

3-4-2015

State v. Komen Respondent's Brief Dckt. 41916

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Komen Respondent's Brief Dckt. 41916" (2015). *Not Reported*. 1850.
https://digitalcommons.law.uidaho.edu/not_reported/1850

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 WILLIAM DEE VAN KOMEN JR.,)
)
 Defendant-Appellant.)
)
 _____)

No. 41916

Kootenai Co. Case No.
CR-2009-19831

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

**HONORABLE JOHN T. MITCHELL
District Judge**

**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**JUSTIN M. CURTIS
Deputy State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712**

**PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division**

**NICOLE L. SCHAFER
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**

**ATTORNEYS FOR
PLAINTIFF-RESPONDENT**

**ATTORNEY FOR
DEFENDANT-APPELLANT**

FILED - COPY
MAR - 4 2015
Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature Of The Case	1
Statement Of Facts And Course Of Proceedings	1
ISSUE	3
ARGUMENT	4
Van Komen Has Failed To Establish A Violation Of His Fifth Amendment Rights.....	4
A. Introduction.....	4
B. Standard Of Review	4
C. The District Court Acted Well Within Its Sentencing Discretion In Relinquishing Jurisdiction	4
CONCLUSION.....	11
CERTIFICATE OF SERVICE.....	12

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Garner v. U.S.</u> , 424 U.S. 648 (1976).....	8
<u>Minnesota v. Murphy</u> , 465 U.S. 420 (1984)	7, 8, 9
<u>State v. Chapel</u> , 107 Idaho 193, 687 P.2d 583 (Ct. App. 1984).....	5
<u>State v. Crowe</u> , 131 Idaho 109, 952 P.2d 1245 (1998).....	7, 8, 9
<u>State v. Farwell</u> , 144 Idaho 732, 170 P.3d 397 (2007)	4
<u>State v. Hood</u> , 102 Idaho 711, 639 P.2d 9 (1981)	4
<u>State v. Josephson</u> , 125 Idaho 119, 867 P.2d 993 (Ct. App. 1993).....	7
<u>State v. Lee</u> , 117 Idaho 203, 786 P.2d 594 (Ct. App. 1990).....	5

STATEMENT OF THE CASE

Nature Of The Case

William Dee Van Komen Jr. appeals from the district court's order relinquishing jurisdiction. Van Komen contends the district court violated his Fifth Amendment right against self-incrimination by relinquishing jurisdiction subsequent to Van Komen's refusal to take a polygraph exam.

Statement Of Facts And Course Of Proceedings

Van Komen pled guilty to possession of a controlled substance with the intent to deliver. (R., pp.103-117.) The court sentenced him to a five-year unified sentence with two years fixed and three years indeterminate and retained jurisdiction for up to 180 days. (R., pp.117-120.) After Van Komen successfully completed his period of retained jurisdiction, the court placed him on a five-year period of probation. (R., pp.133-134.) A little over two years into Van Komen's probationary period, the court found Van Komen in violation but continued him on probation. (R., pp.156-167.)

Some sixth months after being reinstated on probation, the state once again asserted Van Komen was in violation of the terms of his probation. (R., pp.173-179.) Van Komen admitted to being in violation of his probation by having a relationship with a 16-year old girl on juvenile probation and by failing to submit to multiple drug tests. (R., p.173; Tr., p.7, Ls.13-19.) The court revoked Van Komen's probation and retained jurisdiction for up to 365 days, once again giving him the opportunity to prove himself ready for probation. (R., pp.195-198; Tr., p.17, Ls.5-13.)

In retaining jurisdiction for the second time, the court advised Van Komen that he did not have enough information about his conduct while on probation and ordered him to obtain a polygraph examination on the nature of his relationship with the minor as well as his sobriety. (Tr., p.17, L.12 – p.18, L.8.) Van Komen agreed to “the polygraph arrangement” and was transported for his period of retained jurisdiction. (Tr., p.18, Ls.16-25.)

Van Komen appeared before the court upon the completion of his second period of retained jurisdiction. In response to the court’s inquiry regarding the previously ordered polygraph, Van Komen, through his attorney, asserted his Fifth Amendment right and refused to obtain one:

[I]n regards to any potential crime, uh, regarding some contact with the individual who I believe is a minor, I would advise him to assert his Fifth Amendment right as to that, but as to the drug usage I don’t think there would be a problem in that regard.

(Tr., p.24, Ls.16-20.)

The court, concerned with Van Komen’s inability to “comply with orders” and “comply with the law,” imposed sentence after finding it could not trust Van Komen’s word and could not ensure the safety of the public by again placing Van Komen on probation. (Tr., p.28, Ls.1-16.) Van Komen timely appealed. (R., pp.204-207, 216-217.)

ISSUE

Van Komen states the issue on appeal as:

Did the district court abuse its discretion when it relinquished jurisdiction because it violated Mr. Van Komen's Fifth Amendment rights?

The state rephrases the issue on appeal as:

Has Van Komen failed to demonstrate that consideration of his refusal to participate in a polygraph, as ordered by the court, in relation to whether to relinquish jurisdiction violated his Fifth Amendment rights?

ARGUMENT

Van Komen Has Failed To Establish A Violation Of His Fifth Amendment Rights

A. Introduction

Van Komen argues that the court's relinquishment of jurisdiction was an abuse of its discretion "because it did so in violation of [his] Fifth Amendment rights." (Appellant's brief, p.5.) As part of his argument, Van Komen also contends the district court abused its discretion by imposing the sentence as a punishment for Van Komen's refusal to participate in a polygraph examination before coming back to court on his retained jurisdiction review. (Id., p.8.) Van Komen's arguments fail. Even assuming the district court considered Van Komen's refusal to submit to a polygraph in relinquishing jurisdiction, such did not implicate his Fifth Amendment rights. Van Komen has failed to establish an abuse of discretion.

B. Standard Of Review

When a sentence is within statutory limits, the appellate court will review only for an abuse of discretion. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). The appellant bears the burden of demonstrating that the sentencing court abused its discretion. Id.

C. The District Court Acted Well Within Its Sentencing Discretion In Relinquishing Jurisdiction

The decision to relinquish jurisdiction is a matter within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of that discretion. See State v. Hood, 102 Idaho 711, 712, 639 P.2d 9, 10

(1981); State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). A court's decision to relinquish jurisdiction will not be deemed an abuse of discretion if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate under I.C. § 19-2521. State v. Chapel, 107 Idaho 193, 194, 687 P.2d 583, 584 (Ct. App. 1984). Contrary to Van Komen's assertions on appeal, a review of the record in this case supports the district court's determination that Van Komen was not a suitable candidate for a third chance on probation, particularly in light of his ongoing failure to be truthful with the court and his potential threat to the community. (Tr., p.27, L.4 – p.28, L.19.)

Prior to being sentenced to his second period of retained jurisdiction, Van Komen admitted to being in violation of his probation by "having a relationship with a 16-year-old girl on probation" (R., p.173) and by failing to report to drug testing "on multiple dates" (Id.). Although Van Komen's probation officer described Van Komen's relationship with A.O. as "romantic" (R., p.169) and one where Van Komen "knowingly carried on a relationship with a 16-year-old girl involving her in sexual activity and drugs" (R., p.174), Van Komen advised the court he did not have sex with A.O. (Tr., p.11, Ls.22-23). Additionally, Van Komen advised the court he was "clean" (Tr., p.10, L.16) and had "made bad decisions" by not "go[ing] to [his] drug tests" (Tr., p.10, Ls.21-22).

Concerned with Van Komen's truthfulness at sentencing, the court ordered him to obtain a polygraph examination on specific issues prior to the review of his period of retained jurisdiction:

I'm going to order that you be polygraphed on that issue, whether there's been any drug use or alcohol use since March 28th, 2013, and I'm going to order that you be polygraphed as to whether or not you had sexual activity of any kind with [A.O.]. If you test deceptive as to either of those things, then I will likely impose the prison sentence, have you serve the rest of your time in prison regardless of whether you do well on the rider. If you want to change your story, now would be the time to do it. If you test deceptive after this on either of those two questions, I'll send you to prison.

(Tr., p.17, L.22 – p.18, L.8.) Van Komen “agree[d] to the polygraph arrangement.” (Tr., p.18, Ls.16-17.)

At his retained jurisdiction review hearing, Van Komen asserted his Fifth Amendment right as the reason for failing to obtain a polygraph exam on the issue of the nature of his relationship with A.O. and indicated that he was unable to obtain an exam while incarcerated on the issue of drug use. (Tr., p.24, L.12 – p.25, L.5.) The court continued to be concerned with Van Komen's truthfulness, especially in light of an allegation that he was attempting to contact a minor female while serving his period of retained jurisdiction. (Tr., p.25, L.6 – p.26, L.9.)

Van Komen has failed to establish any constitutional infirmity in the district court's decision to relinquish jurisdiction, in lieu of placing Van Komen on probation, because Van Komen declined the court's requirement that he obtain a polygraph exam in order to establish his truthfulness and readiness for probation. Van Komen argues the polygraph requirement was unconstitutional because it would have required a waiver of his Fifth Amendment rights and any agreement to take the polygraph came “only after the court announced its intention to punish Mr. Van Komen if he did not participate in the polygraph.” (Appellant's

brief, p.7.) Contrary to Van Komen's assertions, the fact that the court gave him the choice of waiving his Fifth Amendment privilege and taking a polygraph or being subject to his underlying prison sentence instead of being granted another shot at probation did not violate his constitutional rights.

As an initial matter, it bears noting that Idaho's appellate courts have already upheld conditions of probation that require a waiver of constitutional rights. As long as the condition is reasonably related to the purpose of probation, a court may require as a condition of probation that the defendant waive his or her Fourth Amendment rights. State v. Josephson, 125 Idaho 119, 122-23, 867 P.2d 993, 996-97 (Ct. App. 1993). There is no reasoned basis why this same principle would not apply to Fifth Amendment waivers. Here, the purpose of the exam was to gauge Van Komen's truthfulness to the court in determining if he was a good candidate for probation.

In addition, it is well settled that the Fifth Amendment is not violated merely because a state insists as a condition of probation on compelling answers to incriminating questions. Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984); State v. Crowe, 131 Idaho 109, 952 P.2d 1245 (1998). The defendant in Crowe pled guilty to sexual abuse of a minor and was placed on probation, the terms of which required him to, *inter alia*, complete a specialized sex offender therapy program, submit to polygraph examinations at the request of either his probation officer or his sex offender therapist, and report any contact with minor children. Crowe, 131 Idaho at 110-11, 952 P.2d at 1246-47. Crowe subsequently failed a polygraph examination and, at the request of his therapist, made verbal and

written admissions to his probation officer to having unsupervised and sexually inappropriate contact with his 10-year-old niece. Id. at 111, 952 P.2d at 1247. Based on Crowe's admissions, the district court revoked Crowe's probation and ordered his sentence executed. Id.

On appeal from the order revoking his probation Crowe argued that the use against him of the compelled statements that were required as a condition of his probation violated his Fifth Amendment rights. Id. at 112, 952 P.2d at 1248. Specifically, he argued "that his statements to his counselor should be suppressed because the questions posed to him forced him to answer or to be punished as a probation violation for asserting his privilege against self-incrimination," thus forcing him into a "classic penalty" situation. Id. Citing Murphy, supra, the Idaho Supreme Court rejected Crowe's argument, noting as an initial matter that the Fifth Amendment privilege against self-incrimination is ordinarily subject to waiver merely by the failure to invoke it. Crowe, 131 Idaho at 112, 952 P.2d at 1248 (citing Murphy, 465 U.S. at 427-28; Garner v. U.S., 424 U.S. 648, 654 (1976)). An exception applies "if the State compels an individual to forego the Fifth Amendment privilege by a threat to impose a penalty if the privilege is invoked"; but that exception is limited "to situations in which the statement obtained was to be used in a subsequent criminal proceeding." Id. (citing Murphy, 465 U.S. at 434). "[A] State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." Id. (quoting Murphy,

465 U.S. at 436 n.7 (brackets original)). Because Crowe's statements were used against him in a probation revocation proceeding, and not in a separate criminal proceeding, Crowe was not subject to any new or different penalty and the use of the statements did not violate Crowe's Fifth Amendment rights. Id.

Van Komen argues the court "announced its intention to punish [him] if he did not participate in the polygraph." (Appellant's brief, p.7.) As made clear by the *both* the United States Supreme Court in Murphy and the Idaho Supreme Court in Crowe, however, a penalty situation arises only when the state seeks to use statements compelled as a condition of probation against the probationer in a different criminal proceeding. Murphy, 465 U.S. at 436 n.7; Crowe, 131 Idaho at 112, 952 P.2d at 1248. Although the Fifth Amendment would have precluded use of any Van Komen's incriminating statements in subsequent criminal proceedings, it did not preclude appropriate evaluations as a condition to determine if Van Komen was a candidate for probation.

Before ordering the polygraph, the district court noted Van Komen's history of not being truthful with the court and provided him with the opportunity to provide the court with a complete version of his violations or to obtain a polygraph examination on the issues prior to the granting of probation. (Tr., p.17, L.5 – p.18, L.9.) That Van Komen ultimately declined the opportunity to "come clean" with the court in favor of a prison sentence does not establish a violation of Van Komen's Fifth Amendment rights. Van Komen has failed to show any illegality in either the relinquishment of the court's jurisdiction and imposition of sentence or manner in which that sentence was imposed.

Finally, the court relinquished jurisdiction, not as a punishment for exercising his Fifth Amendment right as Van Komen claims (Appellant's brief, p.8), but for his history of untruthfulness and his potential threat to the public:

The reason that I am revoking your probation is you haven't done what I ordered you to do when I sent you on a rider, and that was to get a polygraph evaluation to assess both the truthfulness of no alcohol or drugs after March 28th, 2013, and the extent of any sexual activity with [A.O.].

Compounding the problem is the fact that you haven't corrected the allegation, and I've read it twice now, I'm not gonna [sic] read it a third time, communicating with a minor female, and there is no reason for me to disbelieve the Department of Corrections. There's no reason – in the report and there's no reason for me to disregard or disbelieve the C Note which reads, talked to the defendant with the, I assume the lieutenant about his contact with underage girl, among other concerns. During the meeting defendant was given a direct order by both his CM and the lieutenant that he was not to attempt to have any contact by phone or mail with this underage girl. Defendant stated he understood. This is conduct that's directly related to what you were violated on your probation for. It's conduct that occurred only a month ago.

It does not appear to me that you made any progress as far as your ability to comply with my orders, comply with the law. I don't think we've made any progress on this rider. This is your second CAPP rider. You knew what to expect as far as honesty, and you've let me down. I've known you since 2010. It's been four years, but there are – there's lies during the arrest, there's lies during the presentence interview, there are lies about your drug court performance, there were lies in drug court. There have been nothing but lies, and I charged you with getting a polygraph to convince me that you either were telling the truth or ferret out the truth, and you didn't do it, and that's – those are all decisions that you're responsible for, and so I can't put you on probation. I don't think I can protect the public. I don't think I can protect [A.O.].

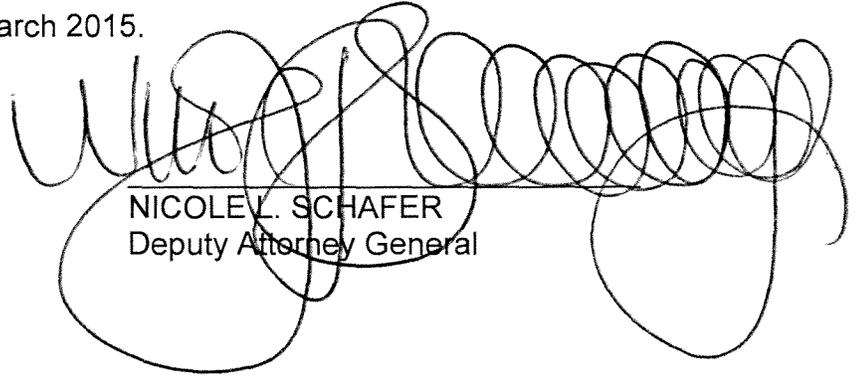
You indicated to me, to your prior probation officer that you're really not all that interested in following the rules of probation.

(Tr., p.27, L.4 – p.28, L.19.)

CONCLUSION

The state respectfully requests that this Court affirm the judgment and sentence entered upon the district court's relinquishment of jurisdiction following Van Komen's second period of retained jurisdiction.

DATED this 4th day of March 2015.



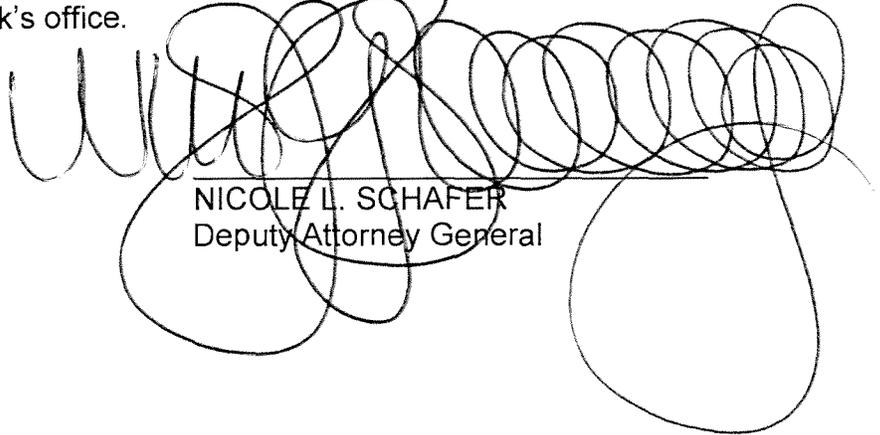
NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of March 2015, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JUSTIN M. CURTIS
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.



NICOLE L. SCHAFER
Deputy Attorney General