

11-9-2012

State v. Gillespie Respondent's Brief Dckt. 39743

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 39743
)	
vs.)	
)	
ALLEN W. GILLESPIE,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

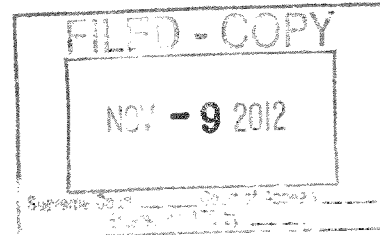
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of Facts and Course of Proceedings	1
ISSUES	4
ARGUMENT	5
I. Gillespie’s Appeal Should Be Dismissed Because He Knowingly And Voluntarily Waived His Right To Appeal Pursuant To The Plea Agreement	5
A. Introduction.....	5
B. Standard Of Review	5
C. Gillespie Knowingly And Voluntarily Waived The Right To Appeal The District Court’s Rulings	5
II. Alternatively, Gillespie Has Failed To Establish That The District Court Abused Its Sentencing Discretion	9
A. Introduction.....	9
B. Standard Of Review	9
C. The District Court Acted Well Within Its Sentencing Discretion In Relinquishing Jurisdiction	9
D. Gillespie Has Failed To Show That The District Court Abused Its Discretion By Not <i>Sua Sponte</i> Reducing His Sentence Upon Relinquishing Jurisdiction	13
CONCLUSION.....	14
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Dunlap v. State</u> , 141 Idaho 50, 106 P.3d 376 (2004)	5
<u>State v. Chapel</u> , 107 Idaho 193, 687 P.2d 583 (Ct. App. 1984)	10
<u>State v. Cope</u> , 142 Idaho 492, 129 P.3d 1241 (2006)	5, 6, 8
<u>State v. Hanington</u> , 148 Idaho 26, 218 P.3d 5 (Ct. App. 2009)	13
<u>State v. Holdaway</u> , 130 Idaho 482, 943 P.2d 72 (Ct. App. 1997)	6, 7
<u>State v. Hood</u> , 102 Idaho 711, 639 P.2d 9 (1981)	10
<u>State v. Lee</u> , 117 Idaho 203, 786 P.2d 594 (Ct. App. 1990)	10
<u>State v. Moore</u> , 131 Idaho 814, 965 P.2d 174 (1998)	9
<u>State v. Murphy</u> , 125 Idaho 456, 872 P.2d 719 (1994)	5, 6, 8
<u>State v. Person</u> , 145 Idaho 293, 178 P.3d 658 (Ct. App. 2007)	8
<u>State v. Stover</u> , 140 Idaho 927, 104 P.3d 969 (2005)	13
<u>State v. Wersland</u> , 125 Idaho 499, 873 P.2d 144 (1994)	9
<u>State v. Wolfe</u> , 99 Idaho 382, 582, P.2d 728 (1978)	14
 <u>STATUTES</u>	
I.C. § 19-2521	10
I.C. § 19-2801	6

STATEMENT OF THE CASE

Nature of the Case

Allen Wayne Gillespie attempts to appeal from the district court's order relinquishing jurisdiction and executing without reduction the unified sentence of seven years, with three years fixed, imposed upon his guilty plea to felony DUI. Because Gillespie waived his right to "appeal and Idaho Criminal Rule 35 relief" pursuant to a plea agreement, his appeal should be dismissed.

Statement of Facts and Course of Proceedings

While on supervised probation for a prior DUI conviction, Gillespie drove while intoxicated and with a suspended driver's license.¹ (PSI, pp.2, 11, 19.) When officers attempted to detain him, Gillespie physically resisted, "exposed his buttocks to the officers," and "[m]ade himself vomit." (PSI, p.2.) He was eventually transported to the police department, where "he continued to be noncompliant," "threatened to urinate in the office," and spat at an officer. (PSI, p.2.) After two unsuccessful attempts to obtain a breath sample, Gillespie finally cooperated with the breathalyzer test and blew a .130/.136. (PSI, p.2.)

The state charged Gillespie with felony DUI (two prior DUI convictions within 10 years) and three misdemeanors: DWP, assault, and resisting and/or obstructing officers. (R., pp.26-29.) Pursuant to a binding Rule 11 plea

¹ The presentence investigator wrote that Gillespie committed the DUI that is the subject of this appeal five days after being released from misdemeanor probation. (PSI, p.19.) This appears to be a misstatement, as the PSI otherwise reflects that Gillespie did not complete his misdemeanor probation until March 30, 2011, and he committed the instant offense on March 4, 2011. (PSI, pp.2, 11, 19.)

agreement, Gillespie pled guilty as charged and the parties stipulated that Gillespie “shall be sentenced to 36 months fixed and 48 months indeterminate, with credit for time served and the court to retain Jurisdiction and recommend placement in the CAPP program during the retained jurisdiction.” (R., pp.18-20.) The parties also agreed that if Gillespie “successfully completes the retained jurisdiction the court shall suspend the execution of the sentence and place [Gillespie] on supervised probation for a period of four (4) years.” (R., p.19.) The plea agreement also contained the following appeal waiver provision: “The Defendant waives appeal and Idaho Criminal Rule 35 relief.” (R., p.19.) Gillespie and his attorney both signed the agreement and, in so doing, specifically represented that Gillespie “understands this agreement and by his signature agrees to the terms of the agreement.” (R., p.20.)

The district court accepted Gillespie’s pleas and, consistent with the plea agreement, imposed a unified sentence of seven years with three years fixed for the felony DUI.² (R., pp.46-47.) Also consistent with the agreement, the court retained jurisdiction and specifically recommended that Gillespie be placed in the CAPP program. (R., p.46.) Ultimately, the department of correction determined that Gillespie was ineligible for placement in the CAPP program and placed him instead in the Therapeutic Community (TC) program. (R., pp.57-58; see also APSI, p.2.) Gillespie did not perform well in the TC program and, less than six months into the “9 to 12 month program,” TC staff recommended that the court

² The court imposed concurrent jail sentences for each of the misdemeanors to which Gillespie pled guilty. (6/10/11 Tr., p.16, L.19 – p.17, L.7.) Gillespie does not challenge those sentences on appeal.

relinquish jurisdiction. (APSI cover and pp.1-3.) The court followed the recommendation, relinquished jurisdiction and ordered Gillespie's sentence executed without reduction. (R., pp.86-88.)

Gillespie filed a notice of appeal within 42 days of the court's order relinquishing jurisdiction. (R., pp.109-13.)

ISSUES

Gillespie states the issue on appeal as:

Whether the district court abused its discretion by relinquishing jurisdiction over Mr. Gillespie, or alternatively, by not reducing his sentence *sua sponte* pursuant to Rule 35 when it did so.

(Appellant's brief, p.5.)

The state rephrases the issues on appeal as:

1. Should Gillespie's appeal be dismissed because, as part of the stipulated plea agreement, Gillespie waived his right to "appeal and Idaho Criminal Rule 35 relief?"
2. Alternatively, has Gillespie failed to establish that the district court abused its discretion by relinquishing jurisdiction and ordering his sentence executed without reduction?

ARGUMENT

I.

Gillespie's Appeal Should Be Dismissed Because He Knowingly And Voluntarily Waived His Right To Appeal Pursuant To The Plea Agreement

A. Introduction

Gillespie argues that the district court abused its discretion by relinquishing jurisdiction and executing without reduction the unified sentence of seven years with three years fixed imposed upon his guilty plea to felony DUI. (Appellant's brief, pp.9-16.) Gillespie's appeal should be dismissed because, as part of the stipulated plea agreement, he knowingly and voluntarily waived his right to "appeal and Idaho Criminal Rule 35 relief." (R., p.19.)

B. Standard Of Review

"A plea agreement is contractual in nature, must be measured by contract law standards, and as a question of law, [the appellate court] exercises free review." State v. Cope, 142 Idaho 492, 495, 129 P.3d 1241, 1244 (2006) (citing Dunlap v. State, 141 Idaho 50, 63, 106 P.3d 376, 389 (2004)). Where the waiver of the right to appeal is entered as part of a plea agreement, the appellate court "employ[s] the same analysis as [it] would in determining the validity of any plea of guilty." State v. Murphy, 125 Idaho 456, 457, 872 P.2d 719, 720 (1994), quoted in Cope, 142 Idaho at 496, 129 P.3d at 1245.

C. Gillespie Knowingly And Voluntarily Waived The Right To Appeal The District Court's Rulings

The right of a criminal defendant to appeal matters relating to his conviction and/or sentence is a statutory right that may be waived. State v.

Cope, 142 Idaho 492, 496, 129 P.3d 1241, 1245 (2006); State v. Murphy, 125 Idaho 456, 457, 872 P.2d 719, 720 (1994) (citing I.C. § 19-2801). When the waiver of the right to appeal is included as a term of a plea agreement, such waiver is enforceable as long as the record shows that it was voluntarily, knowingly, and intelligently made. Cope, 142 Idaho at 496, 129 P.3d at 1245; Murphy, 125 Idaho at 456, 872 P.2d at 719; State v. Holdaway, 130 Idaho 482, 484, 943 P.2d 72, 74 (Ct. App. 1997).

Gillespie acknowledges the appeal waiver provision of his plea agreement but contends the “waiver does not bar the present appeal” because, he argues, the waiver only extends to his right to appeal from the judgment and sentence, not to the court’s order relinquishing jurisdiction. (Appellant’s brief, pp.6-7.) Alternatively, he argues the appeal waiver is ambiguous and, as such, must be interpreted in his favor to permit the present appeal. (Appellant’s brief, pp.8-9.) Neither of Gillespie’s arguments have merit.

The stipulated plea agreement is unambiguous. In exchange for Gillespie’s plea of guilty to felony DUI and three misdemeanors (DWP, assault and resisting and obstructing police officers), the parties agreed that Gillespie would be sentenced to a unified term of seven years, with three years fixed, with the court retaining jurisdiction and recommending Gillespie’s placement in the CAPP program. (R., pp.18-19.) Gillespie stipulated to the imposition of that sentence and specifically agreed to “waive[] appeal and Idaho Criminal Rule 35 relief.” (R., p.19.) Gillespie and his attorney both signed the agreement and, in

so doing, acknowledged that Gillespie understood the agreement and agreed to its terms. (R., p.20.)

Pursuant to the plain language of the plea agreement, Gillespie waived, without any express or implied limitation, his right to “appeal and Idaho Criminal Rule 35 relief.” (R., p.19.) Although Gillespie’s appellate counsel apparently believes that the scope of Gillespie’s appeal waiver did not include a waiver of the right to appeal the district court’s ultimate decision, made after judgment, to relinquish jurisdiction and order Gillespie’s sentence executed without reduction, neither the plain language of the appeal waiver provision nor the applicable law supports that position.

This is not a case, like State v. Holdaway, 130 Idaho 482, 484, 943 P.2d 72, 74 (Ct. App. 1997), where the defendant agreed to a limited waiver of the right to appeal only from the “judgment and sentence.” To the contrary, the appeal waiver provision of the plea agreement in this case is extremely broad and includes an *unlimited* waiver of the right to “appeal and Idaho Criminal Rule 35 relief.” (R., p.19.) Gillespie was aware when he executed the agreement and entered his pleas that the district court would be retaining jurisdiction. (See R., p.19.) He was also aware that the court would only be required to place him on probation if he “successfully complete[d] the retained jurisdiction.” (Id.) Had Gillespie wished to retain the right to appeal the district court’s ultimate determination whether to place him on probation following the period of retained jurisdiction he could easily have done so by requiring the state to include such provision in the written plea agreement. Gillespie did not do so, however, and

agreed instead to plead guilty and waive, without limitation, his appellate rights and right to Rule 35 relief. (R., p.19.)

That the district court's order relinquishing jurisdiction is itself an appealable order under Idaho's appellate rules does not support Gillespie's position that he has the right *in this case* to appeal from that order. (See Appellant's brief, p.7 (citing, *inter alia*, Rules 11(c)(9) and 14, I.A.R., for proposition that "Gillespie may appeal a decision to relinquish jurisdiction of right").) As previously discussed, the right of a criminal defendant to appeal matters pertaining to his or her conviction and sentence is a statutory right that may be waived. Cope, 142 Idaho at 496, 129 P.3d at 1245; Murphy, 125 Idaho at 457, 872 P.2d at 720. Moreover, the meaning and scope of the appeal waiver, like other provisions of the plea agreement, is dictated by the language of the agreement itself, not by the appellate rules. See, e.g., State v. Person, 145 Idaho 293, 298, 178 P.3d 658, 663 (Ct. App. 2007) (examining language of plea agreement to determine its meaning). Pursuant to the unambiguous language of the plea agreement in this case, Gillespie waived, without limitation, his right to "appeal and Idaho Criminal Rule 35 relief." Because Gillespie executed an unlimited waiver of his appellate rights and right to Rule 35 relief, his appeal from the district court's order relinquishing jurisdiction and ordering his sentence executed without reduction should be dismissed.³

³ Even if this Court concludes that the term "waives appeal," as it is used in the plea agreement, is ambiguous as it pertains to Gillespie's ability to appeal the court's order relinquishing jurisdiction, there is nothing ambiguous about Gillespie's waiver of "Idaho Criminal Rule 35 relief." (R., p.19.) Regardless of the propriety of Gillespie's appellate challenge to the court's decision to

II.

Alternatively, Gillespie Has Failed To Establish That The District Court Abused Its Sentencing Discretion

A. Introduction

Gillespie argues that the district court abused its discretion by relinquishing jurisdiction without giving sufficient consideration to several factors that he claims are mitigating, including his traumatic childhood, mental condition, acceptance of responsibility, family support and the efforts he made while in the retained jurisdiction program. (Appellant's brief, pp.9-15.) Citing the same factors, he also contends that the district court abused its discretion by not *sua sponte* reducing his sentence when it relinquished jurisdiction. (Appellant's brief, pp.15-16.) Even if this Court considers the merits of Gillespie's appellate claims, Gillespie has failed to show 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 Sentencing Discretion In Relinquishing Jurisdiction

The decision to relinquish jurisdiction is a matter within the sound discretion of the trial court and will not be overturned on appeal absent an abuse

relinquish jurisdiction, Gillespie's claim on appeal that the district court abused its discretion by not "reducing his sentence *sua sponte* pursuant to Rule 35" is in direct contravention of his express waiver of Rule 35 relief and, as such, is not properly before this Court.

of that discretion. See State v. Hood, 102 Idaho 711, 712, 639 P.2d 9, 10 (1981); State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). A court's decision to relinquish jurisdiction will not be deemed an abuse of discretion if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate under I.C. § 19-2521. State v. Chapel, 107 Idaho 193, 194, 687 P.2d 583, 584 (Ct. App. 1984). Contrary to Gillespie's assertions on appeal, a review of the record in this case supports the district court's determination that Gillespie was not a suitable candidate for probation, particularly in light of his extensive criminal record, his failures to take advantage of rehabilitative opportunities and his poor performance during the period of retained jurisdiction.

Thirty-eight-year-old Gillespie has a 20-year history of violating the law. His criminal record occupies more than eight pages of the PSI and includes 34 misdemeanor and five felony convictions. (PSI, pp.4-11, 18.) His conviction in this case represents his second felony DUI conviction and his fifth DUI conviction overall. (PSI, pp.4-11.) The majority of his other convictions also appear to be for alcohol and driving related offenses – *e.g.*, minor in possession (amended from DUI), unauthorized use of a motor vehicle, “driving with spirit, liquor in body,” no auto insurance (three convictions), reckless driving, driving on a suspended license (10 convictions), open container, pedestrian under the influence, failure to purchase driver's license (amended from DWP), and unsafe operation of a vehicle (amended from inattentive/careless driving). (PSI, pp.4-11.) He has also been convicted of numerous property crimes and crimes of

violence, including assault, resisting arrest, criminal damage (three convictions), endangerment, criminal damage per domestic violence, and disorderly conduct per domestic violence. (PSI, pp.7-11.)

As a result of his prior convictions, Gillespie has been afforded multiple opportunities for probation. (PSI, pp.4-13.) He appears to have completed some of those probationary periods without incident, but violated others by committing new crimes, consuming alcohol and using illegal substances, including marijuana, cocaine and methamphetamine. (Id.) He has served three prison terms (PSI, pp.12-13) and has also participated in at least three substance abuse treatment programs, including staying for approximately six months at what appears to be a residential treatment facility (PSI, p.18). Prior sanctions and treatment opportunities have not assisted Gillespie in overcoming his substance abuse issues nor deterred him from committing new crimes. Gillespie himself admits that, when he is not on probation, he reverts to consuming alcohol and, he states, "It's like I just got out of trouble, and then I get in trouble again." (PSI, p.17.) Even that admission does not appear to be entirely forthcoming, as the PSI indicates Gillespie has consumed alcohol and illegal substances even while on probation (PSI, 12-13, 17) and, in fact, was on misdemeanor probation when he committed the felony DUI of which he was convicted in this case (PSI, pp.2, 11, 19).

Despite Gillespie's demonstrated unwillingness or inability to abstain from alcohol and illegal substances and to otherwise conform his behavior to the requirements of the law, the district court, in an exercise of leniency, followed the

plea agreement and retained jurisdiction to afford Gillespie yet another opportunity to prove his amenability to community supervision. (R., pp.46-47; 6/10/11 Tr., p.11, L.22 – p.12 L.5, p.13, Ls.7-11.) Gillespie utterly failed to take advantage of that opportunity, however, as he failed to complete two of the three programs in which he was enrolled, including the core Therapeutic Community (TC) program which is specifically “designed and structured to create an environment for social learning and change” and includes “intense drug and alcohol treatment.” (APSI, p.1.)

According to TC staff, Gillespie “started his TC programming with an air of arrogance,” “seemed surly and insolent,” and “demonstrated no desire to follow the rules.” (APSI, p.2.) He received a written warning for violating program rules, was “pulled up a significant number of times for his negative behavior” and, despite numerous interventions by staff and other program participants, displayed neither interest nor motivation “to invest time and energy in his TC programming in order for him to change to become a productive member of society.” (APSI, pp.2-4; APSI Discharge Summary, pp.1, 3.) TC staff recognized Gillespie’s minimal accomplishments during the program but noted that, “[o]verall, there has been little significant change in Mr. Gillespie” as a result of his programming. (APSI Discharge Summary, pp.1-2.) Ultimately, the staff concluded that Gillespie “remain[ed] a high-risk for reoffending within the community” and, as such, was not an appropriate candidate for probation. (APSI, p.4) In light of this information, the district court acted well within its discretion in relinquishing jurisdiction.

In arguing an abuse of discretion Gillespie cites a number of mitigating factors that he claims militate against the district court's decision to relinquish jurisdiction. (Appellant's brief, pp.11-15.) While it is undoubtedly true, as asserted by Gillespie, that he had a traumatic childhood, that he suffers from depression and dyslexia, that he purported to accept responsibility for his actions that led to his convictions in this case, and that he is supported by his family, these considerations in no way diminish the district court's conclusion that Gillespie would not be successful on probation. Gillespie has a history of drinking and driving and was deemed to pose a high risk of reoffense. (PSI, p.19; APSI, p.4.) His programming during the retained jurisdiction period did not reduce that risk. Considering all the evidence, and giving deference to the district court's ability to weigh that evidence, Gillespie has failed to show an abuse of discretion.

D. Gillespie Has Failed To Show That The District Court Abused Its Discretion By Not *Sua Sponte* Reducing His Sentence Upon Relinquishing Jurisdiction

Upon relinquishing jurisdiction, a court may order the original sentence executed or reduce the sentence as authorized by Idaho Criminal Rule 35. I.C.R. 35. A court's decision not to reduce a sentence is reviewed for an abuse of discretion subject to the well-established standards governing whether a sentence is excessive. State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 7 (Ct. App. 2009). 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

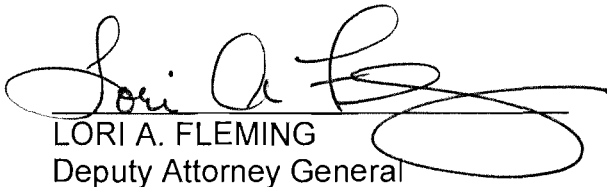
P.3d 969, 975 (2005). Those objectives are: “(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrong doing.” State v. Wolfe, 99 Idaho 382, 384, 582, P.2d 728, 730 (1978).

Citing the same factors he claims militated against the relinquishment of jurisdiction, Gillespie argues that the district court abused its discretion by not *sua sponte* reducing the unified sentence of seven years, with three years fixed, imposed upon his conviction for felony DUI. (Appellant’s brief, pp.15-16.) For the reasons already set forth in section II.C., *supra*, and incorporated herein by reference, Gillespie has failed to show that he was entitled to a reduction of his sentence. Gillespie has failed to show an abuse of discretion.

CONCLUSION

The state respectfully requests that Gillespie’s appeal be dismissed. Alternatively, the state requests that this Court affirm the district court’s order relinquishing jurisdiction and executing without reduction the sentence imposed upon Gillespie’s guilty plea to felony DUI.

DATED this 9th day of November 2012.



LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th 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