IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-42891**

MITCHELL MARTIN,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
Sarah V. Weaver, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM

for Appellee

Stalter Law LLC
Kenneth H. Stalter
Albuquerque, NM

for Appellant

MEMORANDUM OPINION

WRAY, Judge.

{1} This matter was submitted to the Court on the brief in chief pursuant to the Administrative Order for Appeals in Criminal Cases from the Second, Eleventh, and Twelfth Judicial District Courts in *In re Pilot Project for Criminal Appeals*, No. 2022-002, effective November 1, 2022. Having considered the brief in chief, concluding the briefing submitted to the Court provides no possibility for reversal,

and determining that this case is appropriate for resolution on Track 1 as defined in that order, we affirm for the following reasons.

{2} Defendant appeals from the district court's determination to sentence him as an adult following an amenability hearing. Defendant accepted a defective plea in 2007 for sexual crimes committed against his minor cousins. [BIC 1, 10] Defendant completed the underlying sentence and began dual supervision under probation and parole in 2009. [BIC 4] In 2024, the district court granted Defendant's fourth petition for writ of habeas corpus, permitting Defendant to withdraw the 2007 plea and enter a new plea. [3 RP[1] 530] Defendant—then thirty-five years old—entered into the new plea agreement, and the district court held a new amenability hearing to determine whether he would be sentenced as a minor or adult. [BIC 1, 5-6; 3 RP 530] As Defendant's pre-sentence credit exceeds his sentencing exposure, Defendant acknowledges that the only practical effect of this determination is whether he must register as a sex offender. [BIC 5-6]

BACKGROUND

{3} At the amenability hearing, the State introduced evidence that Defendant accrued three parole violations while under supervision for varying reasons: for an undisclosed relationship in 2018, for disrespect, and for being removed from a

[1]This case contains two sets of record proper. Consistent with Appellant's briefing, record proper citations in this opinion will refer to DCT 0001. [BIC 3 n.1]

residential treatment program for possessing an unapproved, second cell phone. [BIC 11; 3 RP 637] The State also introduced evidence that Defendant was convicted of a commercial burglary in 2013 while on probation for his original sentence. [3 RP 637] A juvenile probation and parole officer also testified that Defendant was not amenable to treatment given the severity of his charges. [BIC 9] The officer conceded he did not have expertise in rehabilitation for individuals over twenty-one years old. [BIC 9]

{4} Defendant presented testimony from an expert forensic psychologist, who had performed a clinical interview and document review of Defendant's case. [BIC 6] The psychologist testified that Defendant expressed remorse for the offenses he had committed and had made "substantial improvement in maturity." [*Id.*] He also testified that Defendant had a "favorable" prognosis based on his "insight, acceptance of responsibility, participation in therapy, and desire for change." [BIC 7] Defendant also testified on his own behalf about his history of parole violations and the commercial burglary charge. [BIC 9] Defendant indicates in briefing that he "acknowledged that he had the wrong attitude toward parole in 2018 and that contributed to his violation," and "the 2023 violation [was] a misunderstanding or miscommunication between him and staff at the [residential treatment center], but he also acknowledged he could have handled the situation better." [*Id.*]

{5} Following the hearing, the district court entered an order with express findings on the factors listed in NMSA 1978, Section 32A-2-20(C) (2023). [3 RP 675-79] The district court found that the seriousness of the offense, whether the offense was committed in an aggressive, violent, premeditated, or willful manner, and whether the offense was against persons or property all weighed against Defendant. [3 RP 675-77] The district court also found that the record and previous history weighed against Defendant, given his additional felony conviction and parole retakes, which the district court noted "will not be discarded as simple technical violations as they demonstrate the [Defendant's] inability to stay out of prison." [3 RP 678] That Defendant did not use a firearm weighed in his favor, as did the consideration of his home, environmental situation, social and emotional health, pattern of living, brain development, trauma history, and disability. [*Id.*] The district court did find that Defendant had a likelihood of reasonable rehabilitation, especially as he had "completed every treatment available to him while incarcerated." [*Id.*] In its consideration of "any other relevant factor," under Section 32A-2-20(C)(8), the district court noted that Defendant's forensic psychologist had "never before evaluated an adult-aged person for their amenability to treatment as a child." [*Id.*] The district court noted that Defendant's "parole retakes occurred after the completion of the majority of his treatment, which is significant to the [c]ourt." [*Id.*] The district court stated its agreement with the psychologist's assessment that

Defendant is open to treatment, but "disagree[d] with [the psychologist's] analysis where it focuses on the Defendant's completion of treatment while incarcerated but ignores his struggles on parole, which, to the [c]ourt, is a snapshot of [Defendant's] true progress." [3 RP 679] The district court ultimately weighed these "other relevant factor[s]" neutrally, but nevertheless ordered that Defendant be sentenced as an adult. [3 RP 678-79]

DISCUSSION

{6} Defendant first argues that the district court applied the incorrect legal standard by assessing whether he could be rehabilitated rather than whether he had been rehabilitated. [BIC 14-16] Defendant premises his argument on language in *State v. Nehemiah G.*, stating that when a district court makes an amenability determination involving a youthful offender pending adult sentencing or juvenile disposition, the question that a district court "effectively must decide is whether [the child] . . . *has been* rehabilitated or treated sufficiently to protect society's interests." 2018-NMCA-034, ¶ 69, 417 P.3d 1175 (alteration, internal quotation marks, and citation omitted).

{7} "We review amenability determination for abuse of discretion." *Id.* ¶ 42. As part of that determination, the district court must consider the seven factors enumerated in Section 32A-2-20(C), and the additional catch-all, eighth factor. *See* § 32A-2-20(C). To "consider" these factors, the "court must think about this

evidence with a degree of care and caution." *Nehemiah G.*, 2018-NMCA-034, ¶ 21 (internal quotation marks and citation omitted). Defendant argues that the language of the district court's order indicates the district court relied on technical violations rather than the "protective interests of society." [BIC 15] In particular, Defendant cites language from the district court order regarding the court's observation that after treatment, Defendant still failed to comply with the terms of his probation. [BIC 15]

{8} We are unpersuaded. The district court's order considers whether Defendant's treatment was successful, exactly as *Nehemiah G.* directs. *See id.* ¶ 69. The district court found that Defendant's "parole was retaken three times: once for an undisclosed relationship, once for disrespect, and once for carrying an unapproved second cell phone." [3 RP 677] The district court questioned whether these violations were "due to a parole officer having an axe to grind" against Defendant, but concluded that in Defendant's testimony "there was a degree of excuse making—while the [Defendant] ultimately accepted responsibility, it was difficult for him to do so." [*Id.*] The order demonstrates a view of whether Defendant *has been* rehabilitated, using language about "a snapshot of . . . Defendant's true progress." [3 RP 679] We therefore conclude the district court did not abuse its discretion, consistent with the standard articulated in *Nehemiah G.*

{9} Defendant's remaining arguments all challenge different aspects of the district court's decision to sentence Defendant as an adult following the amenability hearing, essentially contending the district court erred in weighing the psychologist's testimony as less credible in light of his parole violations and new charges. Defendant argues: the district court erred in relying on technical parole violations, which he contends do not accurately reflect his prospective risk to public safety [BIC 16-17]; the district court erred in sentencing him as an adult when the State failed to meet its burden to a clear and convincing evidence standard [BIC 17-19]; the district court's decision was against the logic and effect of reason [BIC 19-21]; and the district court's decision violated the policy considerations behind the Children's Code [BIC 21-22].

{10} Here, the district court found that Defendant violated his parole three times over a span of several years [3 RP 677-79], Defendant was convicted of a felony since the original conviction [3 RP 677], and "[Defendant's] parole retakes occurred after the completion of the majority of his treatment, which is significant to the [c]ourt." [3 RP 678] The district court expressly weighed the psychologist's testimony, and noted that it "focuse[d] on [Defendant's] completion of treatment while incarcerated but ignore[d] his struggles on parole." [3 RP 679] Unlike in *Nehemiah G.*, where the district court disregarded expert testimony through a "basic misunderstanding" of the evidence, 2018-NMCA-034, ¶ 62, the district court here

considered the psychologist's testimony and found it less persuasive than the concrete facts in the record regarding Defendant's parole violations and other charges, and the district court expressly stated that in the order. [3 RP 678-79] *See id.* ¶ 63 ("It is the fact-finder's prerogative to weigh the evidence and to judge the credibility of the witnesses. The court was free to disregard expert opinion." (alteration, internal quotation marks, and citation omitted)).

{11} Defendant argues that the district court erred by relying "exclusively on technical [parole] compliance" [BIC 15], but Defendant's general distinction between malum prohibitum versus malum in se violations does not indicate that the district court abused its discretion in weighing the evidence. *See State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (stating that our Supreme Court does not second-guess trial court decisions concerning the credibility of witness, reweigh the evidence, or substitute our judgment for that of the fact-finder). [BIC 16] Insofar as Defendant alleges that the State did not carry its burden to a clear and convincing evidence standard [BIC 17-19] or was against the logic and effect of the evidence [BIC 19-21], Defendant's arguments would require us to reweigh the evidence, which we cannot do. *See State of N.M. ex rel. Child., Youth & Fams. Dep't v. Amanda M.*, 2006-NMCA-133, ¶ 23, 140 N.M. 578, 144 P.3d 137. We cannot say that the district court abused its discretion in weighing the three parole violations and new charge in its duty as finder of fact. *See Nehemiah G.*, 2018-NMCA-034, ¶

63. We are unpersuaded, particularly in light of the fact that Defendant's new charge in 2013 would not be a "technical" violation under Rule 5-805 NMRA. *See, e.g.*, Rule 5-805(C)(3) (defining a "technical violation" for purposes of that rule as "any violation that does not involve new criminal charges").

{12} Defendant lastly argues that the district court's order contravened the public policy implications of the Children's Code. [BIC 21-22] We are unpersuaded. *See State v. Maestas*, 2007-NMSC-001, ¶ 14, 140 N.M. 836, 149 P.3d 933 ("Our role is to construe statutes as written and we should not second guess the [L]egislature's policy decisions."). Defendant argues that he should not be punished for the system's failures despite completing significant rehabilitation treatment, and that the *Nehemiah G.* framework would become "meaningless" if technical parole violations are allowed to be a "dispositive factor." [BIC 22] Contrary to Defendant's allegation, the order does not indicate that technical parole violations were dispositive. [3 RP 675-79] In the order, the district court recognized Defendant's difficult upbringing, his "marked improvement," and that he "completed every treatment available to him while incarcerated." [3 RP 677-78] However, the district court weighed other factors, apart from the parole violations and the felony conviction, against Defendant, including the seriousness of the alleged offense, the manner in which it was committed, and the injury that resulted. [3 RP 675-678] *See Nehemiah G.*, 2018-NMCA-034, ¶ 54 ("It is not possible to evaluate whether the offender is amenable

to treatment without evaluating the facts of the crimes that the offender committed, because the offender's conduct in the past is relevant to whether the offender poses a risk of danger to the public."). The district court weighed all of the evidence and reached the conclusion that Defendant was not amenable to treatment due to a pattern of "struggl[ing] to comply with parole during the brief times he was not incarcerated." [3 RP 679] That the district court ultimately decided to sentence Defendant as an adult does not itself mean that the district court found one factor to be dispositive. *See Nehemiah G.*, 2018-NMCA-034, ¶ 45. We therefore conclude Defendant has not demonstrated reversible error on this point.

{13} For the foregoing reasons, we conclude that Defendant has not demonstrated error in the district court's determination to sentence him as an adult, and we therefore affirm.

{14} **IT IS SO ORDERED.**

Katherine A. Wray

KATHERINE A. WRAY, Judge

WE CONCUR:

Jane B. Yohalem

JANE B. YOHALEM, Judge

Gerald E. Baca

GERALD E. BACA, Judge