6-12-2013

State v. Widmyer Respondent's Brief Dckt. 39954

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. GARRY KEVIN WIDMYER, Defendant-Appellant.	)	No. 39954 Kootenai Co. Case No. CR-2010-16971

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

STATEMENT OF THE CASE

Nature of the Case

Garry Kevin Widmyer appeals from the 156-day jail sentence imposed upon his guilty plea to misdemeanor injury to a child.

Statement of Facts and Course of Proceedings

Based on allegations that Widmyer committed sexual offenses against two separate minor victims in May 2008, a grand jury indicted him on one count of lewd conduct with a minor under sixteen and one count of sexual abuse of a child under the age of sixteen years. (R., pp.13-14.[1]) Widmyer pled not guilty and the case proceeded to trial, at the conclusion of which the jury was unable to reach a unanimous verdict as to either charge.[2] (R., pp.277-357, 394; Tr., pp.8-747.)

Pursuant to a plea agreement reached after the mistrial, Widmyer entered an *Alford*[3] plea to an amended charge of misdemeanor injury to a child. (R., pp.403-05; Tr., pp.752-58.) The district court imposed a 365-day jail sentence, with 169 days suspended, and placed Widmyer on supervised probation for two

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[1] Citations to the clerk's record correspond to the page numbers of the electronic file "Gary Widmyer.pdf."

[2] It appears from the record that Widmyer had previously been charged in a separately filed case with the same or similar charges and that a jury trial in that case also resulted in a mistrial. (See, e.g. R., p.5 (indicating filing of trial transcript "in CR08 25251, defendant's earlier case"), pp.30-31 (trial counsel indicating case had been tried before and resulted in a hung jury and a mistrial); Tr., p.752, Ls.17-19, p.754, Ls.6-9 (defense counsel and court indicating at change of plea hearing that there had been two prior trials).)

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

years, ordering among the conditions of probation that Widmyer obtain a sexual offender evaluation, "with polygraph," and "comply with any treatment recommendations." (R., pp.411-14, 443-44; Tr., p.778, L.10 – p.779, L.24.)

Almost two months after he was sentenced, Widmyer filed a Rule 35 motion for reduction or correction of his sentence, arguing, *inter alia*, that (1) the 365-day jail sentence imposed upon his *Alford* plea exceeded the statutorily authorized maximum sentence of six months for misdemeanor injury to a child, and (2) the condition of probation that he obtain a sexual offender evaluation – a condition Widmyer expressly accepted at sentencing (see Tr., p.779, Ls.14-21) – violated his Fifth Amendment right to be free from self-incrimination (R., pp.449-53; see also R., pp.454-64 (addendum to Rule 35 motion asserting court lacked authority to order a supervised probation)). Following a hearing, the district court granted Widmyer's Rule 35 motion on the basis that the sentence imposed exceeded the statutorily authorized maximum penalty. (R., p.466; Tr., p.785, L.22 – p.786, L.18.) The court therefore vacated the sentence and continued the matter for resentencing. (R., p.467; Tr., p.789, Ls.6-18.)

At the outset of the resentencing hearing, the district court advised the parties that, if the court placed Widmyer on probation, "he would be required as conditions of that probation to complete a psychosexual [evaluation] and polygraph." (Tr., p.793, Ls.19-23.) The court then addressed defense counsel: "He [Widmyer] of course has the right to tell me he doesn't want probation which would eliminate any possibility he would have to do that. Is he willing to accept a probation, knowing those are going to be conditions?" (Tr., p.793, L.23 – p.794,

L.2.) Defense counsel responded, "My client will exercise his right to remain silent and respectfully and humbly decline to obtain a psychosexual evaluation. ... We are wholeheartedly in agreement to an unsupervised [probation] without a term of that probation being a psychosexual evaluation." (Tr., p.794, Ls.4-11.) After hearing the recommendations of the parties, the court imposed a 156-day jail sentence and gave Widmyer credit for 81 days served. (R., pp.469-71; Tr., p.801, Ls.18-20.) The court declined to place Widmyer on probation, reasoning:

> THE COURT: The goals of sentencing are to protect the public. In line with protecting the public, the Court [initially] crafted a sentence that would involve a psychosexual evaluation and a polygraph to make sure that the defendant did not pose a risk to the public and if he did, we could get some appropriate treatment done. The defendant accepted that term and condition of probation. I asked him. He said yes. Maybe under the stress of the situation he didn't know what he was doing.
>
> [Widmyer]: I did not. Sorry.
>
> THE COURT: Today he has communicated to me through counsel that he wishes to exercise his Fifth Amendment right.

(Tr., p.800, Ls.7-19.) Directly addressing Widmyer, the court continued:

> Your attorney has voiced to the Court that you are going to remain silent on and you don't accept the psychosexual or polygraph. I have to be mindful of the goals of sentencing. I understand it has had a huge impact on your family. It had a huge impact on the other families. I sat through the testimony. It was disputed. Whether I agree with the jury doesn't matter because it was the jury's call. But, having entered a guilty plea, albeit pursuant to Alford, you in fact admitted that you were taking advantage of what you believed to be a favorable sentencing recommendation.

(Tr., p.800, L.23 – p.801, L.8.) Noting that Widmyer "declined to accept what the Court would impose as a condition of probation," the court imposed sentence

without placing Widmyer on probation. (Tr., p.801, L.16 – p.802, L.4.) The court concluded:

> You certainly have the right to decline conditions of probation or to speak to those issues presentence. By vacating the sentence, that reinstated your Fifth Amendment right, and you asserted that you don't want to sit for a psychosexual. There is case law that says you don't have to at this juncture if you don't want to. That will be the judgment of the Court today.

(Tr., p.800, L.23 – p.802, L.11.)

Widmyer filed a notice of appeal timely from the judgment entered after resentencing. (R., pp.472-73.) He also filed a motion for stay of execution of his jail sentence, which the district court granted. (R., pp.474, 480.)

ISSUES

Widmyer states the issues on appeal as:

1. Did the district court abused [sic] its judicial discretion in imposition of Mr. Widmyer's sentence?

2. Did the district court imposed [sic] an illegal sentence?

3. Did the district court imposed [sic] a penalty upon Mr. Widmyer for asserting his 5th Amendment right?

(Appellant's brief, p.4.)

The state rephrases the issues as:

1. Has Widmyer failed to establish that the district court abused its discretion by imposing a 156-day jail sentence upon his guilty plea to misdemeanor injury to a child?

2. Has Widmyer failed to demonstrate from the record either that his sentence is illegal or that it was imposed in an illegal manner?

ARGUMENT

I.
Widmyer Has Failed To Establish An Abuse Of Sentencing Discretion

A. Introduction

Widmyer argues the 156-day jail sentence imposed upon his conviction for misdemeanor injury to a child is excessive and unnecessary to achieve the goals of sentencing. (Appellant's brief, pp.5-9.) As part of his argument, Widmyer also contends the district court abused its discretion by imposing the sentence as a punishment for his refusal to participate in a psychosexual evaluation and polygraph examination as a term of probation. (Id., pp.7-8.) Widmyer's arguments fail. A review of the record and of the applicable law supports the district court's determination that, absent Widmyer's willingness to submit to a psychosexual evaluation and polygraph followed by any necessary treatment, the sentence imposed was necessary to protect society. Widmyer has failed to establish an abuse of discretion.

B. Standard Of Review

When a sentence is within statutory limits, the appellate court will review only for an abuse of discretion. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). The appellant bears the burden of demonstrating that the sentencing court abused its discretion. Id.

C. Widmyer Has Failed To Carry His Burden Of Establishing That The 156-Day Jail Sentence Imposed Upon His Conviction For Misdemeanor Injury To A Child Is Excessive Under Any Reasonable View Of The Facts

Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it 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 it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

Widmyer was originally charged with two felony sex offenses – lewd conduct with a minor under sixteen sexual abuse of a child under the age of sixteen years – but, after two mistrials, he pled guilty to a single amended charge of misdemeanor injury to a child, a crime that carries a statutory maximum penalty of six months in jail. I.C. §§ 18-113, 18-1501(2). Although the amended indictment did not allege any specific injury to the two named victims (see R., pp.404-05), and Widmyer, by virtue of his *Alford* plea, did not admit any facts giving rise to the charge (see generally Tr., pp.752-57), the district court presided over one of Widmyer's jury trials (see Tr., p.752, Ls.17-20) and, as such, was well aware of the factual basis upon which the injury to a child charge rested. Specifically, the state's evidence showed that, over a period of several months, Widmyer engaged in what the state's expert characterized as grooming behavior by ingratiating himself with two of his daughter's adolescent friends, welcoming

them into his home, sending text messages and giving gifts to one of them, and routinely engaging in wrestling matches and tickle fights with both of them. (See generally Tr., pp.151-270, 271-327, 369-92.) One victim testified that, in May 2008, during a tickle fight, Widmyer put his hand down her pants and underwear and rubbed his fingers on her vagina. (Tr., p.198, L.20 – p.205, L.8, p.209, L.11 – p.210, L.7, p.265, L.4 – p.267, L.25.) The other victim testified that, on a separate occasion in May 2008, also during a tickle fight, Widmyer put his hand down her pants and underwear and touched her near her vagina with his fingertips. (Tr., p.279, L.17 – p.286, L.23, p.300, L.22 – p.301, L.23, p.320, Ls.1-11.) When Widmyer was interviewed by law enforcement he claimed that any inappropriate touching that may have occurred with either victim was unintentional, and that was also his defense at trial. (Tr., p.347, L.24 – p.351, L.20, p.675, L.7 – p.676, L.20, p.714, L.20 – p.715, L.8, p.718, L.15 – p.719, L.21.)

In fashioning an appropriate sentence, the district court specifically recognized that Widmyer disputed the state's evidence and that, ultimately, the jury was unable to reach a verdict as to the original charges. (Tr., p.801, Ls.3-5.) The court also recognized it had discretion, based on Widmyer's *Alford* plea to a reduced charge of misdemeanor injury to a child, to impose up to six months in jail. (Tr., p.801, Ls.5-15.) The court was cognizant of the "huge impact" the charge had on both the victims' and Widmyer's families, and it was "[m]indful of the goals of sentencing," particularly the goal of protecting of society. (Tr., p.800, Ls.7-8, p.800, L.25 – p.801, L.3.) To achieve that goal, the court deemed it

necessary, if it placed Widmyer on probation, to require as a condition of probation that Widmyer obtain a psychosexual evaluation and polygraph "to make sure that [Widmyer] did not pose a risk to the public and if he did, [to] get some appropriate treatment done." (Tr., p.793, Ls.20-23, p.800, Ls.8-12.) When Widmyer indicated an intent to decline that probation condition, the court determined that the goals of sentencing would best be achieved by the imposition of a 156-day jail sentence, 81 days of which Widmyer had already served. (Tr., p.801, L.16-21.)

Widmyer contends on appeal that, under any reasonable view of the facts, the length of his sentence is not necessary to achieve the protection of society or any of related the goals of sentencing. (Appellant's brief, pp.6-9.) In advancing this argument, Widmyer asks this Court to focus exclusively on factors he claims are mitigating – including his lack of a prior criminal record, the fact that his family depends on his financial and emotional support, the time and expense he has already spent defending against the allegations, and other negative ramifications the allegations have had on his family – and to ignore entirely the facts that gave rise to the misdemeanor injury to child charge, contending those facts are not relevant and should not have been considered by the district court because they were not specifically alleged in the amended indictment nor admitted by Widmyer pursuant to his *Alford* plea. (Id.) Widmyer's argument is without merit because it is contrary to well established legal standards applicable to the district court's sentencing discretion.

In crafting an appropriate sentence, a district court is required to take into account both the nature of the crime and the character of the offender. I.C. § 19-2521(1); State v. Fisch, 142 Idaho 781, 785, 133 P.3d 1246, 1250 (Ct. App. 2006); State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App.1982). Where, as here, the defendant has entered an *Alford* plea to a crime, the court is entitled to "treat the defendant, for purposes of sentencing, as if he or she were guilty and may consider – amid assertions of innocence – evidence of the crime, the defendant's criminal history, and whether the defendant demonstrates remorse." State v. Baker, 153 Idaho 692, 697, 290 P.3d 1284, 1289 (Ct. App. 2012) (citing, *inter alia*, State v. Howry, 127 Idaho 94, 96, 896 P.2d 1002, 1004 (Ct. App. 1995)) (review denied); see also Steele v. State, 153 Idaho 783, 789, 291 P.3d 466, 472 (Ct. App. 2012) (review denied). The court may also "assess the defendant's potential for rehabilitation when sentencing by considering that the defendant entered an *Alford* plea and did not admit guilt or fully accept responsibility for the crime." Baker, 153 Idaho at 697, 290 P.3d at 1289 (citing State v. Leon, 142 Idaho 705, 711, 132 P.3d 462, 468 (Ct. App. 2006)).

Consistent with these legal principles, the district court in this case was entitled to consider not only the mitigating facts cited by Widmyer, but also the evidence of the crime to which he pled guilty and his demonstrated lack of remorse or acceptance of responsibility. That Widmyer entered an *Alford* plea to misdemeanor injury to a child, and not to the sex offenses with which he was originally charged, does not, as suggested by Widmyer on appeal, mean that the district court could not properly consider as a component of its sentencing

determination the evidence presented at Widmyer's trial. As even Widmyer's trial counsel acknowledged at the change of plea hearing, the evidence at Widmyer's "multiple prior trials" actually supplied the factual basis for the injury to child charge to which Widmyer entered his *Alford* plea. (Tr., p.752, Ls.17-19.) Having presided over "at least one" of those trials (Tr., p.752, L.20), the district court appropriately relied on the evidence and testimony presented to inform its sentencing decision.

Contrary to Widmyer's assertions on appeal, there is no indication in the record that the trial court sentenced him "according to the charges he was tried for, rather than the charges [sic] he entered his *Alford* plea to." (Appellant's brief, p.8.) In fact, the record shows just the opposite: The court recognized that the evidence presented at trial was disputed, that the jury ultimately acquitted Widmyer of the sexual offenses on which he stood trial, and that Widmyer was appearing for sentencing on his *Alford* plea to misdemeanor injury to a child, which carried a maximum sentence of six months in jail. (Tr., p.801, Ls.1-16.) The court also implicitly acknowledged the mitigating factors cited by defense counsel, stating it understood the criminal proceedings "had a huge impact on [Widmyer's] family." (Tr., p.801, Ls.1-2.) However, because Widmyer entered an *Alford* plea and did not otherwise make any statements regarding the circumstances of the crime, the only evidence before the court regarding the nature of the offense was that presented at trial. Considering that evidence which showed, at worst, that Widmyer touched the victims inappropriately to gratify his own sexual desires and, at best, that the touching happened but there

was no sexual intent, the district court was understandably concerned that any sentence it imposed be crafted to protect society from the unknown, but potentially very real risk Widmyer presented to commit a sexual offense. (See Tr., p.800, Ls.7-12.) Widmyer has failed to point to anything in the record to demonstrate that the 156-day jail sentence imposed by the court was not reasonable to achieve that end.

Again ignoring the underlying facts of the crime to which he pled guilty and the district court's stated reasons for imposing the sentence it did, Widmyer argues that, by imposing close to the maximum sentence, the district court was simply "punishing" him "for refusing to take a polygraph and psychosexual evaluation as a term of probation." (Appellant's brief, pp.7-8.) This assertion finds no support in the record.

Because Widmyer entered an *Alford* plea, the district court had no information, other than that presented at trial, relating either to the risk Widmyer posed or to his potential for rehabilitation. The court thus determined that, if it were to place Widmyer on probation, a necessary condition of that probation would be that Widmyer participate in a psychosexual evaluation and a polygraph examination such that his risk level could be assessed and any necessary treatment provided. As was his right to do, Widmyer rejected that proposed condition of probation. See State v. McCool, 139 Idaho 804, 807, 87 P.3d 291, 294 (2004) ("A defendant may decline probation when he or she deems its conditions too onerous, and demand instead that he or she be sentenced by the court." (citation, internal quotations and brackets omitted).) As was its right to

do, the court thus imposed and executed the 156-day jail sentence – not to punish Widmyer for refusing to cooperate with a psychosexual evaluation and polygraph, but to protect society from any risk Widmyer posed to reoffend.

Widmyer does not contend that the proposed condition of probation that he participate in a psychosexual evaluation and polygraph was not rationally related to the goal of rehabilitation. Instead, he argues the condition was illegal because it was not authorized by statute and otherwise violated his Fifth Amendment rights. (Appellant's brief, pp.8-12.) Because, for the reasons set forth in Section II, *infra*, the proposed probation condition was not illegal, the district court acted well within its discretion in offering Widmyer the choice to accept that condition or receive a sentence that would otherwise ensure the protection of society.

The district court considered all of the relevant information, acted consistently with the applicable legal standards and imposed a reasonable sentence. Widmyer has failed to show an abuse of discretion.

II.
Widmyer Has Failed To Demonstrate From The Record Either That His Sentence Is Illegal Or That It Was Imposed In An Illegal Manner

A. Introduction

Widmyer challenges the legality of his sentence and, alternatively, the legality of the manner in which it was imposed. Specifically, he contends the district court lacked authority to require as a condition of probation that he submit to a psychosexual evaluation and polygraph and that giving him the choice to do so or accept an executed jail sentence violated his Fifth Amendment rights.

(Appellant's brief, pp.9-12.) Widmyer's arguments fail. A review of the record and the applicable law shows no illegality either in Widmyer's sentence or the manner in which it was imposed.

B. Standard Of Review

The legality of a sentence is a question of law subject to free review by the appellate court. State v. Clements, 148 Idaho 82, 84, 218 P.3d 1143, 1145 (2009).

C. A Review Of The Record And Applicable Law Shows No Illegality In Widmyer's Sentence Or The Manner In Which It Was Imposed

Idaho Criminal Rule 35 is a "narrow rule" that permits a trial court to correct a sentence imposed in an illegal manner within 120 days of the entry of judgment and to correct an illegal sentence at any time. State v. Peterson, 153 Idaho 157, 161, 280 P.3d 184, 188 (2012) (citing State v. Farwell, 144 Idaho 732, 735, 170 P.3d 397, 400 (2007)). An illegal sentence is "one in excess of a statutory provision or otherwise contrary to applicable law." State v. Alsanea, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App. 2003). Because the 156-day jail sentence imposed by the court in this case is within the statutory maximum six-month sentence proscribed for misdemeanor injury to a child, see I.C. §§ 18-113, 18-1501(2), Widmyer must demonstrate from the record that either the sentence or the manner in which it was imposed was "otherwise contrary to applicable law."

In an attempt to carry his burden on appeal, Widmyer advances two arguments. First, he contends the district court lacked statutory authority to

require as a condition of probation that he submit to a psychosexual evaluation and, "therefore," the court's requirement that Widmyer accept the condition of probation or be subject to an executed jail sentence was unlawful. (Appellant's brief, pp.9-10.) Second, he contends that the execution of a jail sentence on the basis that he was not willing to participate in a psychosexual evaluation and polygraph violated his Fifth Amendment right to be free from self-incrimination. (Appellant's brief, pp.11-12.) For the reasons that follow, neither of Widmyer's claims have merit.

Idaho Code § 19-2601(2) authorizes a sentencing court to place defendants on probation subject to "such terms and conditions as it deems necessary and expedient." This language gives the courts "maximum flexibility" in fashioning the conditions of probation. State v. McCool, 139 Idaho 804, 807, 87 P.3d 291, 294 (2004); State v. Wagenius, 99 Idaho 273, 279, 581 P.2d 319, 325 (1978). The effective limitation on the courts' discretion is that any condition "must be reasonably related to the purpose of probation, rehabilitation." McCool, 139 Idaho at 807, 87 P.3d at 294. For the reasons already discussed in Section I, *supra*, the requirement that Widmyer participate in a psychosexual evaluation was reasonably related to his rehabilitation because, without such evaluation, there was no way to accurately assess Widmyer's risk level and provide him the appropriate treatment.

Without addressing the clear relationship between his rehabilitation and the proposed requirement that he obtain a psychosexual evaluation as a condition of probation, Widmyer argues that the district court was "not authorized

to require [him] to take a psychosexual examination" because he did not plead guilty to a sex offense. (Appellant's brief, p.10.) To support his argument, Widmyer cites I.C. § 18-8316, which provides in relevant part that, "If ordered by the court, an offender convicted of [an enumerated sex offense] may submit to an evaluation to be completed and submitted to the court ... for the court's consideration prior to sentencing and incarceration or release on probation." Widmyer's reliance on this provision to demonstrate the court lacked authority to order as a condition of probation that Widmyer submit to a psychosexual evaluation is clearly misplaced. Contrary to Widmyer's assertions, the statute does not limit the court's authority to order a psychosexual evaluation; it only prescribes the circumstances in which, "[i]f ordered," certain classes of offenders may submit to such an evaluation. Nothing in the statute prevents a sentencing court from exercising the broad discretion granted to it under I.C. § 19-2601(2) to order a psychosexual evaluation as a condition of probation where such evaluation is otherwise reasonably related to the offender's rehabilitation.

Widmyer's reliance on I.C. § 19-2524 as a limitation on the court's authority to order a psychosexual evaluation is likewise misplaced. That statute prescribes the circumstances in which a trial court must order substance abuse or mental health evaluations in a felony case. I.C. § 19-2524. Although Widmyer correctly notes the statute is inapplicable to him because he was not convicted of a felony (Appellant's brief, p.10), this fact is of no consequence because the statute does not otherwise limit the ability of a court to impose as a condition of misdemeanor probation a requirement that the offender submit to a

psychosexual evaluation when reasonably necessary to achieve the goals of probation. See State v. Josephson, 125 Idaho 119, 122, 867 P.2d 993, 996 (Ct. App. 1993) ("Our statutes make no distinction between felonies and misdemeanors with respect to the discretion afforded the sentencing court in fashioning the terms of probation."). Widmyer has failed to demonstrate that the court exceeded any statutory authority in requiring as a proposed condition of probation that Widmyer obtain a psychosexual evaluation.

Widmyer has also failed to establish any constitutional infirmity in the district court's decision to execute a jail sentence, in lieu of placing Widmyer on probation, because Widmyer declined the proposed condition of probation that he obtain a psychosexual evaluation. Widmyer claims that the probation condition was unconstitutional because it would have required a waiver of his Fifth Amendment rights. (Appellant's brief, pp.11-12.) The state agrees that Widmyer had a Fifth Amendment right to not participate in a psychosexual evaluation. Estrada v. State, 143 Idaho 558, 564, 149 P.3d 833, 839 (2006). Contrary to Widmyer's assertions, however, the fact that the court gave him the choice of waiving his Fifth Amendment privilege or being subject to an executed jail sentence did not violate his constitutional rights.

As an initial matter, it bears noting that Idaho's appellate courts have already upheld conditions of probation that require a waiver of constitutional rights. In State v. Josephson, 125 Idaho 119, 867 P.2d 993 (Ct. App. 1993), for example, the Idaho Court of Appeals upheld as valid a probation condition that required a misdemeanor defendant to waive his Fourth Amendment rights to

warrantless searches. See also State v. Gawron, 112 Idaho 841, 736 P.2d 1295 (1987) (upholding against Fourth Amendment challenge requirement of probation that defendant convicted of a felony consent to warrantless searches). Regardless of whether the offense is a misdemeanor or felony, so long as the condition is reasonably related to the purpose of probation, a court may require as a condition of probation that the defendant waive his or her Fourth Amendment rights. Josephson, 125 Idaho at 122-23, 867 P.2d at 996-97. Although Widmyer argues otherwise, there is no reasoned basis why this same principle would not apply to Fifth Amendment waivers.

In addition, it is well settled that the Fifth Amendment is not violated merely because a state insists as a condition of probation on compelling answers to incriminating questions. Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984); State v. Crowe, 131 Idaho 109, 952 P.2d 1245 (1998). The defendant in Crowe pled guilty to sexual abuse of a minor and was placed on probation, the terms of which required him to, *inter alia*, complete a specialized sex offender therapy program, submit to polygraph examinations at the request of either his probation officer or his sex offender therapist, and report any contact with minor children. Crowe, 131 Idaho at 110-11, 952 P.2d at 1246-47. Crowe subsequently failed a polygraph examination and, at the request of his therapist, made verbal and written admissions to his probation officer to having unsupervised and sexually inappropriate contact with his 10-year-old niece. Id. at 111, 952 P.2d at 1247. Based on Crowe's admissions, the district court revoked Crowe's probation and ordered his sentence executed. Id.

On appeal from the order revoking his probation Crowe argued that the use against him of the compelled statements that were required as a condition of his probation violated his Fifth Amendment rights. Id. at 112, 952 P.2d at 1248. Specifically, he argued "that his statements to his counselor should be suppressed because the questions posed to him forced him to answer or to be punished as a probation violation for asserting his privilege against self-incrimination," thus forcing him into a "classic penalty" situation. Id. Citing Murphy, *supra*, the Idaho Supreme Court rejected Crowe's argument, noting as an initial matter that the Fifth Amendment privilege against self-incrimination is ordinarily subject to waiver merely by the failure to invoke it. Crowe, 131 Idaho at 112, 952 P.2d at 1248 (citing Murphy, 465 U.S. at 427-28; Garner v. U.S., 424 U.S. 648, 654 (1976)). An exception applies "if the State compels an individual to forego the Fifth Amendment privilege by a threat to impose a penalty if the privilege is invoked"; but that exception is limited "to situations in which the statement obtained was to be used in a subsequent criminal proceeding." Id. (citing Murphy, 465 U.S. at 434). "[A] State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." Id. (quoting Murphy, 465 U.S. at 436 n.7 (brackets original)). Because Crowe's statements were used against him in a probation revocation proceeding, and not in a separate criminal proceeding, Crowe was not subject to any new or different penalty and the use of the statements did not violate Crowe's Fifth Amendment rights. Id.

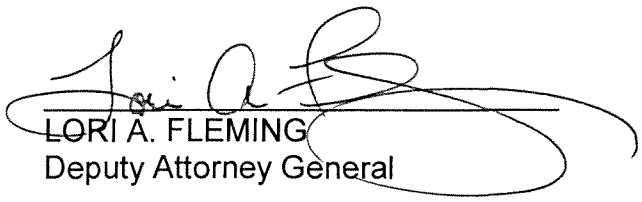
Citing Murphy but not Crowe, Widmyer argues on appeal that forcing him to choose between submitting to a psychosexual evaluation and polygraph as a condition of probation or being subject to an executed jail sentence created a "classic penalty situation" and a violation of his Fifth Amendment rights. (Appellant's brief, pp.11-12.) As made clear by the *both* the United States Supreme Court in Murphy and the Idaho Supreme Court in Crowe, however, a penalty situation arises only when the state seeks to use statements compelled as a condition of probation against the probationer in a different criminal proceeding. Murphy, 465 U.S. at 436 n.7; Crowe, 131 Idaho at 112, 952 P.2d at 1248. Although the Fifth Amendment would have precluded use of any Widmyer's incriminating statements in subsequent criminal proceedings, it did not preclude appropriate evaluations as a condition of probation.

The district court gave Widmyer the opportunity to accept probation on the terms the court deemed necessary to achieve both the protection of society and Widmyer's rehabilitation. That Widmyer declined the terms of probation in favor of an executed jail sentence does not establish a violation of Widmyer's Fifth Amendment rights. Widmyer has failed to show any illegality in either his 156-day jail sentence or manner in which that sentence was imposed.

CONCLUSION

The state respectfully requests that this Court affirm the judgment and sentence entered upon Widmyer's guilty plea to misdemeanor injury to a child.

DATED this 12th day of June 2013.



LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of June 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

J. BRADFORD CHAPMAN
Kootenai County Public Defender's Office
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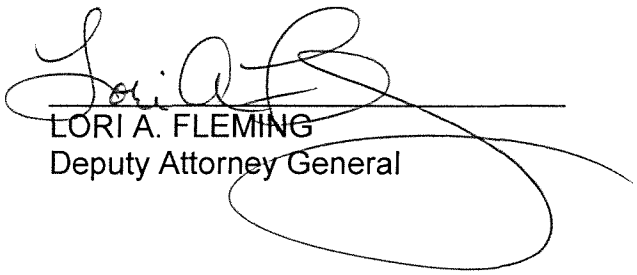

LORI A. FLEMING
Deputy Attorney General

LAF/pm