4-6-2009

State v. Rogers Respondent's Brief Dckt. 35128

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 35128
	)	
vs.	)	
	)	
PAUL LAWRENCE ROGERS, JR.,	)	
	)	
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

Paul Lawrence Rogers, Jr., appeals from his dismissal from the drug-court program and subsequent imposition and execution of sentence.

Statement of the Facts and Course of the Proceedings

The Idaho Supreme Court stated the facts and procedure as follows:

> On February 24, 2003, Rogers was charged with possession of methamphetamine and driving without privileges. Rogers reached a plea agreement with the State, wherein the State agreed to drop the charge of driving without privileges and charges for burglary and attempted grand theft in an unrelated case, in return for Rogers pleading guilty to the possession charge. The State additionally agreed to dismiss the case altogether if Rogers successfully completed the Ada County Drug Court Program (ACDCP). Pursuant to the plea agreement Rogers pleaded guilty to possession of methamphetamine and entered into a Phase I contract for drug court on February 11, 2004. The district court judge, the Honorable Michael McLaughlin, then transferred jurisdiction over Rogers to the drug court.
>
> During Rogers's participation in ACDCP he violated various rules and was sanctioned twice. After these initial violations of the drug court program's rules Rogers seemed to improve markedly and even earned praise of his performance from the drug court judge on May 12, 2004, and May 26, 2004. However, on June 30, 2004, the drug court judge, the Honorable Ronald Wilper, confronted Rogers with information suggesting Rogers had been attempting to solicit fellow drug court participants to enter into a prostitution or "adult entertainment business."
>
> At a hearing on July 14, 2004, Judge Wilper terminated Rogers from the drug court program.

State v. Rogers, 144 Idaho 738, 739-40, 170 P.3d 881, 882-83 (2007) (footnote omitted). The Court reversed Rogers' judgment, concluding that he had not been

provided due process in his termination from the drug court program. Id. at 740-43, 170 P.3d at 883-86.

On remand, Rogers was provided an evidentiary hearing on the state's allegations of violating drug court requirements. (Tr., pp. 33-184; "Motion for Discharge from Drug Court" (Augmentation).) After taking evidence, the district court found that Rogers had violated drug court requirements by:

1. Failing to attend the orientation on February 23, 2004;
2. Failing to provide a urinalysis test (hereinafter "UA") on February 23, 2004;
3. Using a controlled substance on or about February 24, 2004;
4. Using a controlled substance on or about February 25, 2004;
5. Using a controlled substance on or about March 29, 2004;
6. Presenting an adulterated urine sample for testing on March 29, 2004;
7. Failing to attend group counseling on March 29, 2004;
8. Failing to attend group counseling on March 30, 2004;
9. Failing to attend group counseling on March 31, 2004;
10. Using Methamphetamine on or about April 1, 2004;
11. Failing to report for a UA on April 3, 2004;
12. Failing to report for a UA on April 4, 2004;
13. Failing to report for a UA on April 5, 2004;
14. Failing to contact his mentor;
15. Soliciting other drug court members to work for him in an adult entertainment business;

16. Failing to inform a doctor that he was a drug addict when he obtained medication; and

17. Failing to pay his program fees.

(Tr., p. 179, L. 6 – p. 184, L. 11; see also Tr., p. 37, L. 24 – p. 38, L. 8 (setting forth "allegation number 17," related to obtaining medication from a doctor, as later referenced by the district court in its ruling).) The court then entered judgment, sentenced Rogers to five years with one year determinate, suspended the sentence, and placed Rogers on probation expiring October 1, 2009. (R., pp. 30-34.) Rogers filed a timely appeal from the judgment. (R., pp. 38-40.)

ISSUES

Rogers states the issues on appeal as:

> 1. Is there sufficient evidence to support the district court's finding that Mr. Rogers violated the drug court rules by "soliciting drug court participants to work in an adult entertainment business?"
>
> 2. Did the district court abuse its discretion when it terminated Mr. Rogers' participation in drug court?

(Appellant's brief, p. 17.)

The state rephrases the issues as:

1. In making his claim that the court lacked sufficient evidence for its finding that Rogers violated drug court rules when he solicited other drug court participants to work at his adult entertainment business, Rogers relies upon evidence never presented to the district court and ignores the evidence actually presented. Should this Court decline to accept new evidence and further decline to weigh that evidence against the evidence presented to the district court?

2. The district court found seventeen violations of the drug court program. Has Rogers failed to demonstrate that the district court abused its discretion in terminating him from the drug court program?

ARGUMENT

I.
Rogers' Claim Of Insufficient Evidence To Support The Finding That Rogers Violated Rules By Recruiting Fellow Drug Court Participants To Work For His "Adult Entertainment" Business Is Without Merit

A. Introduction

The district court found that Rogers solicited drug court participants to work in an adult entertainment business called "Desires, Inc.," which was a violation of the drug court rules. (Tr., p. 180, L. 20 – p. 181, L. 18.) On appeal Rogers asserts, relying on evidence never presented to the district court, that there was no prohibition against him soliciting other drug court participants to work for him in the adult entertainment business he wanted to start. (Appellant's brief, pp. 19-20.) Rogers' argument is without merit because it requests this Court on appeal to accept new evidence and to ultimately deem the new evidence more credible than the evidence actually presented to the district court.

B. Standard Of Review

Where the district court conducts a hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous. Mitchell v. State, 132 Idaho 274, 276-277, 971 P.2d 727, 729-730 (1998). "Thus, a factual finding that a probation violation has been proven will be upheld on appeal if there is substantial evidence in the record to support the finding." State v. Egersdorf, 126 Idaho 684, 686, 889 P.2d 118, 120 (Ct. App. 1995).

C. The Factual Findings Of The District Court Are Supported By Substantial Evidence In The Record

The district court found that Rogers had violated "Condition No. 13," which proscribed drug court participants from being employed by other drug court participants, by offering at least one other drug court participant a job at "Desires, Inc.," an adult entertainment company he was trying to start. (Tr., p. 180, L. 20 – p. 181, L. 18.) A review of the record shows substantial evidence supporting this finding of fact.

At the hearing the state presented the testimony of Maureen Baker-Burton, the Ada County Drug Court Coordinator. (Tr., p. 47, L. 13 – p. 49, L. 1.) As part of her duties she would participate in "staffings" with the treatment staff and probation officers, which would sometimes also include the drug court participants. (Tr., p. 67, Ls. 6-22.) At one such staffing she and others confronted Rogers with information that he had been contacting drug court participants and passing out business cards for a company called "Desires, Inc." (Tr., p. 67, L. 23 – p. 68, L. 23; State's Exhibit 6.) Rogers admitted passing out the cards and talking to others at drug court about the business. (Tr., p. 68, Ls. 14-20.) He explained that the business was to provide escorts, dancers and strippers, but not prostitutes. (Tr., p. 68, L. 24 – p. 70, L. 11.) Ms. Baker-Burton explained that such a business and environment was harmful to participants in drug court, and that this was explained in both orientation and in groups. (Tr., p. 70, L. 12 – p. 72, L. 3.) She also explained that the program did not allow drug

court participants to work together because that is harmful to the treatment. (Tr., p. 72, Ls. 4-21.)

Ms. Baker-Burton explained that the September 2002 drug court handbook was in effect at the time Rogers was in the program. (Tr., p. 81, Ls. 9-19.) She read part of that handbook in court: "'Condition Number 13: Participants may not be employed by other drug court participants,' on page 4." (Tr., p. 84, Ls. 13-20.)

The state also presented evidence that Rogers admitted offering fellow drug court participant Dana Smith a "front office job" at the escort business. (State's Exhibit 4; see also Tr., p. 104, L. 1 – p. 113, L. 22.)

Rogers testified and acknowledged that he had business cards made up for "Desire, Inc." with the intent of starting an adult entertainment business, and that he gave the cards to others in drug court, but claimed he did this just so they would have his phone number. (Tr., p. 123, L. 15 – p. 128, L. 12.) He denied ever asking anyone in drug court to be an escort, but admitted he talked to Dana Smith about an office job. (Tr., p. 128, L. 13 – p. 129, L. 7; p. 134, L. 11 – p. 135, L. 5; see also p. 144, L. 7 - p. 146, L. 15.) He also admitted reading the handbook, including the part about drug court participants not being employed by other drug court participants. (Tr., p. 131, L. 13 – p. 132, L. 4; see also, State's Exhibit 1, p. 6 (question, "Have you received and reviewed a copy of the Drug Court Participant Handbook?" marked "Yes").)

This evidence before the district court supports its factual findings. The evidence shows that Rogers was trying to start an escort service, that he talked

to more than one fellow drug court participant about the business, and, by his own admission, offered at least one an actual job in the business.

Rogers does not dispute that the evidence allowed the district court to find that he solicited drug court participants to work at his adult entertainment business. (Appellant's brief, p. 19.) He does claim, however, that there was no "Condition No. 13" in the handbook. (Appellant's brief, pp. 19-20.) In doing so, he cites to a February 2002 version of the drug court handbook (Id.), which is evidence never presented to the district court.

"It is axiomatic that an appellate court will not consider new evidence that was never before the trial court. We are limited to review of the record made below." State v. Mitchell, 124 Idaho 374, 376 n.1, 859 P.2d 972, 974 n.1 (Ct. App. 1993) (and cases cited). See also State v. Aims, 80 Idaho 146, 151, 326 P.2d 998, 1000 (1958) (appellant may not create appellate record by presenting affidavits to appellate court); State v. Rambo, 121 Idaho 1, 822 P.2d 31 (Ct. App. 1991) (appellant may not create appellate record by attaching exhibits to brief). Rogers did not present the February 2002 handbook to the district court, presented no evidence that this version of the handbook was even relevant to the proceedings, and made no presentation as to why he would have been given a version of the handbook upon his guilty plea in 2004 that had been superseded almost a year and one-half earlier. Rogers' request that this Court accept new evidence and find it more persuasive than the evidence presented to the district court is flatly inappropriate.

Rogers' argument as to why the Court should accept this new evidence and reject the contrary evidence actually presented to the district court is contained in a footnote to his argument. (Appellant's brief, pp. 19-20, n.14.) He argues that by taking notice of the February 2002 handbook and declining to take *notice of the September 2002 handbook* the Idaho Supreme Court determined that the February 2002 handbook was the "version of the Handbook Mr. Rogers agreed to be bound by when he entered drug court." (Appellant's brief, p. 20, n. 14.) Therefore, he argues, it "is now law of the case" that the February 2002 handbook was the applicable handbook. (Id.) This argument is fatally flawed in several respects.

First, Rogers cites to no legal authority or argument to support his claim it is "law of the case" that the February 2002 handbook was the version applicable to him. He has therefore failed to present any "law of the case" issue on appeal. See I.A.R. 35; State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.")

Second, Rogers did not preserve any appellate claim of "law of the case" by presenting that issue to the district court. The Idaho Supreme Court has repeatedly held that issues raised for the first time on appeal will not be considered. State v. Russell, 122 Idaho 488, 490, 835 P.2d 1299, 1301 (1992); State v. Lavy, 121 Idaho 842, 844, 828 P.2d 871, 873 (1992). Rogers did not object to evidence that the September 2002 handbook controlled (Tr., p. 81, Ls. 9-19; p. 84, Ls. 13-20), and in fact presented evidence that was consistent with

that finding (Tr., p. 131, L. 13 – p. 132, L. 4). Because Rogers did not raise any "law of the case" claim to the district court, he cannot raise this issue for the first time on appeal.

Third, even if the claim of "law of the case" were properly before this Court, it is without merit.

> The "law of the case" doctrine provides that when "the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal." *Suitts v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 21, 713 P.2d 1374, 1380 (1985) (quoting *Fiscus v. Beartooth Elec. Coop., Inc.*, 180 Mont. 434, 435, 591 P.2d 196, 197 (1979)).

Taylor v. Maile, ___ Idaho ___, 201 P.3d 1282, 1286 (2009). Thus, to be law of the case, a pronouncement of the Supreme Court must be "state[d] in its opinion" and must be "a principle or rule of law necessary to the decision." Rogers relies on an order taking judicial notice, not the opinion of the Court. In addition, what version of the handbook Rogers was provided is not a "principle or rule of law necessary to the decision" of the prior appeal. To the contrary, what edition of the handbook applied to Rogers is clearly a finding of fact. Rogers' claim that the Idaho Supreme Court made a finding of fact that is binding on the district court lacks merit.

As a final attack on the district court's factual finding that Rogers was prohibited from soliciting other drug court members to be his employees in the adult entertainment business he was trying to start, Rogers argues that the September 2002 handbook "says nothing about drug court participants working

for one another." (Appellant's brief, p. 20, n.14.) The testimony of Maureen Baker-Burton was that the handbook contains "'Condition Number 13: Participants may not be employed by other drug court participants,' on page 4." (Tr., p. 84, Ls. 13-20.) This is the only evidence on what Condition 13 said presented to the district court. Rogers' claim of lack of evidence on this point is without merit.

Even if this Court decided to go outside the record, it would discover that Rogers' argument is based on a misrepresentation. The copy of the September 2002 handbook attached to the opinion of the Idaho Court of Appeals opinion in the prior appeal, at page 4, contains the following: "13. You must be employed or a student throughout the duration of the program. **Participants may not be employed by other drug court participants**." State v. Rogers, 2006 Opinion No. 59, Docket No. 31264, Appendix 2 (Idaho App. August 22, 2006) (emphasis changed). Even the most cursory comparison shows that the witness accurately quoted the relevant portion of the handbook.

The evidence in the record supports the district court's findings of fact. Rogers' argument to the contrary depends entirely upon trying to persuade this Court to reject the evidence presented to the district court and instead accept and rely exclusively upon evidence never presented to the district court. Because Rogers' argument is diametrically opposed to actual appellate review and is inconsistent with well established rules of appellate review, his argument should be rejected.

II.
The Multitude Of Violations Supports The District Court's Decision To Terminate Rogers' Participation In The Drug Court Program

A. Introduction

The district court found that Rogers was in violation of the drug court programming requirements in 17 different ways. (Tr., p. 179, L. 6 – p. 184, L. 11.) The court ultimately concluded he was not a good candidate for reinstatement in that program. (Tr., p. 190, L. 6 – p. 191, L. 1.) The court, however, ultimately reinstated the previously imposed sentence and placed Rogers on probation until October 1, 2009. (Tr., p. 203, L. 1 – p. 207, L. 23.) Rogers argues that, because most of the violations occurred early in the program, the termination was an abuse of the district court's discretion. (Appellant's brief, pp. 20-21.) Review of the record, however, shows that Rogers' compliance with the program rules was very marginal and short-lived, while his violations are numerous. The record supports the district court's exercise of discretion.

B. Standard Of Review

"Revocation of probation is within the discretion of the district court and may occur at any time during the probationary period if the probationer has violated any of the terms of the probation." State v. Boss, 122 Idaho 747, 748, 838 P.2d 876, 877 (Ct. App. 1992). Absent an abuse of discretion, the district court's decision to revoke probation will not be reversed on appeal. State v. Corder, 115 Idaho 1137, 1138, 772 P.2d 1231, 1232 (Ct. App. 1989). On review, the appellate court must determine whether the district court "acted within the

boundaries of its discretion, consistent with any legal standards applicable to specific choices, and whether the court reached its decision by an exercise of reason." State v. Lafferty, 125 Idaho 378, 381, 870 P.2d 1337, 1340 (Ct. App. 1994).

C. The District Court Acted Within The Bounds Of Its Discretion When It Concluded That Rogers' Multiple Violations Justified His Termination From The Drug Court Program

Rogers was accepted into the drug court program and instructed to attend orientation on February 23, 2004. He missed the orientation, instead going and using drugs; he absconded from the program for about a week in late March and early April, again to use drugs; in early June he obtained a prescription without informing the doctor that he is an addict, in violation of drug court rules; the staffing related to solicitation of drug court members to work in his adult entertainment business was on June 25, 2004; at no point did he contact his mentor or pay any of the costs he was required to pay, instead choosing to spend his money on drugs. (Tr., p. 179, L. 6 – p. 184, L. 11; see also Tr., p. 37, L. 24 – p. 38, L. 8 (setting forth "allegation number 17," related to obtaining medication from a doctor, as later referenced by the district court in its ruling); State's Exhibit 5.) It thus appears that Rogers was never in total compliance with the requirements of the program (seeing his mentor and paying his fees). He absconded from the program in February and again for a week in late March and early April to use drugs. He did better in April (after he came back) and May, but in early June he obtained a prescription without informing the doctor of his addiction and in late June decided to start his own adult entertainment business

and consulted with fellow drug court participants about the business and even offered at least one a job. Thus, the most substantial period of compliance was about seven weeks during just a little over four months while he was in the program.

Rogers relies primarily on his argument that the district court wrongly found a violation in relation to his attempt to start an adult entertainment business in contending that the court abused its discretion. (Appellant's brief, p. 21.) As shown above, the district court did not wrongly find this violation.

Rogers also argues that he had been living "cleanly" in the community for a year prior to the district court's decision. (Appellant's brief, p. 21.) He cites for this proposition the argument of his trial counsel. (Id. (citing Tr., p. 199, Ls. 17-22; p. 200, Ls. 17-19).) Even assuming counsel correctly represented a lack of parole violations, this does not show an abuse of discretion. Rogers' past behavior while in the drug court program is probably a better predictor of his future behavior in that program than his performance on parole, which most likely did not require the same level of intervention and supervision. In addition, it is probable that the district court considered Rogers' most recent performance on parole as a factor that persuaded it to ultimately suspend the sentence and order probation.

Rogers has failed to show that the court abused its discretion by declining to reinstate Rogers in the drug court program and instead reinstating his sentence and placing him on probation.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order terminating Rogers from the drug court program, reinstating his sentence, and placing him on probation,

DATED this 6th day of April 2009.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of April 2009, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ERIK R. LEHTINEN
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.

KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm