in out-patient or in-patient treatment because the condition gave the probation officer "the power to decide the nature or extent of the punishment." 53 F.4th at 1155 (internal quotation marks omitted). Unlike the challenged condition in *Nishida*, here, the challenged conditions and statutes do not grant the Division authority to determine whether Smith will have to

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[2]Condition 3 states, "Upon order of the Division of Parole and Probation or its agent, [Smith] shall submit to a medically recognized test for breath, blood, or urine to determine alcohol content." Condition 4 states that Smith "shall submit to drug testing as required by the division or its agent." Sex offender condition 1(f) states that Smith shall "[s]ubmit to periodic tests, as requested by the parole and probation officer assigned to the defendant, to determine whether the defendant is using a controlled substance." Sex offender condition 1(g) states that Smith shall "[s]ubmit to periodic polygraph examinations, as requested by the parole and probation officer assigned to the defendant."

participate in a particular type of treatment. Rather, the challenged conditions and statutes permit the Division to determine only when Smith will have to submit to certain testing and do not implicate the nature or extent of punishment.

In *Stephens*, the Ninth Circuit determined that the district court improperly delegated to a probation officer the determination of how many times the defendant would be required to submit to a non-treatment drug test. 424 F.3d at 883. The Ninth Circuit's decision was based on a federal statute, 18 U.S.C. § 3583, which required the district court to set a maximum number of non-treatment drug tests that a probation officer could impose. *Id.* at 879, 882-83. Unlike the statute in *Stephens*, neither NRS 176A.400 nor NRS 176A.410 requires the district court to set a maximum number of tests that the Division may request.[3]

Thus, the cases relied on by Smith are distinguishable from this case. Moreover, the Nevada appellate courts have never held that a district court improperly delegates its judicial authority when it requires a defendant to submit to testing as required by the Division. Therefore, Smith fails to demonstrate that any error is clear under current law from a casual inspection of the record. Because Smith has not demonstrated error plain from the record, we conclude Smith is not entitled to relief on this claim.[4]

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[3]In fact, NRS 176A.410 specifically requires a district court to order as a condition of probation that the defendant submit to periodic testing for controlled substances and periodic polygraph examinations "as requested by" the Division. *See* NRS 176A.410(1)(f), (1)(g).

[4]Smith argues that probation condition 3 is contradicted by sex offender condition 1(h) because condition 3 allows him to have alcohol as long as it is not to excess but condition 1(h) requires him to abstain from alcohol. Condition 1(h) is statutorily required, *see* NRS 176A.410(1)(h); thus it was error to also impose condition 3. However, because condition 1(h)

Second, Smith argues that four conditions of his probation are overbroad and thus violate due process: sex offender conditions 1(m), 1(o), and 1(p) and condition 8.[5] In support of his argument, Smith relies on the Ninth Circuit's decision in *United States v. Cope*, 527 F.3d 944 (9th Cir. 2008), for the proposition that the conditions at issue are overbroad and prohibit conduct that are not related to his crime. However, the statute at issue in *Cope* required the release conditions be reasonably related to the grant of release or treatment. Unlike *Cope*, the statute setting out the conditions for sex offenders on probation does not require that they be reasonably related. *See* NRS 176A.410. Further, the same court has previously approved similar conditions. *See United States v. Bee*, 162 F.3d 1232, 1234 (9th Cir. 1998) (holding the following conditions did not violate the First Amendment: that the probationer "not possess any sexually stimulating or sexually oriented material as deemed inappropriate by [his]

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was required, Smith fails to demonstrate his substantial rights were affected.

[5]Sex offender condition 1(m) states Smith shall, "[u]nless approved by the parole and probation officer assigned to the defendant and by a psychiatrist, psychologist or counselor treating the defendant, if any, not knowingly be within 500 feet of any place, or if the place is a structure, within 500 feet of the actual structure, that is designed primarily for use by or for children, including, without limitation, a public or private school, a school bus stop, a center or facility that provides day care services, a video arcade, an amusement park, a playground, a park, an athletic field or a facility for youth sports, or a motion picture theater." Sex offender condition 1(o) states Smith shall "not possess any sexually explicit material that is deemed inappropriate by the parole and probation officer assigned to the defendant." Sex offender condition 1(p) states Smith shall, "not patronize a business which offers a sexually related form of entertainment and which is deemed inappropriate by the parole and probation officer assigned to the defendant." Condition 8 states, "Directives and Conduct: You shall follow the directives of the Division of Parole and Probation and your conduct shall justify the opportunity granted to you by this community supervision."

probation officer and/or treatment staff, or patronize any place where such material or entertainment is available"). And the Nevada Supreme Court has previously upheld geographic restrictions for sex offenders. *See Aldape v. State*, 139 Nev., Adv. Op. 42, 535 P.3d 1184, 1195 (2023). Thus, Smith fails to demonstrate that any alleged error is clear under current law from a casual inspection of the record.

As to condition 8, Smith fails to demonstrate that the same or similar conditions have been struck as overbroad, and "a district court judge enjoys wide discretion under grants of authority to impose . . . conditions [of probation]. *See Igbinovia v. State*, 111 Nev. 699, 707, 895 P.2d 1304, 1309 (1995). Thus, Smith fails to demonstrate any alleged error is clear under current law from a casual inspection of the record. Therefore, Smith fails to demonstrate that the imposition of the four conditions constituted plain error, and we conclude Smith is not entitled to relief on this claim.

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Joseph Hardy, Jr., District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk