2-24-2014

State v. Heck Appellant's Reply Brief Dckt. 40678

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. VIRGIL HECK, Defendant-Appellant.	)	NOS. 40678 & 40679 TWIN FALLS COUNTY NO. CR 2011-6207 & CR 2012-4682 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature of the Case

Virgil Heck appeals, asserting that the district court abused its discretion by revoking his probation, or alternatively, by not reducing his sentence when it did so. As part of that appeal, he requested several transcripts be produced and augmented to the record, but the Idaho Supreme Court denied that motion in regard to all but one of the requested transcripts. Mr. Heck asserts that this was also erroneous, violating his state and federal constitutional rights to due process and equal protection.

In regard to the constitutional claim, the State relies on the Idaho Supreme Court's recent decision in *State v. Brunet*, ___ Idaho ___, 316 P.3d 640 (2013), *reh'g denied*. Under that decision, the State argues that Mr. Heck failed to make a colorable showing that the transcripts contain information relevant to the appeal, and that the information presented at the hearings for which transcripts were requested was not part of the record before the district court when it revoked Mr. Heck's probation. However, even under the standard articulated in *Brunet*, the grounds of appeal make out a colorable need for the inclusion of the rider review hearing held on October 25, 2012.[1]

In regard to the improper revocation claim, the State argues that the district court's decisions were reasonable, and that it did consider the mitigating factors in the record. Because this argument is not remarkable, no additional argument on that point is made herein.

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[1] Mr. Heck concedes that, under the standard articulated in *Brunet*, no such showing exists for the May 30, 2012, evidentiary hearing where Mr. Heck admitted the alleged violations. Therefore, he would withdraw that particular argument from consideration.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Heck's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Whether the Idaho Supreme Court denied Mr. Heck due process and equal protection when it denied his renewed 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. Heck's probation or, alternatively, when it executed his sentence without modification when it did so.

ARGUMENT

I.

The Idaho Supreme Court Denied Mr. Heck Due Process And Equal Protection When It Denied His Renewed Motion To Augment The Record With Transcripts Necessary For Review Of The Issues On Appeal

Even under the standard articulated in the Idaho Supreme Court's recent opinion in *Brunet*, the grounds of appeal in this case make out a colorable need for inclusion of the transcript of the October 25, 2012, rider review hearing. The *Brunet* opinion reaffirmed the existing standard of review, which is that, when reviewing decisions such as the decision to relinquish jurisdiction, "this Court conducts an independent review of the *entire* record available to the trial court at sentencing, focusing on the objectives of criminal punishment." *Brunet*, 316 P.3d at 644 (emphasis added) (citing *State v. Pierce*, 150 Idaho 1, 5 (2010)). The Idaho Supreme Court also recognized that there is a federal and state constitutional requirement for the State to provide transcripts sufficient for an adequate appellate review. *See id.* at 643-44 (citing *Mayer v. City of Chicago*, 404 U.S. 189, 195 (1971); *State v. Strand*, 137 Idaho 457, 462 (2002)).

Therefore, the two fundamental themes established in the United States Supreme Court decisions in this regard still control the analysis. The first fundamental theme is that the scope of the due process and equal protection clauses is broad, and the second is that disparate treatment of indigent defendants is not tolerable. As a result, the State must provide an adequate record for appellate review, but that record need not include frivolous or unnecessary materials. *See, e.g., Mayer*, 404 U.S. at 195. Therefore, the rule from *Brunet* is that, in order to show that the transcript requested is necessary for an adequate appellate review, the party moving for its inclusion in the

record "must make out a colorable need for the additional transcripts." *Brunet*, 316 P.3d at 643. That rule does reflect the rule from the United States Supreme Court, but is not exactly the same. In *Mayer*, the United States Supreme Court did not hold that the appellant must show a colorable need; rather, it looked at the "grounds of appeal," (*i.e.*, the record itself), and held that "where the grounds of appeal, as in this case, make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds". *Mayer*, 404 U.S. at 195.

The State, based on the language in *Brunet*, misinterprets the burden in such cases, and erroneously contends that "[Mr.] Heck fails to provide a legal basis for his proposition [that there is a colorable need for the transcript], and only makes self-serving conclusory statements." (Resp. Br., p.9.) Not only does that argument misstate the burdens in this case, *see Mayer*, 404 U.S. at 195, it is also untrue. In his Appellant's Brief, Mr. Heck pointed out that the grounds of appeal in this case make out a colorable need for the transcript of the rider review hearing held on October 25, 2012, based on the rules articulated by the Court of Appeals in *State v. Gervasi*, 138 Idaho 813 (Ct. App. 2003), and *State v. Hansen*, 154 Idaho 882 (Ct. App. 2013), *rev. denied.* (App. Br., pp.12-13.)

In *Gervasi*, the Idaho Court of Appeals found that the defendant needs to have the opportunity to make a statement in allocution because such statements are highly relevant to the district court's sentencing determinations. *Gervasi*, 138 Idaho at 816. *Hansen* clarified *Gervasi*, explaining that, while allocution is important, there is not a constitutionally-protected right to allocute. *Hansen*, 154 Idaho at 887-88. Since rider

review hearings deal with similar concerns as sentencing hearings and the decisions at both hearings are guided by the same factors, the defendant's statements at rider review hearings are highly relevant to the district court's disposition. *See State v. Merwin*, 131 Idaho 642, 648 (1998); *State v. Lee*, 117 Idaho 203, 205 (Ct. App. 1990). Therefore, there is a legal basis for Mr. Heck's request for the transcript of the October 25, 2012, hearing, and the grounds of appeal (erroneous disposition) makes out a colorable need for a transcript of that hearing.

The only other question, then, is whether the evidence provided at that hearing was part of the entire record available to the district court when it subsequently decided to revoke Mr. Heck's probation. *See Brunet*, 316 P.3d at 644; *Pierce*, 150 Idaho at 5. The State contends that the information in the record, such as the information provided in the Presentence Investigation Report (*hereinafter,* PSI) and Addendum to the PSI (*hereinafter,* APSI), constitutes the extent of the record on appeal. (Resp. Br., pp.9-10.) However, that assertion does not address the longstanding and still-viable case law which holds that district court judges are expected to rely on their memories of prior proceedings in a case. *See, e.g., Downing v. State*, 136 Idaho 367, 373-74 (Ct. App. 2001); *see also State v. Wallace*, 98 Idaho 318, 321 (1977); *State v. Sivak*, 105 Idaho 900, 907 (1983); *State v. Gibson*, 106 Idaho 491, 495 (Ct. App. 1984); *State v. Adams*, 115 Idaho 1053, 1055-56 (Ct. App. 1989). Since the same district court judge who relinquished jurisdiction over Mr. Heck also presided over the October 25, 2012, rider review hearing (*compare* R., pp.209, 258), the comments made by Mr. Heck at the October 25, 2012, hearing are part of the record that was available to the district court when it revoked Mr. Heck's probation.

Furthermore, to the State's point that there are other documents which provide relevant information to the district court, such as the APSI, they are not sufficient to provide an alternative record of what Mr. Heck told the district court at the rider review hearing. The minutes of that hearing only indicate that there were "Comments by Defendant." (R., p.209.) Additionally, the APSI reports, "Mr. Heck did not make a statement at the time of his final staffing, but would like to have the opportunity to make a statement directly to his judge." (PSI, p.45.) Therefore, neither the record nor the exhibits attached thereto are sufficient to provide an adequate record upon which this Court could conduct its review of the entire record available to the district court when it revoked Mr. Heck's probation and executed his sentence without modification.[2] *See Brunet*, 316 P.3d at 643; *Mayer*, 404 U.S. at 195. As such, the State has failed to meet its burden to show that only a portion of the transcript or an alternative will suffice to provide an adequate appellate record. *Mayer*, 404 U.S. at 195.

[2] In that same vein, an adequate appellate record is necessary to vindicate Mr. Heck's constitutional right to effective assistance of counsel. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 397 (1985) (relying on *Douglas v. California*, 372 U.S. 353, 355-56 (1963), and *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963)). The State contends that Mr. Heck failed to demonstrate how counsel's performance fell outside the objective standard of reasonableness, and therefore, there was no violation of his right to effective counsel. Given that the objective standard of reasonableness requires appellate counsel to "consider *all* issues that might affect the validity of the judgment of conviction and sentence" and, therefore, appropriately advise on the probable outcome of a challenge to the sentence, *see* American Bar Association's Standards For Criminal Justice, Standard 4-8.3(b) (emphasis added), appellate counsel needs to be able to review the entire record available to the district court, as this Court would on review, in order to provide a professional evaluation of the questions that might be presented on appeal and consider all issues that might have affected the district court's decision to revoke probation, which is now at issue. As such, not providing access to an adequate appellate record also denies Mr. Heck access to effective appellate counsel.

Ultimately, even under the standards articulated in *Brunet*, the decision to deny Mr. Heck's motion to augment the appellate record with the transcript of the October 25, 2012, rider review hearing violated his state and federal constitutional rights to equal protection and due process.

II.

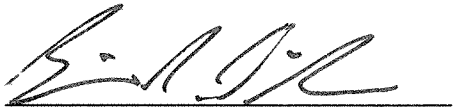
The District Court Abused Its Discretion When It Revoked Mr. Heck's Probation Or, Alternatively, When It Executed His Sentence Without Modification When It Did So

Because the State's argument concerning the district court's decision to revoke Mr. Heck's probation is not remarkable, no further reply is necessary. Accordingly, Mr. Heck simply refers the Court back to pages 22-27 of his Appellant's Brief.

CONCLUSION

Mr. Heck respectfully requests access to the requested transcripts and the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review. In the event this request is denied, Mr. Heck respectfully requests that this Court reduce his sentence as it deems appropriate, or, in the alternative, that it remand the case for a new disposition hearing.

DATED this 24th day of February, 2014.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of February, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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