

6-29-2012

## State v. Warth Appellant's Reply Brief Dckt. 38854

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NOS. 38854 & 38983
	)	
v.	)	
	)	
SHAYNE RICHARD WARTH,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	

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REPLY BRIEF OF APPELLANT

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

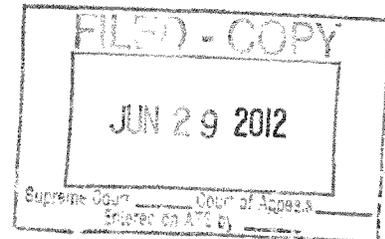
HONORABLE JOEL E. TINGEY  
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## STATEMENT OF THE CASE

### Nature of the Case

In his Appellant's Brief, Mr. Warth argued that the Idaho Supreme Court denied him due process and equal protection when it denied his Motion to Augment the record with a transcript of the June 29, 2009, probation violation admission and disposition hearing.<sup>1</sup> Mr. Warth argued that the requested transcript is necessary for his appeal because the district court could utilize its own memory of the prior proceedings when it decided to revoke Mr. Warth's probation. Mr. Warth also argued that the district court abused its discretion when it relinquished jurisdiction and executed excessively harsh sentences.

In response, the State argues that the requested transcript cannot be added to the appellate record because it did not exist prior to the jurisdictional review hearing and, therefore, the district court did not consider it when it relinquished jurisdiction and executed the underlying sentences. The State also argues that the requested transcript is not relevant to the issues on appeal because Mr. Warth cannot prove that the district court relied on the information discussed at those hearing when it relinquished jurisdiction and executed the underlying sentences.

This brief is necessary to address the State's characterization of the requested transcript as new evidence. Mr. Warth argues that the requested transcript is not new evidence because a district court can rely on its own memory of the prior proceedings when it considers whether to relinquish jurisdiction or reduce a sentence. Since Idaho

appellate courts conduct an independent review of the record when determining whether a district court abused its discretion in regard to a sentencing/probation determination, what the district court actually considered is generally irrelevant. The only questions are whether the information at issue was before the district court and if it is relevant to the issues on appeal.

#### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Warth's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

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<sup>1</sup> The State accurately points out that Mr. Warth has abandoned his due process and equal protection claim in regard to the transcript of the I.C.R. 35 hearing held on May 9, 2011. (Respondent's Brief, p.5 n.2.)

## ISSUES

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?<sup>2</sup>
3. Did the district court abuse its discretion when it failed to reduce Mr. Warth's sentences *sua sponte* upon relinquishing jurisdiction?

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<sup>2</sup> Issues II and III will not be addressed in this brief.

## ARGUMENT

### I.

#### The Idaho Supreme Court Denied Mr. Warth Due Process And Equal Protection When It Denied His Motion To Augment The Record With The Requested Transcript

##### A. Introduction

In Idaho, district courts consider a broad range of information when making sentencing decisions. Because of this, Idaho appellate courts have scrupulously required defendants to provide an extensive appellate record because they conduct an independent review of the entire record before the district court when determining whether an abuse of discretion occurred in regard to a sentencing/probation determination. In other words, the question on appeal generally does not focus on how or what the district court actually considered. Instead, the central question is whether the record before the court supports its sentencing/probation determination.

Since Idaho appellate courts need to have all of the relevant information that was before the district court to conduct this analysis, they will presume that any missing information supports the trial court's determination and refuse to rule on the merits of the issue. In some instances, appeals have been dismissed due to the appellant's failure to provide transcripts of hearings which occurred years before the disposition of the issue on appeal.

In this case, Mr. Warth argued that the Idaho Supreme Court denied him due process and equal protection when he requested a transcript necessary to provide an adequate record for appeal. In response, the State argues that the requested transcript is not necessary because the district court did not have that transcript when it made the

determination to relinquish jurisdiction and execute the underlying sentences. The State goes as far as arguing that the requested transcript would constitute new information on appeal, which cannot be considered by an appellate court. The State's position is not supported by case law and, if taken to its logical conclusion, would limit the information a district court could consider because a transcript of a prior hearing would have to be created before a district court could consider information from that hearing in regard to a subsequent proceeding. For example, without a transcript of a defendant's original sentencing hearing, a district court could not consider information from that sentencing hearing when determining whether to grant or deny an I.C.R. 35 motion.

B. The Idaho Supreme Court Denied Mr. Warth Due Process And Equal Protection When It Denied His Motion To Augment The Record With The Requested Transcript

An indigent defendant can require the State to pay for an appellate record including verbatim transcripts of the relevant trial proceedings. However, the State does not necessarily have to provide indigent defendants with everything they request. In order to meet the constitutional mandates of due process and equal protection, the State must provide indigent defendants with a sufficient appellate record to enable a merit-based review of the issues raised on appeal. In this case, the Idaho Supreme Court denied Mr. Warth's request for the transcript of the June 29, 2009, probation violation admission and disposition hearing. That denial prevents Mr. Warth from adequately addressing the issues raised on appeal. Further, it could be presumed that the information contained in the missing transcripts supports the district court's decisions to relinquish jurisdiction and execute the underlying sentences.

In response to this position, the State argues that the requested transcripts pertain to issues over which this Court has no jurisdiction and cannot be considered on appeal 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.” (Respondent’s Brief, p.7.) Contrary to the State’s position, the question of whether the transcript of the requested proceeding was before the district court at the time of the jurisdictional review hearing is not relevant in deciding whether the transcript is relevant to the issues on appeal because in reaching a sentencing or probation decision, a district court is not limited to considering only that information offered at the proceeding from which the appeal is filed. Rather, a court is entitled to utilize knowledge gained from its own official position and observations. *Downing v. State*, 136 Idaho 367, 373-74 (Ct. App. 2001); *see also State v. Sivak*, 105 Idaho 900, 907 (1983) (recognizing that the findings of the trial judge in sentencing are based, in part, upon what the court heard during the trial); *State v. Wallace*, 98 Idaho 318 (1977) (recognizing that the court could rely upon “the number of certain types of criminal transactions that [the judge] has observed in the courts within his judicial district and the quantity of drugs therein involved”); *State v. Gibson*, 106 Idaho 491 (Ct. App. 1984) (approving sentencing court’s reliance upon evidence presented at the preliminary hearing from a previously dismissed case because “the judge hardly could be expected to disregard what he already knew about Gibson from the other case”). Thus, whether the prior hearing was transcribed or not is irrelevant, because the district court may rely upon the information it already knows from

presiding over that hearing when it made the decisions to relinquish jurisdiction and execute the underlying sentence.

Additionally, the State's position is unworkable and inconsistent with case law because all transcripts, except a transcript of the hearing from which an appeal is taken, would be deemed new information. This is inconsistent with the holding from *State v. Burdett*, 134 Idaho 271, 276 (Ct. App. 2000), where the district court examined the defendant about his guilty plea during the change of plea hearing. Since the defendant in *Burdett* failed to provide a transcript of that hearing on appeal, the Court of Appeals presumed that something occurred in that hearing which supported the district court's sentencing decision. *Id.*

If the State's argument is taken to its logical conclusion, a transcript of a defendant's original sentencing hearing would be new information in instances where an appeal is filed from an I.C.R. 35 motion. Further, if that is new information, a district court should not, absent a transcript, consider what happened at sentencing when evaluating an I.C.R. 35 motion. However, in *State v. Wright*, 114 Idaho 451, 452-453 (Ct. App. 1988), the Idaho Court of Appeals refused to address the merits of an appeal from the denial of an I.C.R. 35 motion because the appellant failed to provide the PSI and a transcript of the sentencing hearing in the appellate record. *See also State v. Rundle*, 107 Idaho 936 (Ct. App. 1984).

The State's argument is also refuted by *State v. Warren*, 123 Idaho 20 (Ct. App. 1992). In that case, Mr. Warren was convicted of aggravated battery in 1988 and placed on probation. *Id.* at 21. Mr. Warren's probation was then revoked and the district court retained jurisdiction for 180 days. *Id.* After completing the period of

retained jurisdiction, Mr. Warren was placed on probation. *Id.* Mr. Warren's probation was then revoked. *Id.* Mr. Warren then appealed and alleged that his sentence was excessive. *Id.* On appeal, Mr. Warren argued that his probation violation was trivial. *Id.* The Court of Appeals addressed that argument stating, "Warren incorrectly points to the nature of the probation violation by arguing that his violation was trivial. This Court must look at the nature of the original criminal offense, in this case aggravated battery where Warren bit off his victim's ear." *Id.*<sup>3</sup> However, the Court of Appeals did not address the merits of his sentencing claim because he failed to provide the original PSI and a transcript of the original sentencing hearing. *Id.* Even though the district court's original sentence was not directly being appealed, and happened years before the decision at issue, the Idaho Court of Appeals held that the transcript was necessary to address Mr. Warren's claims of error. Moreover, there was no indication that the district court referenced the original sentencing hearing at the probation violation disposition hearing. It appears that the Court of Appeals assumed that the original sentencing hearing would address the nature of the original offense. Had Mr. Warth failed to request the various transcripts, the State could have argued that his appeal should have been dismissed for failure to provide an adequate appellate record.

According to the State, Mr. Warth argued, "with no citation whatsoever," due process and equal protection require the State to "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.'" (Respondent's

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<sup>3</sup> This is an example of the Idaho Court of Appeals conducting an independent review of the record.

Brief, p.9 (quoting Appellant's Brief, p.7) (original emphasis).) Mr. Warth's burden shifting argument was based on *Mayer v. City of Chicago*, 404 U.S. 189, 195 (1971), where the United States Supreme Court first held that the State does not need to "waste its funds by providing what is unnecessary for adequate appellate review." However, the Court went on to hold that:

We emphasize, however, that 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. 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. This rationale underlies our statement in *Draper*,<sup>4</sup> that:

'(T)he State could have endeavored to show that a narrative statement or only a portion of the transcript would be adequate and available for appellate consideration of petitioners' contentions. The trial judge would have complied with \* \* \* the constitutional mandate \* \* \* in limiting the grant accordingly on the basis of such a showing by the State.'<sup>5</sup>

*Id.* (footnote omitted). If it is apparent on the record that there is a colorable need for the requested transcripts, it is the State's burden to prove that the requested transcripts

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<sup>4</sup> *Draper v. Washington*, 372 U.S. 487, 498 (1963).

<sup>5</sup> While addressing that argument, the Court also noted:

[This analysis does not include a] balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant.

*Mayer*, 404 U.S. at 196-197.

are irrelevant. Therefore, Mr. Warth's burden shifting position is supported by the case law referenced by the State.

Based on the *Mayer* opinion, the State also argues that Mr. Warth has failed to make the requisite showing that the requested transcripts are relevant to the issues on appeal. (Respondent's Brief, pp.7-9.) Specifically, the State cites to the *Mayer* opinion for the proposition "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 a transcription at public expense . . . ." (Respondent's Brief, p.8.) The State then argues that Mr. Warth has failed to show that the district court relied on anything that occurred during the hearing at issue when the district court relinquished jurisdiction. (Respondent's Brief, p.9.) The State's position is flawed because it engrafts its definition of relevance into the holding from *Mayer*<sup>6</sup> and then confuses the applicable standard or review. First, *Mayer* only requires that the State provide an indigent defendant access to transcripts if they are generally relevant to an issue on appeal. That opinion does not attempt to define relevance. It never states that a transcript is relevant if evidence was adduced at a hearing or if the district court relied on the contents of the hearing.

More importantly, the State's position disregards the applicable standard of review. When a sentencing/probation determination is at issue on appeal, the appellate court conducts its own independent review of the record, which is not confined to the

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<sup>6</sup> The State also cites to *State v. Strand*, 137 Idaho 457 (2002). Mr. Warth does not contest the holding in *Strand* which limits indigent defendants access to transcripts of I.C.R. 35 hearings where evidence was presented. (Respondent's Brief, p.9.)

information considered by the district court. *State v. Flores*, 131 Idaho 285, 286 (Ct. App. 1998) (“Where an appellant asserts that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record and focus upon the nature of the offense and the character of the offender.”); see also *State v. Hanington*, 148 Idaho 26, 28 (Ct. App. 2009) (“When we review a sentence that is ordered into execution following a period of probation, we will examine the *entire record* encompassing events before and after the original judgment. We base our review upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation.” (Emphasis added)). In determining whether information is relevant to an appellate court during this review the only question is whether the information was before the district,<sup>7</sup> not whether the district court actually relied on that information. This is plenary review. Therefore, the State’s assertion that Mr. Warth must prove that the district court relied on information which was either discussed or presented at the hearings in question is misplaced because it disregards the applicable standard of review.

Further, the State cites no authority which limits an appellate court’s sentencing/appellate review to information expressly addressed by the district court. In many instances an appellate court will not know what the district court relied on in making a sentencing/probation determination because Idaho courts do not have to provide any explanation when sentencing a defendant. *State v. Nield*, 106 Idaho 665, 666 (1984).

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<sup>7</sup> The information must also relate to a sentencing concern such as the nature of the offense or the defendant’s background.

In sum, Idaho courts consider a very broad range of information when making sentencing decisions. Due to that broad range of information, an appellant must provide an extensive appellate record in order to challenge all forms of sentencing/probation determinations on appeal because Idaho appellate courts will presume any missing information will support the district court's decision. It does not matter what the district court actually considered, if the information was in the record and is relevant to an issue on appeal, an appellate court will review that information. In light of the foregoing, the Idaho Supreme Court denied Mr. Warth due process and equal protection when it denied Mr. Warth transcripts of the hearings he will need to overcome this presumption.

#### CONCLUSION

Appellate counsel respectfully requests access to the requested transcript and the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review. In the event this request is denied, Mr. Warth respectfully requests that this Court remand this matter with instructions for the district court to place Mr. Warth on probation. Alternatively, Mr. Warth respectfully requests that this Court reduce the indeterminate portions of his sentences.

DATED this 29<sup>th</sup> day of June, 2012.



SHAWN F. WILKERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29<sup>th</sup> day of June, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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JOEL E TINGEY  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

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