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State v. Jorgensen Respondent's Brief Dckt. 40338

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 STACE VANCE JORGENSEN,)
)
 Defendant-Appellant.)
)

No. 40338
Bonneville Co. Case No.
CR-2005-8124

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE**

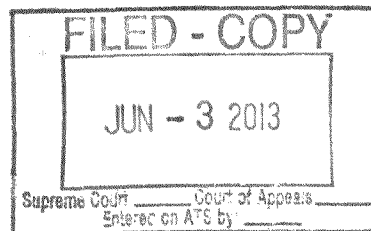
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STATEMENT OF THE CASE

Nature of the Case

Stace Vance Jorgensen appeals from the district court's order revoking his probation and imposing sentence. Jorgensen argues the district court abused its discretion, and that the Idaho Supreme Court erred in denying his motion to augment the record to include transcripts of various hearings.

Statement of Facts and Course of Proceedings

Stace Vance Jorgensen pleaded guilty to felony possession of a controlled substance. (R., pp. 56, 58-59, 65.) The district court sentenced Jorgensen to a term of four years with one and a half years determinate, but suspended execution of judgment, and ordered probation subject to conditions. (R., pp. 76-78.) Less than a year later, Jorgensen violated probation by, among other things, failing to maintain employment, getting into a physical altercation, and failing to maintain supervision. (R., pp. 95-96.) Jorgensen admitted probation violations, but asked to remain on probation. (R., pp. 100-101.) The district court entered judgment on the probation violations, revoked probation, and executed the sentence previously imposed; it also retained jurisdiction. (R., pp. 103-04.)

After three months, Jorgensen moved for work release, and the district court again suspended sentence, placing Jorgensen on probation subject to conditions. (R, pp. 105, 112-15.) Two years and three months later, the district court received a report that Jorgensen had violated probation a second time and absconded. (R., pp. 118-19.) Jorgensen stayed at large for almost 15 months.

(R., pp. 129-30.) Jorgensen admitted probation violations, including absconding from supervision. (R., p. 131-32.) The district court extended probation subject to conditions. (R., p. 133.)

Four months later, the district court received a third probation violation report, again highlighting Jorgensen's failure to maintain supervision. (R., p. 135.) In an addendum report, the probation officer noted that Jorgensen admitted to recent methamphetamine use. (R., p. 140.) Jorgensen admitted violating probation (R., p. 142), and the district court entered judgment on the probation violations, revoked probation, and executed the sentence previously imposed; the district court again retained jurisdiction (R., pp. 146-47). Roughly four months later, the district court suspended sentence a fourth time and ordered probation subject to conditions. (R., pp. 149-50.)

After six months, the district court received a fourth probation violation report. (R., pp. 157-58.) Jorgensen admitted the violations, which included failing to attend mental health appointments, using methamphetamine, and driving without privileges. (R., pp. 157-60.) The district court entered judgment on the probation violation, and executed the sentence previously imposed of five years with one and a half years determinate. (R., p. 177.) Jorgensen timely appealed. (R., p. 179-80.)

ISSUES

Jorgensen states the issues on appeal as:

1. Whether the Idaho Supreme Court denied Mr. Jorgensen due process and equal protection when it denied his motion to augment the record with transcripts necessary for review of the issues on appeal.
2. Whether the district court abused its discretion when it revoked Mr. Jorgensen's probation, or, alternatively, by not reducing his sentence *sua sponte* when it did so.

(Appellant's brief, p. 5.)

The state rephrases the issues as:

1. Has Jorgensen 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 Jorgensen was not denied due process or equal protection rights?
2. Has Jorgensen failed to show the district court abused its discretion in revoking probation and sentencing him within statutory limits, and upon his admission to repeated probation violations?

ARGUMENT

I.

Jorgensen Has 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 Jorgensen 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, Jorgensen requested transcripts from his 2006 change of plea, sentencing, and probation violation hearings; 2010 probation violation hearing; August and October 2011 probation violation hearings; and 2012 motion for work release and probation violation hearings. (12/31/12 Motion.) The Idaho Supreme Court denied all but the last transcript requested. (1/22/13 Order.) In his brief on appeal, Jorgensen argues that the Court's denial of augmentation with these transcripts violates his right to due process and equal protection. (Appellant's brief, pp. 6-21.) 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). Jorgensen 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. 6.) Jorgensen 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 Jorgensen's argument.

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

Even if the Court were to entertain Jorgensen's request for review, Jorgensen has failed to show a legal basis to reverse the Court's decision denying augmentation as to seven of the eight transcripts. Under Idaho case law, Jorgensen's due process 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 Jorgensen's probation and imposing his sentence was based on information provided in prior hearings but *not* provided in his final disposition hearing. (9/6/12 Tr.) The transcript reflects instead that the court revoked Jorgensen's probation based on information before the court for the final hearing. (9/6/12 Tr., p. 11, L. 6 – p. 12, L. 2.)

The district court's statement to Jorgensen in his 2012 disposition hearing was clear and concise, noting

I go back and look at the file and all of the history . . . and the file reflects, it would make a mockery of probation to put you back on probation. . . . You have been regularly in violation where we have had to deal with this almost yearly, and here we are with another violation that says that you are not complying with your programming. You are using drugs and you are committing new substantive crimes. And that sounds more like somebody that is at the beginning, not at the end.

(9/6/12 Tr., p. 11, Ls. 9-25.) The court concluded, saying, "I feel I have no alternative but to revoke probation and order execution of the sentence and shall do so." (9/6/12 Tr., p. 11, L. 25 – p. 12, L. 2.) Jorgensen has failed to show that transcripts from his change of plea, sentencing, probation violation, and motion

for work release hearings in 2006, 2010, 2011, and 2012 would be relevant on this appeal.

According to Jorgensen, all “transcripts that addressed the initial sentence or the decisions thereafter are relevant to the issues raised on appeal and should be provided to allow for sufficient review.” (Appellant’s brief, p. 17.) In support, Jorgensen cites Idaho cases holding that a court is entitled to use knowledge learned from its official position and observations in imposing sentence. (See Appellant’s brief, pp. 13-15.¹) Jorgensen argues that, because the court can use information learned in prior proceedings when sentencing a defendant, transcripts of those proceedings are relevant. But the mere assertion that the transcripts are relevant does not make them so.

Significantly, Jorgensen identifies no factual basis to find that the requested transcripts would be relevant on this appeal. (Appellant’s brief, pp. 13-15.) Indeed, the district court’s rationale in revoking probation and sentencing Jorgensen is apparent from the disposition transcript. Under Morgan, absent indication that the requested transcripts would be germane, the appellate court will not assume relevance. Morgan, 153 Idaho at ___, 288 P.3d at 838.

Essentially, Jorgensen asks this Court to reverse Morgan and adopt a per se rule that transcripts of all prior proceedings, whether or not they were before

¹ Citing Downing v. State, 136 Idaho 367, 373-74 (Ct. App. 2001); State v. Sivak, 105 Idaho 900, 907 (1983); State v. Wallace, 98 Idaho 318 (1977); State v. Gibson, 106 Idaho 491 (Ct. App. 1984); State v. Adams, 115 Idaho 1053, 1055-56 (Ct. App. 1989).

the district court at the final disposition hearing, are relevant as a matter of law. (Appellant's brief, pp. 13-15.) But Jorgensen has provided no legal basis for this proposition, only self-serving conclusory assertions. Thus, Jorgensen has failed to show the requested transcripts are either factually or legally relevant on this appeal.

Absent demonstration that the transcripts are relevant, Jorgensen fails to show that counsel's ability to provide effective assistance is hindered by the Court's denial of augmentation to include the transcripts in the appellate record. (See Appellant's brief, pp. 20-22.) Accordingly, Jorgensen cannot show that the denial of augmentation violates his right to due process.

Regarding Jorgensen'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 Jorgensen 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 Jorgensen's motion was correct.

II.

Jorgensen Has Failed To Show The District Court Abused Its Discretion In Revoking His Probation And Sentencing Him Within Statutory Limits, And Upon His Admission To Repeated Probation Violations

Jorgensen argues that the district court abused its discretion by revoking probation and not reducing his sentence of five years with one and a half years fixed before executing it. (Appellant's brief, pp. 22-26.) 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). Given Jorgensen's admitted probation violations charged in four separate reports over five years, the record here amply supports that rehabilitation was not being satisfied. (See R., pp. 95-96, 118-19, 135, 157-58.) The court's decision revoking probation was therefore well within reason.

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 Jorgensen's sentence – five years with one and a half years fixed – he simply cannot establish that the sentence is excessive. As to Jorgensen's request to simply be unsatisfactorily discharged from probation, the prosecutor noted:

if a defendant were to screw off long enough and just kind of fly under the radar and just kind of swim through his probation until we get to a point where we just kind of wash our hands and be done, I'm not sure that's the message that should be sent . . . There needs to be recompense for this crime.

(9/6/12 Tr., p. 9, L. 25 – p. 10, L. 6.) The prosecutor thus highlighted that any lesser sentence would fail to achieve any of the goals of criminal punishment. In pronouncing sentence, the district court clearly agreed. (9/6/12 Tr., p. 11, L. 6 – p. 12, L. 2.)

The suggestion that not reducing Jorgensen's sentence was an abuse of discretion is wholly unsupported by the record. Jorgensen has not shown that, "under any reasonable view of the facts," his five year sentence with one and a half 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, Jorgensen's sentence must not be disturbed on appeal. Miller, 151 Idaho at 834, 264 P.3d at 941. Accordingly, this Court must deny Jorgensen's argument.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order revoking probation and imposing sentence, as well as the Supreme Court's order denying motion to augment the record.

DATED this 3rd day of June, 2013.



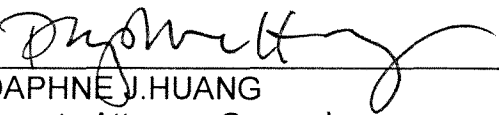
DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of June, 2013, 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.



DAPHNE J. HUANG
Deputy Attorney General

DJH/pm