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State v. Dusenbery Respondent's Brief Dckt. 40156

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 JAMES JOHN DUSENBERY,)
)
 Defendant-Appellant.)
)
 _____)

Nos. 40156, 40157
Bannock Co. Case Nos.
CR-2008-2583, CR-2011-15284

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BANNOCK**

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District Judge

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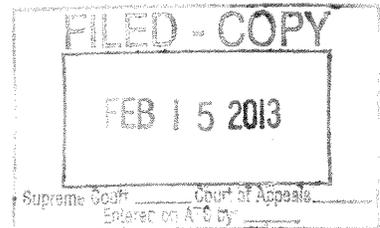


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STATEMENT OF THE CASE

Nature of the Case

This case is before the Court on appeal from the district court's decision revoking James John Dusenbery's probation following his admission to four probation violations.

Statement of Facts and Course of Proceedings

In February 2008, Defendant James John Dusenbery was charged with one count of methamphetamine possession, and one count of grand theft by possession of stolen firearms. (R., pp. 48-49.¹) The latter count was amended to accessory to grand theft by possession of stolen firearms. (R., pp. 57-58.) In May 2008, Dusenbery pleaded guilty to both counts. (R., pp. 66.) In July 2008, the district court sentenced Dusenbery to seven years with four years fixed on the methamphetamine possession count, and five years with three years fixed on the accessory to grand theft count, to run concurrently. (R., pp. 69-70.) The district court retained jurisdiction (R., pp. 70-72.)

In December 2008, the district court suspended Dusenbery's sentence and ordered probation for seven years, subject to conditions. (R., pp. 77-82.) In 2010, Dusenbery was charged with probation violations, including methamphetamine possession. (R., pp. 84-85, 90.) Dusenbery admitted to two probation violations (R., p. 95-97), and the district court revoked his probation, reinstated sentence, and retained jurisdiction. (R., p. 98.) Dusenbery was placed in CAPP (Correctional Alternative Placement Program). (R., p. 106.) In March 2011, the district court again suspended

¹ Citations to the Court Record reference the paper copy's pagination.

Dusenbery's sentence, and ordered continued probation for seven years, subject to conditions. (R., pp. 107-111.)

In September 2011, Dusenbery was again charged with probation violations, including methamphetamine possession, which was also criminally charged in a new case (District Court Case No. CR-2011-15284-FE). (R, pp. 115-16, 141-42, 184-85.) Dusenbery admitted to two probation violations. (R., pp. 122-23.) In March 2012, Dusenbery pleaded guilty to the charge of methamphetamine possession in case CR-2011-15284-FE. (R., pp. 221-22.) In June 2012, in Dusenbery's initial case, the district court revoked probation and reinstated a modified sentence, reduced to five years with two years fixed on the original methamphetamine possession count, and four years with two years fixed on the original accessory to grand theft count, to run concurrently. (R., p. 126.) In case CR-2011-15284-FE, the district court imposed five years with two years fixed, to run concurrent with Dusenbery's sentence in the other case. (R., pp. 226-28.) On July 9, 2012, Dusenbery filed a notice of appeal in both cases. (R., pp. 131-33, 230-32.)

The two cases were consolidated on appeal. (Order Granting Mot. to Consolidate.) The Clerk's Record and Reporter's Transcript on Appeal were filed September 18, 2012. On November 20, 2012, Dusenbery moved to augment the record to include transcripts from his 11/23/10 dispositional hearing and 3/28/11 rider review hearing from the first case. (Appellant's Mot. to Augment.) This Court denied the motion. (11/28/12 Order.)

ISSUES

Dusenbery states the issues on appeal as:

1. Did the Idaho Supreme Court deny Mr. Dusenbery due process and equal protection when it denied his Motion to Augment with the requested transcripts?
2. Did the district court abuse its discretion when it revoked probation in the First Case and failed to place Mr. Dusenbery on probation in the Second Case?

(Appellant's brief, p. 4.)

The state rephrases the issues as:

1. Has Dusenbery failed to show that transcripts he sought to add to the appellate record were relevant or necessary for adequate, effective review, and thus failed to demonstrate a constitutional violation by this Court in denying his request?
2. Has Dusenbery failed to demonstrate that the district court abused its discretion by revoking his probation in his first case and not ordering probation in his second case, where Dusenbery demonstrated a refusal or inability to comply with conditions of probation?

ARGUMENT

I.

Dusenbery Has Failed To Show That Transcripts He Sought To Add To The Appellate Record Were Relevant Or Necessary For Adequate, Effective Review, And Thus Fails To Demonstrate A Constitutional Violation By This Court In Denying His Request

A. Introduction

This Court denied Dusenbery's request for transcripts from his plea and sentencing hearings. (11/28/12 Order.) In his brief on appeal, Dusenbery argues that the Court's denial of augmentation with these transcripts violates his right to due process and equal protection. (Appellant's brief, pp. 5-19.) However, Dusenbery misapplies the relevant law, thus his arguments fail.

B. Denial Of The Motion To Augment Does Not Violate Dusenbery's Constitutional Rights Because The Requested Documents Are Not Relevant To The Issues On Appeal

Dusenbery argues that denial of his motion to augment the record violates his right to due process. (Appellant's brief, pp. 5, 8-19.) Although he offers a lengthy discussion of Idaho case law, Dusenbery fails to clearly identify the applicable rule. A defendant is denied due process or equal protection if he has been denied "a record on appeal that is sufficient for adequate appellate review of the errors alleged regarding the proceedings below." State v. Morgan, 153 Idaho 618, ___, 288 P.3d 835, 838 (Ct. App. 2012) (citations omitted). Although appellate review is not limited to those facts arising between sentencing and the probation revocation appealed, id. (citing State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 8 (Ct. App. 2009)), the appellate record need not include "*all* proceedings in the trial court up to and including sentencing." Id. (emphasis original). Rather, the appellate court will consider those elements of the trial

court record *relevant* to the probation revocation issues and that are properly part of the appellate record. Id.

The appellate rules designating those records necessary for appellate review afford all process due an appellant. Id. at 838-39 (citing I.A.R. 28(a), 29(a), 30). The fact that the appellate court denies an appellant's motion to augment does not show a violation of due process. Under Morgan, the appellate court need only admit those parts of the record below that were germane to the trial court's probation revocation decision. Id. Specifically, the Morgan court said, "This Court will not assume the omitted transcripts would support the district court's revocation order since they were not before the district court in the [final] probation violation proceedings, and the district court gave no indication that it based its revocation decision upon anything that occurred during those prior hearings." Id. at 838.

As in Morgan, the district court here gave no indication that its decision revoking Dusenbery's probation and imposing his sentences was based on information provided in prior hearings but *not* in his final disposition hearing. The transcript reflects instead that the court revoked Dusenbery's probation based on information before the court in the June 2012 sentencing hearing. (Tr., p. 55, L. 1 – p. 56, L. 9; p. 64, Ls. 4-20.²) That information included the PSI, and his repeated probation violations. (Id.)

Dusenbery has failed to show that transcripts from his 11/23/10 disposition and 3/28/11 rider review hearings would be at all relevant in reviewing the district court's decision revoking his probation and imposing sentence. Absent any relevance,

² Citations to transcripts in the appellate record reference pagination used by the court reporter.

Dusenbery has not shown that exclusion of the transcripts in his appellate record hinders his counsel's ability to provide effective assistance. (See Appellant's brief, pp. 17-19.) Accordingly, Dusenbery's due process arguments fail.

Given the transcripts' irrelevance, Dusenbery's equal protection claim (Appellant's brief, pp. 6-10) also fails. The U.S. Supreme Court has held that the "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Griffin v. Illinois, 351 U.S. 12, 19, 76 S.Ct. 585, 591 (1956). However, the state need only provide "adequate and effective appellate review," or those portions of the record necessary to pursue the issues raised on appeal. Id. at 20, 76 S.Ct. at 591. An indigent appellant has a right to "a transcript of relevant trial proceedings," or a record "complete enough to allow fair appellate consideration of his claims." M.L.B. v. S.L.J., 519 U.S. 102, 121-23, 117 S.Ct. 555, 566-67 (1996).

Because Dusenbery has not demonstrated that the transcripts are relevant to the issues here, he has also failed to show they are needed for adequate and effective appellate review.³ Accordingly, Dusenbery has not demonstrated that this Court violated his constitutional rights by denying the requested augmentation.

³ Dusenbery's remaining arguments on this issue fail because the Idaho statutes and rules he cites are inapplicable. Idaho Code § 1-1105(2) does not apply because it concerns transcripts *ordered by the court*. Idaho Code § 19-863(a) does not apply because it pertains to *necessary* transcripts. And Idaho Criminal Rule 5.2 applies to the district court for purposes of trial, not to this Court on appeal.

II.

Dusenbery Has Failed To Demonstrate That The District Court Abused Its Discretion By Revoking His Probation In His First Case And Not Ordering Probation In His Second Case, Where Dusenbery Demonstrated A Refusal Or Inability To Comply With Conditions Of Probation

A. Introduction And Legal Standard

The district court found that probation was not appropriate in Dusenbery's case. Dusenbery argues that such finding was an abuse of the court's discretion. (Appellant's brief, pp. 20-24.)

On review of a district court's decision revoking probation, the appellate court considers (1) whether the defendant violated probation, and (2) whether probation should be revoked or continued. State v. Sanchez, 149 Idaho 102, 105, 233 P.3d 33, 36 (2009). The appellate court will defer to the district court's credibility determinations, and will not disrupt the district court's decision revoking probation absent showing that it abused its discretion. Id. Here, Dusenbery does not dispute that he violated probation. (Appellant's brief, p. 20.) The question is whether the trial court abused its discretion in revoking Dusenbery's probation.

Regarding sentencing, the appellate court will not disturb a sentence within statutory limits, absent showing that the court clearly abused its discretion. State v. Windom, 150 Idaho 873, 875, 253 P.3d 310, 312 (2011) (citation omitted). To carry his burden, an appellant must show that his sentence is excessive "under any reasonable view of the facts," considering the objectives of criminal punishment: protection of society, deterrence, rehabilitation, and retribution or punishment. Windom, 150 Idaho at 876, 253 P.3d at 313. In reviewing an excessive sentence claim, the appellate court

independently reviews the record, examining the nature of the offense, and the offender's character. State v. Delling, 152 Idaho 122, 132, 267 P.3d 709, 719 (2011) (citation omitted). Where reasonable minds could differ as to whether a sentence is excessive, the appellate court will not disturb it. State v. Miller, 151 Idaho 828, 834, 264 P.3d 935, 941 (2011) (citation omitted).

In determining whether the district court abused its discretion – as to a probation revocation or in sentencing – the appellate court considers (1) whether the trial court understood that the issue was discretionary; (2) whether the trial court acted within its discretionary scope and under applicable legal standards; and (3) whether the trial court exercised reason. Miller, 151 Idaho at 834, 264 P.3d at 941 (citation omitted). Dusenbery does not contend the district court failed to comprehend its discretion. Indeed, the court showed awareness of its discretion by reducing Dusenbery's sentence – from seven years with four fixed and five years with three fixed to five years with two fixed and four years with two fixed. (See Tr., p. 64, Ls. 11-13.) Also, Dusenbery acknowledges that his sentence was within statutory limits. (Appellant's brief, p. 21.) The issue is whether the district court exercised reason in revoking probation in Dusenbery's first case, and not ordering probation in the second case.

B. Dusenbery Has Not Met His Burden Of Showing That The District Court Failed To Exercise Reason With Respect To His Probation

Given the facts, Dusenbery simply cannot show that the district court abused its discretion with regard to his probation. The district court expressed considerable compassion for Dusenbery at sentencing, saying, "I like ya, but that doesn't change the fact of your history." (Tr., p. 55, Ls. 18-19.) The court went on to say, "Given everything we've tried so far, I just have a real difficulty with going out on the limb any further in

your situation. It seems like every time I've given you a chance, you've got a [probation violation] out there." (Tr., p. 55, L. 23 – p. 56, L. 2.)

Dusenbery's lengthy history of criminal charges for substance abuse crimes, crimes of violence, disorderly conduct or resisting arrest, and DUIs support the district court's exercise of discretion. (PSI, pp. 3-11.) Dusenbery has acknowledged daily use of methamphetamine since 2005, and at least up until his pre-sentence investigation. (PSI, pp. 15, 17.) Dusenbery has had great difficulty complying with rules and conditions of probation. (PSI, p. 17.) Although he attempted a treatment program for the first time in 2004, he resumed drug use within two days of its completion. (PSI, p. 16.)

In deciding whether to continue probation, the court considers whether probation is achieving the goal of rehabilitation. State v. Leach, 135 Idaho 525, 529, 20 P.3d 709, 713 (Ct. App. 2001). The record here amply supports that rehabilitation was not being satisfied. The court's decision revoking probation was therefore well within reason. Despite evidence that Dusenbery had taken steps toward success (Appellant's brief, p. 21 (citing R., pp. 200-202, 205-206)), the fact remains that Dusenbery repeatedly failed to comply with the terms of his probation. Nor does the evidence of his troubled childhood support a finding that the district court abused its discretion in not ordering probation. (Appellant's brief, p. 22.)

Dusenbery has failed to present a reasonable view of the facts under which his sentence – specifically, that probation was not ordered – could be deemed excessive, or otherwise an abuse of discretion. See Windom, 150 Idaho at 876, 253 P.3d at 313.

The record fully supports the district court's decision revoking, and not again ordering probation. Therefore Dusenbery's abuse of discretion arguments fail.

CONCLUSION

The state respectfully requests that this court deny Dusenbery's appeal.

DATED this 15th day of February, 2013.



DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of February, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SHAWN F. WILKERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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



DAPHNE J. HUANG
Deputy Attorney General

DJH/pm