11-19-2012

State v. Peterson Respondent's Brief Dckt. 39146

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39146, 39147, 39783
	)	
vs.	)	
	)	
THOMAS EDWARD PETERSON,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MICHAEL E. WETHERELL
District Judge

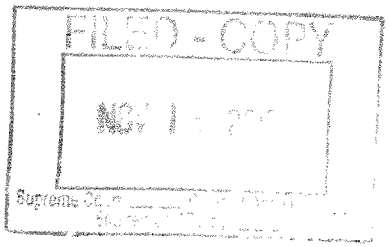
LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

LORI A. FLEMING
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

BRIAN R. DICKSON
Deputy State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712



ATTORNEY FOR
DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

Nature of the Case

Thomas Edward Peterson appeals in these consolidated cases from the sentence imposed upon his conviction for felony violation of a no contact order in Docket No. 39783, and from the orders revoking probation and executing without reduction the sentences imposed upon his convictions for felony violation of a no contact order in Docket Nos. 39146 and 39147. Peterson also appeals, in all three docket numbers, from the district courts' orders denying his Rule 35 motions for reduction of sentence.

Statement of Facts and Course of Proceedings

In November 2007, Peterson physically abused his girlfriend, Dorene Giannini, by shoving her, grabbing her by her hair and strangling her. (PSI, pp.23, 449, 489.[1]) A no contact order issued, which Peterson violated three times between January and March 2008. (PSI, p.444.) Peterson was ultimately convicted of domestic assault (amended from felony domestic battery), as well as three misdemeanor no contact violations, and was thereafter placed on supervised probation and ordered to have no contact with Ms. Giannini, except by telephone, until June 7, 2010. (PSI, pp.444, 472, 475.)

On October 3, 2008, an officer stopped Ms. Giannini for driving without headlights. (PSI, p.441.) Peterson was in the car with Ms. Giannini and, when

[1] PSI page numbers correspond with the page numbers of the electronic file "PetersonPSI.pdf," filed in Docket No. 39783.

questioned, he gave the officer a false name and false date of birth. (PSI, pp.441, 471.)

The state charged Peterson in Docket No. 39146 (district court case no. CRFE-2008-17740) with felony violation of a no contact order and misdemeanor providing false information to law enforcement. (#39146/39147 R., pp.36-37.) Pursuant to a plea agreement, Peterson pled guilty to the no contact order violation, and the state dismissed the remaining charge and agreed to not file a persistent violator enhancement. (#39146/39147 R., pp.54-55.) The district court accepted Peterson's plea and imposed a unified sentence of five years, with three years fixed, and retained jurisdiction. (#39146/39147 R., pp.58-63.) At the conclusion of the retained jurisdiction period, the district court suspended the balance of Peterson's sentence and placed him on probation for five years, beginning on July 23, 2009. (#39146/39147 R., pp.66-75.)

Four months later, the state filed motion for probation violation alleging that Peterson had violated his probation officer's directive to have no contact with Ms. Giannini without first obtaining his probation officer's approval. (#39146/39147 R., pp.91-93.) Peterson admitted the allegation and the court continued him on probation, imposing as an additional court ordered condition that Peterson have no contact with Ms. Giannini, except by telephone, until dismissal of the case or further order of the court. (#39146/39147 R., pp.99-100, 102-05.) A written no contact order memorializing the new probation condition was filed on December 10, 2009. (#39146/39147 R., p.101.)

On June 25, 2010, law enforcement responded to a report that "a suspicious subject" had been "hiding behind a fence" in Ms. Giannini's neighborhood and then rode his bike to Ms. Giannini's residence and entered her yard. (PSI, pp.157, 170.) When the responding officer arrived, he observed Peterson leaving Ms. Giannini's front yard on a bicycle. (PSI, pp.157, 170.)

The state charged Peterson in Docket No. 39147 (district court case no. CRFE2010-10642) with felony violation of a no contact order and a persistent violator enhancement. (#39146/39147 R., pp.241-42, 248-50.) The state also filed a motion for probation violation in Docket No. 39146, alleging that Peterson had violated the conditions of his probation by being charged with the new no contact order violation, consuming alcohol, and failing to make payments toward his court ordered financial obligations. (#39146/39147 R., pp.129-31.) Pursuant to a plea agreement, Peterson pled guilty to the new no contact order violation in Docket No. 39147, and the state dismissed the persistent violator enhancement. (#39146/39147 R., pp.138-39, 254-55.) Peterson also admitted to having violated his probation in Docket No. 39146. (#39146/39147 R., pp.138-39, 254-55.) The district court continued Peterson on probation in Docket No. 39146 and, in Docket No. 39147, it imposed a concurrent unified sentence of five years, with one and one-half years fixed, but suspended the sentence and placed Peterson on probation for five years. (#39146/39147 R., pp.140-45, 256-57, 259-66.) In conjunction with its probation violation and sentencing decisions, the court entered an order on September 30, 2010, prohibiting Peterson from having any contact with Ms. Giannini until October 2015. (#39146/39147 R., p.258.)

Less than three months later, on December 21, 2010, officers received a report that a male matching Peterson's description had slashed the tires of a vehicle that was parked in front of Ms. Giannini's home. (PSI, pp.2, 16, 18.) That same day, Ms. Giannini reported that someone had thrown rocks through her front and kitchen windows. (PSI, pp.2, 16, 18.) Giannini told officers that she believed Peterson was responsible for the vandalism.[2] (PSI, pp.18-19.) She also disclosed that, in the two days preceding the vandalism, Peterson had called her "over 40 times" and "had sent her 145 text messages." (PSI, pp.2, 18.) When confronted by officers, Peterson "adamantly denied" having any contact with Ms. Giannini, either in person or by telephone, since June 25, 2010. (PSI, pp.3, 22.) Officers applied for and received a search warrant to obtain Peterson's telephone records. (PSI, pp.3, 24.) According to the police reports, those phone records showed "approximately 1368 calls and 1899 text messages between Peterson and Giannini from 6/25/10 through 01/06/11." (PSI, pp.3, 24.)

The state charged Peterson in Docket No. 39783 (district court case no. CRFE2011-3748) with felony violation of a no contact order. (#39783 R., pp.26-27.) The state also moved to revoke Peterson's probation in Docket Nos. 39146 and 39147. (#39146/39147 R., pp.157-60, 171-74, 278-80, 291-94.) Pursuant to a plea agreement, Peterson pled guilty to the new no contact order violation in Docket No. 39783 and admitted to having violated his probation in Docket Nos. 39146 and 39147. (#39146/39147 R., pp.188-89, 309-10; #39783 R., pp.34-36.) In Docket Nos. 39146 and 39147, the district court revoked Peterson's probation

[2] Ms. Giannini subsequently retracted this accusation. (PSI, pp.4, 29, 32.)

and ordered his underlying sentences executed. (#39146/39147 R., pp.194-98, 315-319.) In Docket No. 39783, the court imposed a unified sentence of five years, with one and one-half years fixed, and ordered the sentence to run consecutively to Peterson's sentences in Docket Nos. 39146 and 39147. (#39783 R., pp.54-58.) Peterson filed timely Rule 35 motions for reduction of sentence in all three cases, all of which were denied. (#39146/39147 R., pp.199, 206-09, 215-18, 320, 327-30, 336-39; #39783 R., pp.60, 63-64, 69-73.)

Peterson timely appealed from the judgment and order denying his Rule 35 motion in Docket No. 39783 and from the orders revoking his probation and denying his Rule 35 motions in Docket Nos. 39146 and 39147. (#39146/39147 R., pp.200-02, 321-23; #39783 R., pp.74-76.) The cases have been consolidated for appeal. (Order Granting Motion To Consolidate, filed July 11, 2012.)

ISSUES

Peterson states the issues on appeal as:

> 1. Whether the district court violated Mr. Peterson's state and federal constitutional rights to due process by failing to maintain an accurate copy of the record in his case.
>
> 2. Whether the district court abused its discretion by revoking Mr. Peterson's probation in Docket Numbers 39146 and 39147, or, by not reducing his sentences *sua sponte* pursuant to Rule 35.
>
> 3. Whether either or both of the district courts abused their discretion when they denied Mr. Peterson's Rule 35 motions.

(Appellant's brief, p.15.)

The state rephrases the issues on appeal as:

1. Has Peterson failed to show a violation of his due process right to an adequate record on appeal?

2. Has Peterson failed to establish that the district court in Docket Nos. 31946 and 39147 abused its discretion by revoking Peterson's probation and executing his sentences without reduction?

3. Has Peterson failed to establish an abuse of discretion in the denial of his Rule 35 motions?

ARGUMENT

I.
Peterson Has Failed To Show A Violation Of His Due Process Right To An Adequate Appellate Record

A. Introduction

Peterson was charged with and convicted of three felony no contact order violations, the most recent of which involved Peterson having unauthorized telephone and texting contact with the victim, Dorene Giannini, in Docket No. 39783. (#39783 R., pp.26-27.) At his sentencing hearing in Docket No. 39783, Peterson expressed concern that the PSI "specifically talk[ed] about alleged vandalism or malicious injury to property that [Peterson had not] been charged with," but did not "show[] the phone calls and the text messages" that formed the basis of the no contact order violation charge, which Peterson claimed to "accept full responsibility for." (Tr., Vol.5, p.31, Ls.4-12.[3]) The district court assured Peterson that, in making its sentencing decision, it would not consider the uncharged vandalism allegations. (Tr., Vol.5, p.31, Ls.13-20.) The court noted, however, that the facts giving rise to the no contact order violation before it actually came to light during the vandalism investigation, explaining:

> In the investigation of that vandalism case, the police had contact with the victim identified in this no contact order. And through the contact of that victim, the police were able to determine that you had been violating your no contact order that had been issued by Judge Wetherell in the felony case – one of those felony cases that you were on probation for.

[3] The appellate record contains several separately bound volumes of transcripts. For uniformity and ease of reference, the state has adopted the numbering and citation system used by Peterson in his Appellant's brief. (See Appellant's brief, p.4 n.7 (designating the separately bound transcripts by volume number).)

> And in the course of that investigation, according to the police report materials, they obtained a search warrant for the phone records from your victim. Those phone records show that between June of 2010 and January of 2011, they were able to document some 1,368 phone calls from you to the victim, in violation of your no contact order.
>
> Those phone records also indicated that on that same date – between those same dates, they were able to document 1,899 text messages between you and the victim of the no contact order. Those materials are within the presentence materials that I've reviewed, sir.

(Tr., Vol.5, p.31, L.21 – p.32, L.14.) Ultimately, the district court considered the "massive number of violation[s], both in phone contact and in texting between [Peterson] and the victim" as one of the bases for its sentencing decision. (Tr., Vol.5, p.45, Ls.4-9; see also Tr., Vol.5, p.44, Ls.1-11, p.46, L.2 – p.48, L.14.)

After the appellate record in Docket No. 39783 was settled, Peterson filed a motion to augment with "records of the telephone and texting communications from Mr. Peterson's telephone" which, Peterson claimed, "were included with the Presentence Investigation Report and considered by the district court at sentencing." (Motion To Augment And To Suspend The Briefing Schedule And Statement In Support Thereof, filed on or about July 5, 2012.) The Idaho Supreme Court denied the motion, explaining: "[T]his Court has been advised by the district court that there are no records of the defendant's telephone and texting communications." (Order Denying Motion To Augment And To Suspend The Briefing Schedule, filed July 23, 2012.)

Peterson now argues that, "[b]y not maintaining a copy of the telephone records upon which it expressly relied, the district courts [sic] deprived Mr. Peterson of his due process protections to an adequate appellate record."

(Appellant's brief, p.16.) Peterson's claim of a due process violation fails for two independent reasons. First, the record does not support Peterson's claim that the phone records he seeks to include in the appellate record, as opposed to the police reports that merely summarized the contents of those records, were actually ever included in the sentencing materials that were presented to and reviewed by the district court. Second, even if the phone records were included among the sentencing materials reviewed by the district court, Peterson has failed to demonstrate that the absence of those phone records from the appellate record has prejudiced him in the pursuit of his appeal.

B. Standard Of Review

The standard of appellate review applicable to constitutional issues such as claimed due process violations 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. Peterson Has Failed To Show That Any Documents Are Missing From The Appellate Record, Much Less That The "Missing" Documents Have Prejudiced His Ability To Pursue His Appeal

A defendant in a criminal case has a due process 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). In addition, although legal requirements to create a record are

mandatory, failure to do so is not automatically reversible error. State v. Wright, 97 Idaho 229, 231-33, 542 P.2d 63, 65-67 (1975); State v. Cheatham, 139 Idaho 413, 415, 80 P.3d 349, 351 (Ct. App. 2003). To demonstrate that the record is not sufficient, the defendant must show that any omissions from the record prejudiced his ability to pursue his appeal. State v. Polson, 92 Idaho 615, 620-21, 448 P.2d 229, 234-35 (1968); Cheatham, 139 Idaho at 415, 80 P.3d at 351. "[T]o require reversal, some specific error or prejudice resulting from failure to record such proceedings must be called to the court's attention." Wright, 97 Idaho at 233, 542 P.2d at 67. See also State v. Lovelace, 140 Idaho 53, 65, 90 P.3d 278, 290 (2003) ("[E]rror in the abstract does not necessarily rise to the level of constitutional dimension unless and until a defendant properly presents a specific prejudice from such error.").

Peterson's claim of a due process violation rests upon his assertion that records of his telephone and texting communications with the victim were included among the sentencing materials considered by the district court and, through no fault of his own, those records are missing from the appellate record. (Appellant's brief, pp.16-19.) Contrary to Peterson's assertions, however, there is no indication that the district court ever had before it the actual telephone records that are the subject of Peterson's due process claim. At sentencing, the district court stated that, "according to the *police report materials*, they obtained a search warrant for the phone records from your victim." (Tr., Vol.5, p.32, Ls.3-5 (emphasis added).) The court then went on to explain what the *police* "were able to document" from those phone records – *i.e.*, that between June of 2010 and

January of 2011 there were "some 1,368 phone calls" and "1,899 text messages" between Peterson and the victim. (Tr., Vol.5, p.32, Ls.6-13.) The court then concluded, "[t]hose *materials* are within the presentence materials that I've reviewed, sir." (Tr., Vol.5, p.32, Ls.13-14 (emphasis added).)

Read in context, it appears that the district court was referring not to the phone records themselves, but to the "police report materials" that were contained "within the presentence materials." Consistent with the district court's recitation, those "police report materials" are contained within the PSI and do show precisely what the district court stated they showed – *i.e.*, that the police "applied for and received a search warrant to obtain telephone records" and that a review of those records showed "approximately 1368 calls and 1899 text messages between Peterson and Giannini from 6/25/11 through 1/06/11." (PSI, p.24; see also PSI, p.3 (summarizing police report).) Because it appears from the record that the documents included in the PSI and relied on by the district court were only the "police report materials" that discussed the phone records, not the actual phone records themselves, and because those "police report materials" are actually included in the record on appeal, Peterson has failed to show that any documents actually considered by the district court are missing from the appellate record and, as such, has failed to show any due process violation.

Even if the phone records Peterson claims are missing from the appellate record were presented to and considered by the district court, Peterson has still failed to establish a due process violation because he has failed to show that the

absence of those phone records from the appellate record has actually prejudiced his ability to pursue his appeal. See, e.g., Polson, 92 Idaho at 620-21, 448 P.2d at 234-35; Cheatham, 139 Idaho at 415, 80 P.3d at 351. Peterson argues that his ability to pursue his appeal has been prejudiced because, without the "missing" phone records, he is unable to challenge "information which was used [by the district court] as an aggravating factor." (Appellant's brief, p.17.) Peterson's claim of prejudice is unavailing because he has failed to identify what it is about the "missing" information that he wishes to challenge, or even could challenge in light of both the admissions he made in the trial court and the existing record that otherwise supports the trial court's findings regarding the nature and frequency of the prohibited contact.

The only information specifically relied on by the district court as it pertained to the phone records was the fact that those records showed 1,368 calls and 1,899 texts between Peterson and Ms. Giannini in a seven-month period. (See Tr., Vol.5, p.32, Ls.3-14, p.45, Ls.4-9.) That information is well documented in the materials that are included in the appellate record (see PSI, pp.3, 24) and was never disputed by Peterson in the trial court (see Tr., Vol.5, p.32, Ls.3-16). In fact, Peterson readily admitted, both at the change of plea hearing and at sentencing, that he violated the no contact order by repeatedly engaging in telephone and texting communications with Ms. Giannini. (Tr., Vol.5, p.24, L.19 – p.25, L.4, p.31, Ls.4-9.) In light of these admissions and the existing record that supports the district court's findings that the prohibited contact occurred and was extensive, it is hard to imagine – and Peterson has not

even attempted to identify – what it is about the "missing" phone records, and the district court's reliance thereon, that Peterson could successfully challenge. Having failed to even attempt to identify, much less demonstrate, any specific prejudice from the "missing" records, Peterson has failed to establish a violation of his due process rights. See Lovelace, 140 Idaho at 65, 90 P.3d at 290; Polson, 92 Idaho at 620-21, 448 P.2d at 234-35; Cheatham, 139 Idaho at 415, 80 P.3d at 351.

II.
Peterson Has Failed To Establish That The District Court Abused Its Discretion By Revoking His Probation And Ordering His Sentences Executed Without Reduction In Docket Nos. 39146 And 39147

A. Introduction

Peterson challenges the district court's sentencing decisions in Docket Nos. 39146 and 39147, arguing that the court abused its discretion by revoking probation or, alternatively, by not *sua sponte* reducing his sentences pursuant to Rule 35. (Appellant's brief, pp.19-25.) The record, however, supports the district court's sentencing determinations; Peterson 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. The District Court Acted Well Within Its Discretion In Revoking Peterson's Probation

A district court's decision to revoke probation will not be overturned on appeal absent a showing that the court abused its discretion. State v. Lafferty, 125 Idaho 378, 381, 870 P.2d 1337, 1340 (Ct. App. 1994). An abuse of discretion cannot be found if the district court's decision was consistent with applicable legal standards, and was reached by an exercise of reason. Id.

"The purpose of probation is rehabilitation." State v. Wilson, 127 Idaho 506, 510, 903 P.2d 95, 99 (Ct. App. 1995). "In deciding whether revocation of probation is the appropriate response to a violation, the court considers whether the probation is achieving the goal of rehabilitation and whether continued probation is consistent with protection of society." State v. Leach, 135 Idaho 525, 529, 20 P.3d 709, 713 (Ct. App. 2001). Any cause satisfactory to the court, which indicates that probation is not meeting its goals, is sufficient to justify revocation. Wilson, 127 Idaho at 510, 903 P.2d at 99. Contrary to Peterson's assertions on appeal, a review of the record supports the district court's determination that Peterson's probation was no longer achieving the goal of rehabilitation nor consistent with the protection of society.

Peterson has repeatedly demonstrated himself incapable of or unwilling to comply with the law and the terms of probation. At just 31 years old, Peterson has an extensive criminal record consisting of four juvenile adjudications, six misdemeanor convictions and five felony convictions. (PSI, pp.1-3, 156-58, 442-44.) Peterson was twice placed on probation as a juvenile: the first time, his probation was revoked and "he spent three plus months in a boot camp"; the

second time, he completed his probation but, within two months of his release from supervision, was charged with three new felonies – aggravated motor vehicle theft, conspiracy to commit 1st degree aggravated motor vehicle theft, and distribution of marijuana. (PSI, pp.442-43, 445.) He was convicted of two of the felonies in May 2000, received a two-year prison sentence and was paroled, but violated his parole in August 2001. (PSI, pp.442, 445.) He was thereafter reinstated on parole for approximately one year before "the case closed" in December 2003. (PSI, p.445.) During that year, he committed two more criminal offenses – trespass and petit theft. (PSI, p.443.)

Peterson was sentenced for his trespass and petit theft convictions in 2005. (PSI, pp.443.) He left Idaho either shortly before or shortly after that, but returned in 2007 and was subsequently arrested for malicious injury to property, domestic assault/battery, vandalism and multiple no contact order violations. (PSI, pp.444-45.) Peterson injured the victim of the domestic battery, Dorene Giannini, by hitting her, shoving her, grabbing her by the hair and strangling her. (PSI, pp.23, 449, 488-89.) Peterson was ordered to have no contact with Ms. Giannini but violated the no contact order three separate times while the domestic battery case was pending. (PSI, p.444.)

Four months after Peterson was sentenced for the domestic battery and misdemeanor no contact order violations, and while a no contact order was still in effect, an officer discovered Peterson riding in a car with Ms. Giannini. (PSI, pp.441, 471.) Peterson gave the officer a false name and date of birth. (PSI, pp.441, 471.) Peterson subsequently admitted violating the no contact order but

attempted to justify his behavior by claiming that the contact with Ms. Giannini arose only as a result of Ms. Giannini's efforts to support Peterson in his recovery from alcoholism and to help him avoid a relapse. (PSI, pp.441-42; Tr., Vol.1, p.18, L.25 – p.19, L.8.) As a result of the contact, Peterson was convicted of his first felony no contact order violation and was sentenced to a period of retained jurisdiction. (#39146/39147 R., pp.58-63.) He performed well in the retained jurisdiction program and was placed on probation in July 2009. (#39146/39147 R., pp.66-75; PSI, pp.639-45.)

Four months later, Peterson's probation officer filed a report of probation violation alleging that Peterson had violated the probation officer's directive to have no contact with Ms. Giannini. (PSI, pp.629-31.) According to the report, the officer "received information that [Peterson] was at the victim's residence on a regular basis." (PSI, p.629.) Following up on that information, the officer went to Ms. Giannini's residence and found Peterson hiding in her bathroom. (PSI, pp.629-30.) Peterson "locked himself in the bathroom and only exited upon a request from [Ms.] Giannini," and then argued with his probation officer for several minutes "about his inability to see his girlfriend." (PSI, p.630.) Due to what the officer perceived at Peterson's "limited exposure to treatment and his inability to follow [his probation officer's] verbal orders to have no contact with the victim," the probation officer requested the district court to impose as a written order of probation that Peterson have no contact with Ms. Giannini without his supervising officer's permission. (PSI, p.630.) The district court followed the recommendation, continued Peterson on probation and amended the probation

conditions to expressly include a written no contact order. (#39146/39147 R., pp.101-05.)

Six months later, Peterson violated the no contact order and the conditions of his probation by hiding behind a fence in Ms. Giannini's neighborhood and then entering her front yard. (PSI, pp.157, 170.) Once again, Peterson admitted the no contact order violation but attempted to justify his behavior, claiming that he was merely "doing a good deed" and attempting to help Ms. Giannini by "try[ing] to find the person who introduced her to meth." (PSI, p.158; Tr., Vol.1, p.86, L.11 – p.87, L.24.) Despite Peterson's demonstrated inability or unwillingness to abide by every no contact order that had been put in place, and despite the fact that Peterson had now been convicted of his second felony no contact order violation, the district court exercised leniency and continued him on probation for a second time in Docket No. 39146 and placed him on probation in Docket No. 39147, again ordering that Peterson have no contact with Ms. Giannini. (#39146/39147 R., pp.142-45, 258-66.) In so doing, the district court specifically admonished Peterson that "this [was] his final opportunity on probation" and "[a] violation of the no-contact order ... if proven or admitted, [would] violate a fundamental condition of probation and [would] result in imposition of the underlying sentence." (#39146/39147 R., p.263.)

It appears from the record that, even as the district court was sentencing Peterson for his second felony no contact order violation in September 2010, Peterson was still engaging in prohibited contact with Ms. Giannini. According to

police reports, a search of Peterson's phone records showed "approximately 1368 calls and 1899 text messages between Peterson and Giannini from 06/25/10 through 01/06/11." (PSI, pp.3, 24.) Consistent with his pattern of justifying and minimizing his behavior, Peterson admitted the contacts but claimed Ms. Giannini initiated them by coming to his workplace and seeking his comfort and assistance because she had been raped. (#39146/39147 R., pp.306-07; PSI, p.5; Tr., Vol.1, p.117, L.21 – p.6.) Peterson claimed to have initially rebuffed Ms. Giannini's request for assistance but, by his own admission, he was the one who thereafter rekindled the relationship that resulted in the six-month texting and calling campaign. (#39146/39147 R., pp.306-07; PSI, p.5; Tr., Vol.1, p.118, L.7 – p.119, L.11.)

The district court gave Peterson multiple opportunities to succeed on community supervision. With each new opportunity, Peterson claimed to recognize that he could not contact his victim and promised to abide by the court's orders of no contact. (Tr., Vol.3, p.22, Ls.6-15; Tr., Vol.1, p.87, L.25 – p.88, L.5, p.97, Ls.8-17.) With each new opportunity, Peterson promptly violated the no contact orders, demonstrating his utter disregard for the court's orders or the terms of his probation. Clearly, Peterson's probation was not achieving its rehabilitative purpose. The district court thus acted well within its discretion in revoking that probation and executing Peterson's sentences.

On appeal, Peterson concedes he violated his probation multiple times, but contends there are a number of mitigating factors that militated against the revocation of his probation. (Appellant's brief, pp.20-25.) While it is undoubtedly

true, as Peterson contends, that he suffers from some mental health issues as a result of a traumatic brain injury, that he has purported to accept responsibility and express remorse for his unyielding failures to abide by the court's orders, that he enjoys the support of his family, friends and employers, and that Ms. Giannini was often complicit in Peterson's no contact order violations, these considerations in no way diminish the district court's conclusion that Peterson was no longer an appropriate candidate for community supervision. Information with respect to all of these facts was before the court, both at the time it imposed the original sentences and when it revoked Peterson's probation. That the district court did not place greater mitigating weight on these factors, or elevate them above the need, once and for all, to impress upon Peterson the seriousness of his no contact order violations and his continued violations of the law, does not establish an abuse of discretion.

The district court considered all of the relevant information and reasonably determined that Peterson was no longer an appropriate candidate for community supervision. Given any reasonable view of the facts, Peterson has failed to establish an abuse of discretion.

D. Peterson Has Failed To Establish That The District Court Abused Its Discretion By Declining To *Sua Sponte* Reduce His Sentences Upon Revoking Probation

Upon revoking a defendant's probation, a court may order the original sentence executed or reduce the sentence as authorized by Idaho Criminal Rule 35. State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 7 (Ct. App. 2009) (citing State v. Beckett, 122 Idaho 324, 326, 834 P.2d 326, 328 (Ct. App. 1992); State

v. Marks, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989)). 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. Hanington, 148 Idaho at 28, 218 P.3d at 7. Those standards require an appellant to "establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment." State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). Those objectives are: "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrong doing." State v. Wolfe, 99 Idaho 382, 384, 582, P.2d 728, 730 (1978). The reviewing court "will examine the entire record encompassing events before and after the original judgment," i.e., "facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." Hanington, 148 Idaho at 29, 218 P.3d at 8.

Citing the same factors he claims militated against the revocation of his probation, Peterson argues that the district court abused its discretion by declining to *sua sponte* reduce his sentences. (Appellant's brief, p.25.) For the reasons already set forth in section II.C., *supra*, and incorporated herein by reference, Peterson has failed to show that he was entitled to a reduction of his sentence. Peterson has failed to show an abuse of discretion.

III.
Peterson Has Failed To Establish An Abuse Of Discretion In The Denial Of His Rule 35 Motions

After he was sentenced in Docket No. 39783 and his probation was revoked in Docket Nos. 39146 and 39147, Peterson moved in all three cases for reduction of his sentences pursuant to Rule 35. (#39146/39147 R., pp.199, 320; #39783 R., p.60.) The district courts denied the motions, reasoning that Peterson's sentences were reasonable as imposed and Peterson had failed provide any new or additional information warranting a reduction of his sentences. (#39146/39147 R., pp.215-18, 336-39; #39783 R., pp.69-73.) Peterson now challenges the courts' decisions, but he has failed to establish an abuse of discretion.

If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Peterson must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id. Peterson has failed to satisfy his burden.

In Docket Nos. 39146 and 39147, the only information Peterson provided in support of his I.C.R. 35 motions was 1) his statement that he "hope[d] to enroll in the Therapeutic Community while incarcerated," 2) a copy of the APSI that showed Peterson participated in and successfully completed several rehabilitative programs while incarcerated during his rider; and 3) a letter of

support from his employer. (#39146/39147 R., pp.206-14, 327-35.) The district court considered this information but rejected as a basis for reducing Peterson's sentences, reasoning:

> Mr. Peterson has been given numerous opportunities to reform his behavior. Mr. Peterson performed well on his rider in the 2008 case, yet he violated his probation three times following the rider. Furthermore, the last time Mr. Peterson was granted probation, he only managed to go for three months before having a probation violation filed against him. Consequently, the Court is unconvinced of Mr. Peterson's rehabilitative potential, and the Court believes that a long fixed period of incarceration will at least ensure that Mr. Peterson will not cause any harm to society and deter him in the future from flouting the law. Therefore, considering the nature of the offense and the character of the offender with the goal of protecting society in mind, the Court believes that Mr. Peterson's sentences in these cases were reasonable when imposed, and remain reasonable now.

(#31946/39147 R., pp.217-18, 338-39.) Although Peterson argues otherwise, the record amply supports the district court's determination that Peterson's desire for community-based rehabilitation did not outweigh the gravity of his offenses, his multiple probation violations, and his failure to obtain community-based treatment when given the opportunity to do so. Peterson has failed to establish that the district court abused its discretion in denying his motions for reduction of the sentences imposed in Docket Nos. 39146 and 39147.

Peterson has also failed to establish an abuse of discretion in the denial of his motion for reduction of sentence in Docket No. 39783. As noted by the district court in that case, Peterson did not provide any new or additional information that would warrant reconsideration of his sentence. (#39783 R., p.71.) Instead, he requested leniency "because the communications between himself and Giannini were mutual" and because he was performing well while

incarcerated – *e.g.*, he obtained a job, began schooling and attended AA meetings. (#39783 R., pp.64, 71.) Again, the district court considered this information but determined it did not justify of the sentence imposed, reasoning,

> The sentence imposed is within the statutory boundaries and was made in light of the required sentencing factors. Peterson has not provided an adequate reason for the Court to reconsider his sentence. That Peterson's communications with Giannini may have been mutual does not change the Court's view that Peterson's disregard of lawful court orders on multiple occasions make him deserving of the sentence imposed. It is worth nothing that, at the time of these incidents, Peterson was being supervised on [a] suspended sentence for two (2) felonies involving identical conduct. Additionally, while Peterson's progress in prison is worthy of consideration, it is of minimal significance because it may not be an accurate indicator of future behavior in a noncustodial setting when viewed in the context of the whole record. [Citations omitted.] While the Court appreciates Petersons' efforts at self-improvement, the Court is satisfied that the imposed sentence remains reasonable under the circumstances and in light of the above sentencing factors.

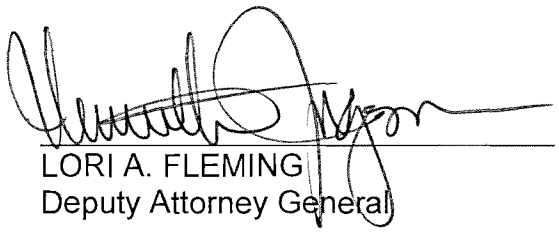
(#39783 R., p.72.) Once again, the record supports the district court's determination. That Peterson's communications with Ms. Giannini were mutual was not new information at all and, in fact, was specifically considered by the district court as a mitigating factor when it crafted Peterson's sentence. (Tr., Vol.5, p.44, p.19 – p.45, L.23.) Moreover, while Peterson's progress while incarcerated is laudable and is undoubtedly relevant to the parole board's consideration of whether to release him at his earliest parole date, the district court correctly determined that it was not itself a basis to reduce Peterson's already reasonable sentence. Indeed, if history is any indicator, the fact that Peterson does well while incarcerated bears little relationship to his ability to succeed on probation. (Compare PSI, pp.639-45 (6/23/09 APSI detailing

Peterson's success in the retained jurisdiction program) with pp.629-31 (11/18/09 report of probation violation), 241-43 (2/21/10 report of probation violation), 173-75 (6/28/10 report of probation violation).) Peterson has failed to establish an abuse of discretion.

CONCLUSION

The state respectfully requests that this Court affirm the district courts' orders revoking Peterson's probation and denying his Rule 35 motions for reduction of sentence.

DATED this 19th day of November 2012.



LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of November 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN R. DICKSON
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.

LORI A. FLEMING
Deputy Attorney General

LAF/pm