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State v. Awantaye Respondent's Brief Dckt. 40799

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO, Plaintiff-Respondent, vs. TONYE DAYE AWANTAYE, Defendant-Appellant.	)	No. 40799 Ada Co. Case No. CR-2004-1658

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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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

STATEMENT OF THE CASE

Nature Of The Case

Tonye Daye Awantaye appeals from the district court's revocation of his probation without reduction of his sentence. He also challenges the Idaho Supreme Court's order denying his motion to augment the appellate record.

Statement Of Facts And Course Of Proceedings

Awantaye pled guilty to felony driving under the influence in 2005 and was placed on probation with an underlying five-year unified sentence with three years fixed. (R., pp.130, 136-143.) In 2008, Awantaye admitted six probation violations[1] (R., pp.169-170, 183), and was ordered to participate in the retained jurisdiction ("rider") program (R., pp.187-189). After completing his rider, Awantaye was placed on probation. (R., pp.204-208.) In 2010, Awantaye admitted two probation violations -- consuming and or possessing alcohol, and leaving the state without permission -- and was placed in the rider program for a second time. (R., pp.226-228, 237-239.) Following his second rider, Awantaye was placed on probation a third time, which he was subsequently found to have violated by consuming/possessing alcohol, using a synthetic cannabinoid, twice changing residences without his probation officer's permission, failing to pay the cost of supervision, failing to reimburse Ada County for the services of the Public

[1] Awantaye admitted violating his probation by (1) consuming alcohol, (2) frequenting an establishment (Mr. Lucky's Bar) where alcohol is the main source of income, (3) using marijuana (two separate times), (4) having contact with a person despite the probation officer's lawful request otherwise, and (5) operating a motor vehicle without a license no less than four times. (R., pp.169-170, 183.)

Defender's Office, and using an opiate. (R., pp.270-273, 310-325; see generally 1/16/13 Tr. (evidentiary hearing).) The court revoked Awantaye's probation and imposed his underlying sentence for felony driving under the influence. (R., pp.352-354; see generally 3/12/13 Tr. (dispositional hearing).) Awantaye timely appealed from the order revoking probation and imposing sentence. (R., pp.355-357.)

After the appellate record was settled, Awantaye filed a motion to suspend the briefing schedule and to augment the record with as-yet unprepared transcripts of nine hearings. (6/21/13 Motion.) The state filed an objection, in part, to Awantaye's motion. (6/26/13 Objection.) The Idaho Supreme Court denied Awantaye's motion with regard to eight of the nine requested transcripts. (7/5/13 Order.)

ISSUES

Awantaye states the issues on appeal as:

1. Did the Idaho Supreme Court deny Mr. Awantaye 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 revoked Mr. Awantaye's probation?

3. Did the district court abuse its discretion when it failed to reduce Mr. Awantaye's sentence sua sponte upon revoking probation?

(Appellant's Brief, p.4.)

The state rephrases the issues as:

1. Has Awantaye failed to establish that the Idaho Supreme Court violated his constitutional rights when it denied his motion to augment the appellate record?

2. Has Awantaye failed to establish that the district court abused its discretion by revoking his probation and executing his sentence without reduction after his third probation violation?

ARGUMENT

I.
Awantaye Has Failed To Show Any Constitutional Violation Resulting From The Denial Of His Motion To Augment

A. Introduction

Awantaye contends, that by denying his motion to augment the appellate record with as-yet-unprepared transcripts of various hearings, the Idaho Supreme Court violated his constitutional rights to due process and equal protection and has denied him effective assistance of counsel on appeal. (Appellant's Brief, pp.5-20.) Should this case be assigned to the Idaho Court of Appeals, however, that Court lacks the authority to review the Idaho Supreme Court's decision to deny Awantaye's motion. Further, even if the Idaho Supreme Court's denial of Awantaye's motion is reviewed on appeal, Awantaye has failed to establish a violation of his constitutional rights.

B. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

C. The Idaho Court Of Appeals, Should It Be Assigned This Case, Lacks The Authority To Review The Idaho Supreme Court's Decision

The Idaho Court of Appeals has "disclaim[ed] any authority to review, and, in effect, reverse an Idaho Supreme Court decision made on a motion made prior to assignment of the case to [the Idaho Court of Appeals] on the ground that the Supreme Court decision was contrary to the state or federal constitutions or other law." State v. Morgan, 153 Idaho 618, 620, 288 P.3d 835 (Ct. App. 2012). "Such an undertaking," the Court explained, "would be tantamount to the Court of Appeals entertaining an 'appeal' from an Idaho Supreme Court decision and is plainly beyond the purview of this Court." Id. However, the Idaho Court of Appeals did leave open the possibility of review of such motions in some circumstances. Id. Such circumstances may occur, the Court indicated, where "the completed appellant's and/or respondent's briefs have refined, clarified, or expanded issues on appeal in such a way as to demonstrate the need for additional records or transcripts, or where new evidence is presented to support a renewed motion." Id.

Should the Idaho Court of Appeals be assigned this case, it lacks the authority to review the Idaho Supreme Court's order. Awantaye has failed to demonstrate the need for additional transcripts, and he has not presented any evidence to support a renewed motion to augment the record. The arguments Awantaye advances on appeal as to why the record should be augmented with the transcripts at issue constitute essentially the same arguments he presented to the Idaho Supreme Court in his motion – *i.e.*, that the scope of appellate

review of a sentence requires consideration of such and that his constitutional rights will be violated without the transcripts. (Compare Motion with Appellant's Brief, pp.5-20.)

Because the Idaho Court of Appeals lacks the authority to review, and in effect, reverse a decision of the Idaho Supreme Court, and because Awantaye has failed to provide any new evidence or clarification in his Appellant's Brief that would permit the Idaho Court of Appeals to do so, the Idaho Court of Appeals must decline, if it is assigned this case, to review the Idaho Supreme Court's denial of Awantaye's motion to augment the record.

D. Even If This Court Reviews The Merits Of Awantaye's Argument, Awantaye Has Failed To Show The Idaho Supreme Court Violated His Constitutional Rights

To the extent this Court considers the merits of Awantaye's constitutional claims, all of his arguments fail. Awantaye claims the failure to provide the transcripts is a violation of his constitutional rights to due process, equal protection, and the effective assistance of appellate counsel. (Appellant's Brief, pp.5-20.) The Idaho Supreme Court recently considered and rejected the same arguments in State v. Brunet, ___ Idaho ___. 316 P.3d 640 (2013) (rehearing denied 1/29/14).

In Brunet, the Court stated: "When an indigent defendant requests that transcripts be created and incorporated into a record on appeal, the grounds of the appeal must make out a colorable need for the additional transcripts." ___ Idaho at ___, 316 P.3d at 643 (citing Mayer v. City of Chicago, 404 U.S. 189, 195

(1971)). "[C]olorable need is a matter of law determined by the court based upon the facts exhibited." Id. In order to show a colorable need, an appellant must show "the requested transcripts contained specific information relevant to [the] appeal." Id. "[H]ypothesiz[ing] that the lack of . . . transcripts could prevent [the appellant] from determining whether there were additional issues to raise, or whether there was factual information contained in the transcripts that might relate to his arguments" does not demonstrate a "colorable need." Id. In other words, an appellant is not entitled to transcripts in order to "search the transcripts for a reason to request and incorporate the transcripts in the first place." Id. Such an endeavor is a "'fishing expedition' at taxpayer expense" – an exercise the constitution does not endorse. Id. In short, "[m]ere speculation or hope that something exists does not amount to the appearance or semblance of specific information necessary to establish a colorable need." Id.

Awantaye argues the transcripts from his change of plea hearing held on May 10, 2005, the sentencing hearing held on July 14, 2005, the probation violation proceedings held on January 8, 2009, the probation violation hearing held on February 13, 2009, the rider review hearing held on July 24, 2009, the probation violation hearing held on August 6, 2010, and the probation hearing held on September 8, 2010 are relevant, regardless of whether they have been prepared or not, because "a district court is not limited to considering only that information offered at the hearing from which the appeal was filed" but rather "the applicable standard of review requires an independent and comprehensive inquiry into the events which occurred prior to, as well as the events which

occurred during, the probation revocation proceedings." (Appellant's Brief, pp.14-16.) Although the appellate court's review of a sentence is independent, as noted in Brunet, the review is limited to the "entire record available to the trial court at sentencing." ___ Idaho at ___, 316 P.3d at 644 (citing State v. Pierce, 150 Idaho 1, 5, 244 P.3d 145, 149 (2010)). As in Brunet, the record in this case contains the relevant sentencing materials, including the original presentence report, with attachments, prepared in February 2009. (See generally PSI.) It also includes all of the reports of probation violation (R., pp.163-171, 226-228, 252-254, 270-278), as well as the minutes of all the hearings for which Awantaye desires a transcript (R., pp.129-130, 133-134, 185-186, 201-202, 234-236). In addition, the court orders that issued as a result of each hearing are included in the record. (R., pp.136-143, 187-189, 204-208, 237-239, 248-251, 310-325, 352-354.) "Therefore, the entire record available to the trial court at sentencing is contained within the record on appeal." Brunet, ___ Idaho at ___, 316 P.3d at 644. As such, Awantaye "has failed to demonstrate that he was denied due process or equal protection by this Court's refusal to order the creation of transcripts at taxpayer expense in order to augment the record on appeal." Id.

Despite the availability of the court minutes and prior sentencing materials, Awantaye suggests this is inadequate, complaining that "[t]o ignore the positive factors that were present at the previous hearings," which resulted in multiple periods of probation, "presents a negative, one-sided view of [him]" and prevents him "from addressing those positive factors in support of his appellate sentencing claims." (Appellant's Brief, p.17.) Awantaye, however, fails to explain why that

information cannot be derived from the available record or, if such factors existed, why they should not have been presented to the court at the final disposition hearing (assuming they were not presented, which is unlikely). Regardless, this argument is representative of the sort of fishing expedition the Court in Brunet said was improper.

Awantaye next argues that "effective counsel cannot be given in the absence of access to the relevant transcripts." (Appellant's Brief, p.20.) This argument also fails. Addressing the claim that "refusal to order the creation of the requested transcripts for incorporation into the record" results in the "prospective[ ]" denial of the effective assistance of counsel, the Court in Brunet concluded Brunet "failed to demonstrate how his counsel's performance fell below an objective standard of reasonableness without the requested transcripts," noting "the entire record available to the trial court at sentencing is contained within the record on appeal." Brunet, ___ Idaho at ___ 316 P.3d at 644. The same is true in this case. "This record meets [Awantaye's] right to a record sufficient to afford adequate and effective appellate review." Id. As such, Awantaye has failed to show a Sixth Amendment violation based on the denial of his motion to augment.

Because Awantaye failed to show a "colorable need" for any of the transcripts he was denied, assuming this Court addresses his claims that the denial of his motion to augment with those transcripts violated his constitutional rights, his claims fail.

II.
Awantaye Has Failed To Establish That The District Court Abused Its Discretion By Revoking His Probation And Executing His Sentence Without Reduction

A. Introduction

Awantaye contends that the district court abused its discretion by revoking his probation and ordering his underlying sentences executed without reduction. (Appellant's Brief, pp.20-25.) Awantaye has failed to establish an abuse of discretion because the record supports the court's sentencing decisions.

B. Standard Of Review

"A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion." State v. Morgan, 153 Idaho 618, ___, 288 P.3d 835, 839 (Ct. App. 2012).

C. The District Court Acted Within Its Sentencing Discretion

A trial court has discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2603, 20-222; State v. Beckett, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); State v. Adams, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989). In determining whether to revoke probation, a court must examine whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society. State v. Upton, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); Beckett, 122 Idaho at 325, 834 P.2d at 327.

Upon revoking a defendant's probation, a court may order the original sentence executed or reduce the sentence as authorized by Idaho Criminal Rule

35. State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 7 (Ct. App. 2009) (citing Beckett, 122 Idaho at 326, 834 P.2d at 328; State v. Marks, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989)). 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. Hanington, 148 Idaho at 28, 218 P.3d at 7. 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). The reviewing court "will examine the entire record encompassing events before and after the original judgment," i.e., "facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." Hanington, 148 Idaho at 29, 218 P.3d at 8.

In this case, the district court's decision to revoke Awantaye's probation was reasonable in light of Awantaye's continuous failure to abide by the terms of his supervision despite multiple opportunities. The district court's decision not to *sua sponte* reduce Awantaye's sentence was also reasonable in light of these failures on probation.

Awantaye's participation in supervised probation was not successful, as he clearly did not taken probation seriously. After the district court revoked

Awantaye's initial probation and elected to retain jurisdiction, Awantaye performed well under the structured and restrictive environment of the retained jurisdiction program. (See PSI, 6/15/09 NICI Addendum to PSI.) The district court's order suspending sentence and reinstating probation stated, in part:

> The Defendant has had prior opportunities for probation. The Defendant is advised that this is his/her final opportunity at probation. Failure to abide by the conditions of probation resulting in a motion for probation violation, will, if proven or admitted, be considered a violation of a fundamental condition of probation which will result in imposition of the underlying sentence.

(R., p.205 (emphasis original).)

About one year later, Awantaye admitted violating his probation by consuming and/or possessing alcohol, and leaving the state without permission, but was given the benefit of being placed in the rider program a second time. (R., pp.226-228, 237-239.) Under the structured environment of the rider program's Correctional Alternative Placement Program ("CAPP"), Awantaye performed very well, completing a variety of programs, and earning a "probation" recommendation. (PSI, 11/15/10 Addendum to PSI.) The district court placed Awantaye on probation a third time, but after probation violation allegations were filed, the court determined at an evidentiary hearing that he violated probation by consuming and/or possessing alcohol, using a synthetic cannabinoid, changing residences (twice) without permission, failing to pay the cost of supervision, failing to reimburse Ada County for the services of the Public Defender's Office, and using an opiate. (R., pp.270-273, 310-325; see generally 1/16/13 Tr. (evidentiary hearing).) At the end of the dispositional hearing, the court revoked

Awantaye's probation and imposed his underlying sentence of five years with three years fixed for felony driving under the influence, explaining:

> I have considered the nature of the offense and character of the offender. I have considered mitigating and aggravating factors and the objectives of protecting society and achieving deterrence, rehabilitation and retribution or punishment.
>
> Mr. Awantaye, condition five of your probation is clear. The defendant has had prior opportunities for probation. The defendant is advised this is his final opportunity at probation. Failure to abide by the conditions of probation resulting in a motion for probation violation will if proven or admitted be considered a violation of a fundamental condition of probation which will result in the imposition of the underlying sentence.
>
> As [defense counsel] pointed out, I backed away from that condition once. I am not going to back away from it again. You were advised precisely what would happen in the event you violated your probation again. And in this case after a full hearing, the Court has determined that you have in fact violated your probation in several respects.
>
> As a result the Court feels that it is appropriate to impose sentence.

(3/12/13 Tr., p.15, L.2 - p.16, L.5.)

In light of Awantaye's persistent failures to abide by the terms of his three separate probation periods, he cannot show that the district court abused its discretion in revoking his probation, regardless of whether the probation officer knew Awantaye had four children that he had to financially support. (See Appellant's Brief, pp.21-22.) Also, Awantaye's contention that he was never notified he had to pay public defender costs (see id., p.22) has no relevance to the disposition of the case without a challenge to the district court's factual finding otherwise. (See R., p.320 ("he had actual knowledge of his obligation by virtue of

the Judgment entered by the Court on September 8, 2010").) Further, Awantaye's willingness to violate probation appears to have escalated to the point that he violated his most recent (i.e., third) probation in seven ways. Probation was obviously not working for Awantaye.

Awantaye has not shown that he was entitled to a *sua sponte* reduction of his sentence. In support of his claim to the contrary, Awantaye essentially relies on facts long known by the district court -- he was a high school graduate with over a year of college, he was a good employee, he performed well in the rider program, he had good family support, and he exhibited positive parenting capabilities. (Appellant's Brief, pp.23-25.) As laudable as those factors are, for the reasons already stated, they did not provide Awantaye enough incentive to comply with the terms of his probation. Given Awantaye's multiple failures to succeed on probation, there is no basis for concluding the district court erred in failing to *sua sponte* reduce his sentence upon revoking probation.

In sum, the district court considered all of the relevant information and reasonably determined Awantaye was no longer a viable candidate for community supervision. Awantaye's demonstrated inability or unwillingness to comply with the law and the terms of his probation, did not entitle him to reinstatement on probation or to a reduction of his underlying sentence. Awantaye has failed to establish that the district court abused its discretion in revoking his probation, or that its sentence as imposed is excessive under any reasonable view of the facts.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order revoking Awantaye's probation and ordering his sentence executed, and hold Awantaye's rights were not violated by the denial of his motion to augment.

DATED this 4th day of March, 2014.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of March, 2014, 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.

John C. McKinney
Deputy Attorney General

JCM/pm