4-27-2012

State v. Warth Respondent's Brief Dckt. 38854

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38854, 38984
	)	
vs.	)	
	)	
SHAYNE RICHARD WARTH,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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District Judge

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Nature Of The Case

Shayne Richard Warth appeals from the district court's order relinquishing jurisdiction. On appeal, he argues that the Idaho Supreme Court denied his due process rights when it denied his motion to augment the record, and that the district court abused its sentencing discretion.

Statement Of The Facts And Course Of The Proceedings

In docket no. 38854, the state charged Warth with trafficking in methamphetamine. (R., Vol. I, p.33.) In docket no. 38984, the state charged Warth with two counts of delivery of cocaine. (R., Vol. II, pp.178-79.) Pursuant to a global plea agreement, the state amended the trafficking charge to possession with the intent to deliver, and Warth pled guilty to all counts. (R., Vol. I, pp.52-55; Vol. II, pp.197-200; 3/19/2007 Tr., p.13, Ls.11-24.) The district court entered judgments of conviction and imposed concurrent unified sentences of four years with one and a half years fixed on the possession with intent to deliver conviction, five years with two years fixed on the first delivery of cocaine conviction, and six years with two and a half years fixed on the second delivery of cocaine conviction. (R., Vol. I, pp.70-74; Vol. II, pp.218-22; 5/14/2007 Tr., p.47, Ls.9-24.) The district court suspended execution of the sentences and placed Warth on five years of probation. (R., Vol. I, pp.71-74; Vol. II, pp.219-22; 5/14/2007 Tr., p.47, L.25 – p.49, L.9.)

Warth received a probation violation report in October 2007 for using marijuana and violating a no contact order (R., Vol. I, p.77), and received ten days discretionary jail time (R., Vol. I, p.81). Warth received a second probation violation report for

committing attempted strangulation in January 2008 (R., Vol. I, p.82), in addition to again violating a no contact order and smoking marijuana (R., Vol. I, pp.86-87). The state later withdrew that probation violation report. (R., Vol. I, p.89.) Warth received yet another probation violation report in April 2009 for leaving his assigned district so he could purchase and sell illegal drugs, in addition to smoking marijuana, drinking, and receiving pending charges in Bingham County for possession with intent to deliver. (R., Vol. I., pp.90-91; Vol. II, pp.237-38.) Warth admitted the violations and was continued on probation with the additional terms of successfully completing the Wood Pilot Project and serving 120 days in county jail. (R., Vol. I, p.105; Vol. II, p.249.) Warth violated his probation again in September 2010 by getting terminated from the Wood Pilot Project for, among other things, using the synthetic cannabinoid, "Spice." (R., Vol. I, pp.110-12; Vol. II, pp.253-55.)

The district court revoked Warth's probation and imposed the underlying sentence, but retained jurisdiction and recommended the therapeutic community concurrent with a district court in Bingham County in an unrelated case. (R., Vol. I, pp.119-21; Vol. II, pp.261-64; 10/12/2010 Tr., p.8, Ls.8-13; see also p.7, Ls.1-4; p.7, L.24 – p.8, L.3.) Warth did not participate in the therapeutic community. (See R., Vol. I, p.123; Vol. II, p.266.) Following the Bingham County district court's order relinquishing jurisdiction, the district court in this case also relinquished jurisdiction. (Id.) Warth filed a notice of appeal, timely only from the order relinquishing jurisdiction. (R., Vol. I, pp.124-26; Vol. II, pp.268-70.)[1]

[1] Warth's appeals, filed in docket nos. 38854 and 38984, respectively, were later consolidated for all purposes by the Idaho Supreme Court. (See Order Consolidating Appeals, filed July 20, 2011.)

Pending appeal, Warth's appellate counsel filed a motion to augment the settled record with transcripts from the June 29, 2009 probation violation admit/deny hearing and the May 9, 2011 Rule 35 hearing. (Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof (hereinafter "Motion to Augment"), filed November 2, 2011.) The state objected to Warth's motion to augment. (Objection to Motion to Augment and to Suspend the Briefing Schedule, filed November 3, 2011.) Finding that Warth failed to show the transcripts were relevant to issues on this appeal, the Idaho Supreme Court denied Warth's request for the transcripts. (Order Denying Motion to Augment and to Suspend The Briefing Schedule (hereinafter "Order Denying Motion to Augment"), filed November 16, 2011.)

ISSUES

Warth states the issues on appeal as:

> 1. Did the Idaho Supreme Court deny Mr. Warth due process and equal protection when it denied his Motion to Augment with the requested transcript?
>
> 2. Did the district court abuse its discretion when it relinquished jurisdiction?
>
> 3. Did the district court abuse its discretion when it failed to reduce Mr. Warth's sentences *sua sponte* upon relinquishing jurisdiction?

(Appellant's brief, p.4.)

The state rephrases the issues as:

1. Has Warth failed to establish that the Idaho Supreme Court violated his constitutional rights by denying his motion to augment the appellate record with an irrelevant transcript?

2. Has Warth failed to establish an abuse of the district court's sentencing discretion, either by relinquishing jurisdiction or by not *sua sponte* reducing Warth's sentence after relinquishing jurisdiction?

ARGUMENT

I.
Warth's Claim That Denial Of His Motion To Augment The Appellate Record With Irrelevant Items Was A Due Process Or Equal Protection Violation Is Without Merit

A. Introduction

After the appellate record was settled, Warth filed a motion to augment the record with various items, including as-yet unprepared transcripts of the June 29, 2009 probation violation admission and disposition hearing and the May 9, 2011 I.C.R. 35 hearing. (Motion to Augment.) The Idaho Supreme Court, finding that Warth failed to show that the transcripts he requested were relevant to his appeal, denied Warth's motion to augment. (Order Denying Motion to Augment.)

Warth now contends that, by denying his motion to augment the appellate record with the requested transcript from the June 29, 2009 admit/deny hearing, the Idaho Supreme Court violated his constitutional rights to due process and equal protection and denied him effective assistance of counsel on appeal.[2] (Appellant's brief, pp.5-14.) Warth's argument is without merit. Due process and equal protection require the state only to provide a record sufficient for appellate review of the errors alleged. Because the denied transcript is not relevant to, much less necessary for, appellate review of the court's order relinquishing jurisdiction (the only issue over which this Court has jurisdiction), Warth has failed to show any error in the Idaho Supreme Court's denial of his motion to augment.

[2] On appeal, Warth appears to have abandoned his claim from his Motion to Augment that he was entitled to a transcript of the May 9, 2011 I.C.R. 35 hearing. (Compare Motion to Augment, p.2, with Appellant's brief, pp.5-14.)

B. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

C. Warth Has Failed To Show Any Constitutional Entitlement To The Requested Augmentation

A defendant in a criminal case has a right to "a record on appeal that is sufficient for adequate appellate review of the errors alleged regarding the proceedings below." State v. Strand, 137 Idaho 457, 462, 50 P.3d 472, 477 (2002) (citing Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956)). The state, however, "will not be required to expend its funds unnecessarily" to provide transcripts or other items that "will not be germane to consideration of the appeal." Draper, 372 U.S. at 495; see also M.L.B. v. S.L.J., 519 U.S. 102, 112 n.5 (1996) ("an indigent defendant is entitled only to those parts of the trial record that are germane to consideration of the appeal") (internal citations omitted); Lane, 372 U.S. 477; Griffin, 351 U.S. 12. To demonstrate that the record is not sufficient, the defendant must show that any omissions from the record prejudiced his ability to pursue the appeal. State v. Polson, 92 Idaho 615, 620-21, 448 P.2d 229, 234-35 (1968) (distinguishing Martinez v. State, 92 Idaho 148, 438 P.2d 893 (1968)). See also United States v. Smith, 292 F.3d 90, 93 (1st Cir. 2002). To show prejudice, Warth

"must present something more than gross speculation that the transcripts were requisite to a fair appeal." Scott v. Elo, 302 F.3d 598, 605 (6th Cir. 2002). Warth has failed to carry this burden.

Warth's appeal is timely only from the district court's March 8, 2011 Order Relinquishing Jurisdiction. (R., Vol. I, pp.123-26; Vol. II, pp.266-70.) Warth argues that the Idaho Supreme Court denied him due process and equal protection by denying his motion to augment the appellate record with the as-yet unprepared transcript of his June 29, 2009 admit/deny and disposition hearing (Appellant's brief, pp.5-14), but he has failed to explain, much less demonstrate, how the transcript of that hearing is necessary to decide the only issue over which this Court has jurisdiction on this appeal. There is no evidence that the district court had that transcript in front of it when it relinquished jurisdiction in March 2011, nor is there any indication that the court relied upon anything said at that previous hearing as a basis for its decision to relinquish jurisdiction. Because the as-yet unprepared transcript was never presented to the district court in relation to the jurisdictional review, it was never part of the record before the district court and is not properly considered for the first time on appeal. See State v. Mitchell, 124 Idaho 374, 376 n.1, 859 P.2d 972, 974 n.1 (Ct. App. 1993) (in rendering a decision on the issues raised on appeal, the appellate court is "limited to review of the record made below" and "will not consider new evidence that was never before the trial court"); see also Huerta v. Huerta, 127 Idaho 77, 80, 896 P.2d 985, 988 (Ct. App. 1995) ("It is not the role of this Court to entertain new allegations of fact and consider new evidence."). Warth has failed to show how the requested transcript of a hearing held in connection with the disposition of prior probation violations is relevant to any issue

arising from the subsequent relinquishment of jurisdiction, the only issue over which this Court has jurisdiction on appeal.

Warth relies on the Court of Appeals' statement from State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 8 (Ct. App. 2009), that appellate "review [of] a sentence that is ordered into execution following a period of probation" is based "upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." (See Appellant's brief, p.11.) Hanington does not support Warth's claim of entitlement to the requested transcript. First, the June 2009 hearing, which resulted in Warth continuing on probation, is entirely irrelevant to his appeal. Second, Warth's appeal is not timely from the district court's June 2009 order continuing his probation, so he cannot challenge it. Finally, Hanington does not stand for the proposition that a merits-based review of a trial court's decision to order a sentence executed following either a period of probation or a period of retained jurisdiction requires preparation and inclusion in the appellate record of transcripts of every hearing over which the trial court presided. To the contrary, the law is well established that, absent a showing that evidence was presented at prior hearings, and/or that the district court relied on such evidence in reaching its decision to revoke probation or relinquish jurisdiction, an appellant is not entitled to transcription at public expense of every hearing conducted before the date probation was finally revoked or jurisdiction was relinquished. Mayer v. City of Chicago, 404 U.S. 189, 194 (1971) (state is not "required to expend its funds unnecessarily" where "part or all of the stenographic transcript ... will not be germane to consideration of the appeal") (citation and internal quotations omitted); Draper, 372 U.S. at 496 ("[T]he fact that an appellant with funds

may choose to waste his money by unnecessarily including in the record all of the transcripts does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review."); see also Strand, 137 Idaho at 462-63, 50 P.3d at 477-78 (indigent appellant challenging denial of Rule 35 motion not entitled to transcription at public expense of Rule 35 hearing at which no evidence was presented).

Although there may be some circumstances that require the inclusion in the appellate record of transcripts of prior hearings to fully review a trial court's decision to relinquish jurisdiction, Warth has failed to show that any such circumstances apply here. Warth has failed to point to anything in the record that would indicate that what happened at the June 2009 admit/deny hearing was considered or played any role in the district court's decision in March 2011 to relinquish jurisdiction. Warth has therefore failed to show that the transcript is necessary to complete an adequate record on this appeal.

Citing Mayer v. City of Chicago, 404 U.S. 189 (1971), Warth also claims that if he can make a "colorable argument" that he needs an "item" or "items" to complete a record, the burden transfers to the *state* "to prove that the requested items are not necessary for the appeal." (Appellant's brief, p.10.) He also argues, with no citation whatsoever, that "to meet the constitutional mandates of due process and equal protection," the state must provide him (and all indigent defendants) with whatever appellate record he desires unless the *state* proves that "some or all of the requested materials are unnecessary or frivolous." (Appellant's brief, p.7; see also p.5 ("The only way a court can constitutionally preclude an indigent defendant access to a requested

transcript is if the State can prove that the transcript is irrelevant to the appeal.").) No reading of Mayer supports these arguments.

Mayer was convicted on non-felony charges punishable only by a fine and he appealed, challenging the sufficiency of evidence and asserting a claim of prosecutorial misconduct. Id. at 190. The appellate court denied his request for a trial transcript at government expense on the basis of a local rule providing that verbatim transcripts of trial proceedings would be provided at government expense only for felonies. Id. at 191-93. The issue was not whether Mayer was entitled to a record of his trial, but whether he was entitled to a verbatim transcript of his trial. Id. at 193. The Court noted it had addressed a similar issue in Draper v. Washington, 372 U.S. 487 (1963), where the Court held that the government need not provide transcripts that were not "germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances." Mayer, 404 U.S. at 194 (quoting Draper, 372 U.S. at 495-96). However, "the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way." Id. at 195. "Moreover, where the grounds of appeal, as in this case, make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds." Id.

Thus, if it is not clear on the existing record, an indigent appellant must establish that a record of certain "proceedings" is germane to the appeal. Id. at 194. Only after the germaneness of the requested record of the proceedings is established and a colorable need for a verbatim record is shown by the appellant will the burden shift to

the state to demonstrate that a partial transcript or some record other than a verbatim transcript will be adequate. Id. at 194-95. See also Britt v. North Carolina, 404 U.S. 226, 227-28 (1971) (in deciding whether a requested record is necessary, the Court should consider the "value of the transcript to the defendant in connection with the appeal," but the standard does not require "a showing of need tailored to the facts of the particular case" and the Court may take notice of the importance of a transcript).

Here the only proceeding challenged on appeal is the relinquishment of jurisdiction on March 8, 2011. The record related to the district court's decision to relinquish jurisdiction is complete. Warth has failed to establish that the requested transcript is necessary to create an adequate appellate record to review the court's order relinquishing jurisdiction. Nothing in the record suggests that the transcript Warth requested in his augmentation was before the district court in relation to its jurisdictional review. Because Warth failed to make a showing of germaneness and colorable need for the requested transcript, there is no burden on the state. Because all of the evidence before the district court is in the appellate record, that record is adequate for appellate review, and Warth has failed to establish a violation of his due process rights.[3] Strand, 137 Idaho at 463, 50 P.3d at 478.

Warth has also failed to establish that denial of his request to augment the record on appeal with an irrelevant transcript denied him equal protection. Warth cites to

[3] As a component of his due process claim, Warth also argues that the denial of his motion to augment the record with the requested transcript has deprived him of effective assistance of counsel on appeal. (Appellant's brief, pp.12-14.) Because Warth has failed to show that the requested transcript is necessary, or even relevant, for appellate review of the district court's order relinquishing jurisdiction, there is no possibility that the denial of the motion to augment has deprived Warth of effective assistance of counsel on this appeal.

several cases where criminal defendants were denied appellate records *because of their indigence*. (See Appellant's brief, pp.7-12 (citing, e.g., Griffin v. Illinois, 351 U.S. 12 (1956); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963).) However, there is nothing in the record that in any way indicates that the Idaho Supreme Court denied Warth's request for the transcript solely because he is indigent. In fact, Warth's motion would have properly been denied even if he had the funds to pay for the transcript. The Idaho Appellate Rules require *any* party seeking augmentation to set forth a ground sufficient to justify the augmentation requested. I.A.R. 30. Warth's motion to augment failed because he failed to meet this minimal burden, imposed upon all parties, of showing that the transcripts were necessary or even helpful in addressing appellate issues. The Idaho Supreme Court's order properly denied the motion to augment because Warth failed to make a showing that any appellant – indigent or otherwise – would be entitled to augment the record as requested. The rule applies to all parties, not just the indigent.

Warth is entitled to a record adequate for appellate review of the district court's order relinquishing jurisdiction and nothing more. He has failed to show that the requested transcript is relevant to appellate review, much less that it is necessary for adequate appellate review. Having failed to make any such showing, his motion to augment the record with an irrelevant transcript that was never before the district court is properly denied. Having failed to show his due process and equal protection rights were implicated, much less violated, by that denial, Warth has failed to show any basis for relief.

II.

Warth Has Failed To Establish An Abuse Of The District Court's Sentencing Discretion

A. Introduction

Warth was sent on concurrent riders by the district court in this case and the court in an unrelated case out of Bingham County. After the district court in Bingham County relinquished jurisdiction, the district court in this case also relinquished jurisdiction. Warth argues that the district court abused its discretion by relinquishing jurisdiction, claiming he performed admirably under confined supervision. (Appellant's brief, pp.14-18.) Alternatively, Warth argues that the district court abused its discretion by not *sua sponte* reducing his sentence when it relinquished jurisdiction. (Appellant's brief, pp.18-21.) Warth has failed to establish an abuse of discretion.

B. Standard Of Review

"Sentencing decisions are reviewed for an abuse of discretion." State v. Moore, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)).

C. Warth Has Failed To Establish That The District Court Abused Its Discretion By Relinquishing Jurisdiction

Whether to grant probation "is a matter left to the sound discretion of the court." I.C. § 19-2601(4). The decision to relinquish jurisdiction is also a matter of discretion. See State v. Hood, 102 Idaho 711, 712, 639 P.2d 9, 10 (1981); State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). A court's decision to relinquish jurisdiction will not be deemed an abuse of discretion if the trial court has sufficient information to determine that a suspended sentence and probation would be

inappropriate. State v. Chapel, 107 Idaho 193, 194, 687 P.2d 583, 584 (Ct. App. 1984). "While a recommendation from corrections officials who supervised the defendant [during the period of retained jurisdiction] may influence a court's decision, it is purely advisory and is in no way binding upon the court." State v. Hurst, 151 Idaho 430, ___, 258 P.3d 950, 958 (Ct. App. 2011) (citing State v. Merwin, 131 Idaho 642, 648, 962 P.2d 1026, 1032 (1998); State v. Landreth, 118 Idaho 613, 615, 798 P.2d 458, 460 (Ct. App. 1990)). Likewise, an offender's "[g]ood performance while on retained jurisdiction, though commendable, does not alone establish an abuse of discretion in the district judge's decision not to grant probation." Hurst, 151 Idaho at ___, 258 P.3d at 958 (citing State v. Statton, 136 Idaho 135, 137, 30 P.3d 290, 292 (2001)).

Following a probation violation, the district court revoked Warth's probation and retained jurisdiction, recommending the therapeutic community. (R., Vol. I, pp.119-21; Vol. II, pp.261-64.) A district court in Bingham County took the same action in an unrelated case. Warth, however, was not placed into the therapeutic community. (See APSI.) Later, the district court in Bingham County relinquished jurisdiction.

In the court ordered Addendum to Presentence Investigation, program managers at NICI noted Warth's good behavior during the retained jurisdiction and recommended probation. (See generally APSI) However, because the district court in Bingham County had relinquished jurisdiction, probation was not an option. (R., Vol. I, p.123; Vol. II, p.266.) Warth had also failed to participate in the therapeutic community, as recommended by the district court. (Id.; see also APSI.) The district court, therefore, relinquished jurisdiction, recommending again that Warth participate in the therapeutic community. (R., Vol. I, p.123; Vol. II, p.266.)

On appeal, Warth ignores that probation was not an option in this case, instead focusing on his good performance while on retained jurisdiction and arguing that the district court abused its discretion when it relinquished jurisdiction. (Appellant's brief, pp.14-18.) Warth's good performance, "though commendable, does not alone establish an abuse of discretion in the district judge's decision not to grant probation." Hurst, 151 Idaho at ___, 258 P.3d at 958 (citing Statton, 136 Idaho at 137, 30 P.3d at 292). Because probation was not an option and because the district court wanted Warth to participate in the therapeutic community prior to placement on probation, Warth has failed to establish an abuse of the district court's sentencing discretion. The court's order relinquishing jurisdiction should be affirmed.

D. Warth Has Failed To Show An Abuse Of The District Court's Sentencing Discretion By Not, *Sua Sponte*, Reducing His Sentence Pursuant To Rule 35

Upon relinquishing jurisdiction, the district court may, pursuant to Idaho Criminal Rule 35, reduce an underlying sentence *sua sponte*. I.C.R. 35. A court's decision not to reduce a sentence is reviewed for an abuse of discretion subject to the well-established standards governing whether a sentence is excessive. State v. Hanington, 148 Idaho 26, 27, 218 P.3d 5, 7 (Ct. App. 2009); State v. Marks, 116 Idaho 976, 978, 783 P.2d 315, 317 (Ct. App. 1989)). Where a sentence is legal, those standards require an appellant to establish that the sentence is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden, the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable if appropriate to achieve the primary

objective of protecting society, and any or all of the related sentencing goals of deterrence, rehabilitation, or retribution. State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978). In deference to the trial judge, the Court will not substitute its view of a reasonable sentence where reasonable minds might differ. State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

Warth has failed to show that his sentence is excessive. In the underlying cases, Warth was convicted of one count of possession with intent to deliver and two counts of delivery of cocaine, but still given an opportunity at probation. (R., Vol. I, pp.70-74; Vol. II, pp.218-22; 5/14/2007 Tr., p.47, L.9 – p.49, L.9.) Warth was not a successful probationer, receiving probation violation reports for using marijuana and violating a no contact order in October 2007 (R., Vol. I, p.77); by committing attempted strangulation, in addition to again violating a no contact order and smoking marijuana, in January 2008 (R., Vol. I, pp.82, 86-87); by leaving his assigned district so he could purchase and sell illegal drugs, in addition to smoking marijuana, drinking, and receiving pending charges in Bingham County for possession with intent to deliver in April 2009 (R., Vol. I., pp.90-91; Vol. II, pp.237-38). After admitting his last violations, Warth was continued on probation with the additional terms of successfully completing the Wood Pilot Project and serving 120 days in county jail. (R., Vol. I, p.105; Vol. II, p.249.) Warth then violated his probation yet again in September 2010 by getting terminated from the Wood Pilot Project for, among other things, using the synthetic cannabinoid, "Spice." (R., Vol. I, pp.110-12, 117-18; Vol. II, pp.253-55, 259-60.)

When convicted on the underlying offenses in 2007, Warth was only 18, yet he had already received charges for theft and property damage, stalking and battery, and

several possession and trafficking charges. (PSI, pp.2-4.) Warth has posed a risk to community safety when not in confinement. Warth's positive behavior while under supervision in confinement does not entitle him to a reduction of his underlying sentence. Warth has failed to establish an abuse of the court's sentencing discretion and the judgment of the district court should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order relinquishing jurisdiction.

DATED this 27th day of April, 2012.

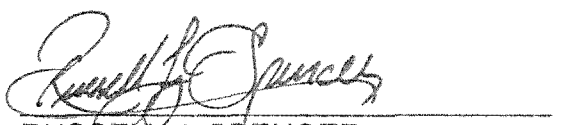
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of April, 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SHAWN F. WILKERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm