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State v. Pasborg Respondent's Brief Dckt. 40184

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	No. 40184
Plaintiff-Respondent,)	
)	Ada Co. Case No.
vs.)	CR-2006-837
)	
MICHAEL ALLEN PASBORG,)	
)	
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

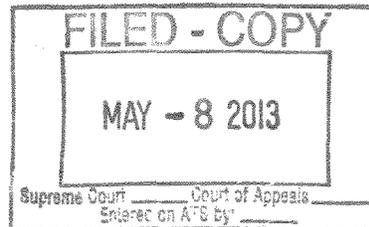
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STATEMENT OF THE CASE

Nature of the Case

Michael Allen Pasborg appeals the district court's order revoking probation and sentencing him to a term of 10 years with two years fixed.

Statement of Facts and Course of Proceedings

Michael Allen Pasborg pleaded guilty to robbery for a crime he committed at age 16. (R., p. 42.) The court sentenced Pasborg to 10 years with two years fixed in a secure juvenile facility, and retained jurisdiction until Pasborg's 21st birthday. (R., pp. 42-43.) The court later suspended sentence and ordered probation subject to conditions, including participation in and full compliance with Bridge Court. (R., pp. 74-75.) A few months later, the court ordered a warrant for Pasborg's arrest for violating probation. (R., pp. 85, 98-100.) Shortly thereafter, the court ordered a bench warrant for Pasborg's failure to appear at his review hearing. (R., p. 87.) Pasborg appeared for his arraignment and subsequent hearings on the probation violation. (R., pp. 92, 101-05.)

At the disposition hearing, the court suspended sentence, and reinstated but amended his probation. (R., pp. 106-07.) One condition of probation was that Pasborg serve 90 days in jail. (R., p. 106.) Upon completion of in-custody requirements, Pasborg moved for early release which the court granted. (R., pp. 111, 113.) Eight months later, Pasborg was arrested for a second probation violation. (R., p. 123-24.) Pasborg admitted violating probation, and the court sentenced him to 10 years in custody with two years fixed, and retained jurisdiction for 180 days. (R., pp. 140-41.) At the end of the retained jurisdiction

period, the court again suspended execution of sentence and ordered probation subject to conditions, again including Bridge Court. (R., pp. 145-47.)

Less than a year later, the state moved for Pasborg's arrest for a third probation violation. (R., pp. 157-60.) The district court continued the probation violation disposition at Pasborg's request, and Pasborg failed to appear for the hearing, prompting the court to issue another warrant for his arrest. (5/7/12 Tr., p. 12, L. 18 – p. 14, L. 2; R., p. 179.) On July 5, 2012, the court revoked Pasborg's probation, entered judgment of conviction, and ordered a term of 10 years in custody with two years fixed. (R., pp. 187-88.) Pasborg timely appealed the order. (R., pp. 190-92.)

ISSUES

Pasborg states the issues on appeal as:

1. Did the Idaho Supreme Court deny Mr. Pasborg due process and equal protection when it denied his Motion to Augment with transcripts necessary for review of the issues on appeal?
2. Did the district court abuse its discretion when it failed to reduce his sentence *sua sponte* upon revoking probation?

(Appellant's brief, p. 4.)

The state rephrases the issues as:

1. Has Pasborg failed to show a right to review of the Idaho Supreme Court's order denying his motion to augment in which, in any event, the Court properly found Pasborg was not denied due process or equal protection rights?
2. Has Pasborg failed to show the district court abused its discretion in sentencing him to 10 years with two years fixed?

ARGUMENT

I.

Pasborg Has Failed To Show A Right To Review Of The Idaho Supreme Court's Order Denying His Motion To Augment In Which The Court Properly Found Pasborg Was Not Denied Due Process Or Equal Protection Rights

A. The Idaho Court Of Appeals Lacks Authority To Review The Idaho Supreme Court's Decision Denying The Motion To Augment

On appeal, Pasborg requested transcripts from his 2006 guilty plea hearing, 2008 sentencing and review hearings, 2009 and 2010 admit/deny and disposition hearings, 2011 rider review hearing, and 2012 disposition hearing. (1/2/13 Motion.) The Idaho Supreme Court denied all but the last transcript requested. (1/31/13 Order.) In his brief on appeal, Pasborg argues that the Court's denial of augmentation with these transcripts violates his right to due process and equal protection. (Appellant's brief, pp. 5-10.) As an initial matter, if this case is assigned to the Idaho Court of Appeals, there is no authority to review the Idaho Supreme Court's decision under Idaho case law.

The Idaho Court of Appeals cannot directly review a decision of the Idaho Supreme Court. Rather, it may only grant an independent motion based on new information "or a new or expanded basis for the motion." State v. Morgan, 153 Idaho 618, ___, 288 P.3d 835, 837 (Ct. App. 2012). Pasborg makes clear here that he is not renewing his motion, but seeks review of the Idaho Supreme Court's denial of the initial motion. (Appellant's brief, p. 5-10.) Pasborg has identified no legal authority allowing such review by the Idaho Court of Appeals. The Idaho Court of Appeals recently rejected an appellant's attempt to seek review of the Idaho Supreme Court's denial of a nearly identical issue in State v.

Cornelison, 2013 WL 1613842 (Ct. App. 2013). If this case is assigned to the Court of Appeals, existing case law supports rejection of Pasborg's argument.

B. The Supreme Court Properly Denied Pasborg's Initial Motion

Even if the Court were to entertain Pasborg's request for review, Pasborg has failed to show a legal basis to reverse the Court's decision denying the motion. Under Idaho case, Pasborg's due process rights and equal protection rights were not violated.

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." Morgan, 153 Idaho at ___, 288 P.3d at 838 (citations omitted). Although the record on appeal is not confined 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)), it 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 Pasborg’s probation and imposing his sentence was based on information provided in prior hearings but *not* provided in his final disposition hearing. (5/7/12 Tr.; 7/2/12 Tr.) The transcripts reflect instead that the court revoked Pasborg’s probation based on information before the court for the final hearing. (7/2/12 Tr., p. 31, L. 24 – p. 33, L. 14.)

The district court’s statement to Pasborg in his 2012 disposition hearing was succinct but thorough, covering the extensive and undisputed history of Pasborg’s many failures to comply with court directives. (7/2/12 Tr., p. 31, L. 24 – p. 33, L. 14.) Pasborg has failed to show that transcripts from his plea, sentencing, admit/deny, and disposition hearings in 2006, 2008, 2009, and 2010, as well as his 2010 disposition hearing and 2011 rider review hearing, would be in any way relevant on this appeal. Simply asserting that they are relevant does not prove them so. (Appellant’s brief, pp. 10-11.)

Pasborg notes that, unlike in Morgan, Pasborg challenges his sentence in addition to his probation revocation. (Appellant’s brief, pp. 12-15.) Thus, Pasborg argues, “the entire record encompassing events before and after original judgment” is needed for his appeal. Pasborg’s argument relies on the

proposition that the entire record of proceedings is relevant. The Morgan court explicitly rejected such a proposition. Morgan, 153 Idaho at ___, 288 P.3d at 838. Nothing in Morgan supports that this holding applies only to an appeal of a probation revocation, but not to an appeal of a defendant's sentence. Pasborg's argument offers a distinction without a reason.

Except for Pasborg's self-serving assertions, Pasborg fails to show that his requested transcripts are relevant. Absent any relevance, Pasborg fails to demonstrate how exclusion of the transcripts from his appellate record hinders his counsel's ability to provide effective assistance. (See Appellant's brief, pp. 18-20.) Accordingly, Pasborg's due process argument fails.

Regarding Pasborg's equal protection claim, 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 Pasborg has not demonstrated that the transcripts are relevant to the issues here, he also fails to show they are needed for adequate and effective appellate review. Accordingly, this Court should find that its initial denial of Pasborg's motion was correct.

II.
Pasborg Has Failed To Show The District Court Abused Its Discretion In
Sentencing Him To 10 Years With Two Years Fixed

Pasborg argues that the district court abused its discretion by not reducing his sentence of 10 years with two years fixed before executing it. (Appellant's brief, pp. 20-22.) The appellate court will not disturb a sentence that is within statutory limits absent a showing 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 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).

Given the brevity of the fixed portion of Pasborg's sentence, which Pasborg acknowledges is within the statutory range (Appellant's brief, p. 20), he simply cannot establish that the sentence is excessive. The sentence is no more than Pasborg's original sentence, and is what the state recommended. (R., p. 43; 7/2/12 Tr., p. 27, Ls. 23-25.) Pasborg has articulated no basis for the court to reduce that sentence upon his probation violation.

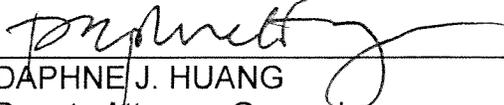
As the district court aptly summed up at disposition, the court “tried lots of things,” and had few remaining options. (7/2/12 Tr., p. 32, Ls. 13-25.) In addition to Pasborg’s failure to attend treatment programs, failure to get and maintain a sponsor, losing work due to on-going drug-use and failure to show up on time, Pasborg failed to appear for court. (7/2/12 Tr., p. 32, Ls. 7-24.) The court concluded that, with Pasborg’s pattern of absconding, “there is no way to really hang onto [him] to get everything done.” (7/2/12 Tr., p. 33, Ls. 6-9.)

Pasborg has not shown that, “under any reasonable view of the facts,” his ten year sentence with two years fixed was an abuse of the district court’s discretion. Windom, 150 Idaho at 876, 253 P.3d at 313. Even where a different but reasonable interpretation of the facts exists, Pasborg’s sentence must not be disturbed on appeal. Miller, 151 Idaho at 834, 264 P.3d at 941. Accordingly, this Court should deny Pasborg’s argument.

CONCLUSION

The state respectfully requests that this Court reject Pasborg’s request for review of the order denying augmentation, and affirm the district court’s judgment of conviction and order of commitment.

DATED this 8th day of May, 2013.

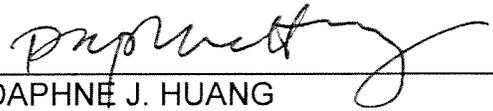

DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of May, 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/vr