10-9-2015

State v. Standley Appellant's Brief Dckt. 43024

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. WESLY STANDLEY, Defendant/Appellant.	)	S.Ct. Docket No. 43024 Twin Falls Co. CR-2014-1232

OPENING 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

HONORABLE RANDY J. STOKER
District Judge

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A. *Nature of the Case*

This is an appeal from an order revoking probation and imposing a life sentence. Relief should be granted because there was insufficient evidence to prove Count II of the probation violation allegations and it is unlikely that the court would have revoked probation absent that violation. Moreover, even had Count II been proved, the court still abused its discretion in revoking probation and imposing the sentence.

B. *Procedural History and Statement of Facts*

1. Sentencing proceedings

Wesly Standley pleaded guilty to a charge of Possession of Heroin with the Intent to Deliver. (Count II.) Count I (Trafficking in Heroin) and Count III (Possession of Methamphetamine) were dismissed, along with a notice to seek an enhanced penalty under I.C. § 37-2732(a)(1)(A) and a persistent violator allegation. R 115-118 (Amended Information); 124 (Court's Minutes); 140 (Order).

A PSI was ordered by the court. The report revealed that Mr. Standley was 44 years old, and had a long history of substance abuse starting with a minor in possession of alcohol conviction when he was eighteen years old. After that, he had three other alcohol related misdemeanor convictions and a delivery of a controlled substance conviction before he turned 21. At 24, he pleaded guilty to possession of a controlled substance and resisting/obstructing officers and was placed on probation.

Eventually, his probation was revoked, in part because of another possession of a controlled substance conviction. While in IDOC custody, he was indicted in federal court for being a felon in possession of a firearm and for possession of heroin and methamphetamine for events occurring prior to his IDOC commitment. He pleaded guilty to the firearm possession count and was paroled by Idaho to his federal detainer. He was released from federal custody on 2008, successfully completed his federal community supervision requirement, and was released from federal supervision in 2011.

On January 27, 2014, Mr. Standley's home was searched pursuant to a warrant. The police found syringes, including two loaded with dissolved heroin, a plastic bag with 1.3 grams of heroin, 1.6 grams of methamphetamine, some marijuana, additional drug paraphernalia, and $1248 in cash. Mr. Standley admitted to the police that he would travel to Utah to buy heroin, some of which he would sell to other users.

While on pre-trial release, Mr. Standley entered into a drug addiction treatment program, supervised by David Hadlock, M.D., which consisted of three phases. Dr. Hadlock, who is board certified in addiction medicine and holds a Master's Degree in addiction counseling, also included Suboxone in the treatment program. T pg. 8, ln 3-13; pg. 9, ln. 1. Suboxone is a medication for those who are addicted to opiates. It contains a synthetic opiate (buprenorphine) and a second

drug (naltrexone) that is designed to counteract the euphoric effect of the opiate. Suboxene is designed to stop drug cravings, while at the same time preventing the user from getting high either from the synthetic opiate or from other opiates. T pg. 15, ln. 11 - pg. 16, ln. 25; pg. 23, ln. 2-13.

The first phase was the Intensive Outpatient Treatment program. The IOP required 30 group sessions, each lasting three hours, over a 10-week session, with at least five sessions of individual counseling. T pg. 26, ln. 13-25. The Relapse Prevention program lasted 12 weeks and the Aftercare Program was ongoing with group sessions and individual counseling. T pg. 27, ln. 8-22. Mr. Standley also attended NA meetings. T pg. 31, ln. 1-16. Dr. Hadlock testified that Mr. Standley "basically has done everything I could possibly could have asked him to do in regards to reprogramming." T pg. 14, ln. 24-25.

The state recommended a twelve-year sentence with four years fixed. Of importance to this appeal, it noted that "we do not believe that [a life sentence] is something that is appropriate[.]" T pg. 40, ln. 5-23. Mr. Standley asked the court to impose a stricter sentence of twelve years with nine years of that fixed, but to grant him one chance by suspending the sentence and granting probation. T pg. 40, ln. 14-24.

The court, noting that neither party was going to "like this sentence" imposed the maximum sentence of life imprisonment with 15 years fixed and the maximum fine of $25,000, suspended the sentence and placed Mr. Standley on ten years

probation. T pg. 51, ln. 8-12; R 167. The court imposed what might be called a "one and done" probation. It noted that, "This is an all or nothing sentence for Wesly Standley, because I am of the firm belief, Mr. Standley, that if you go back to using drugs, you will go back to dealing, and we will be right back here again." T pg. 54, ln. 20-23. The court continued, "So hear out what I'm saying here. You come back on a probation violation, you're gone." T pg. 55, ln. 11-12.

One of the general conditions of probation was that Mr. Standley "shall not associate with any person(s) designated by any agent of IDOC." R 176. Another general condition required Mr. Standley to "meaningfully participate in and successfully complete any treatment, counseling or other programs deemed beneficial to the Defendant and as directed by the Court or any agent of the IDOC." R 174. The court also imposed several special terms of probation, one of which required that:

> The defendant shall complete the Suboxene program that he is currently enrolled in through Dr. David R. Hadlock's office. If the defendant quits the program prior to the completion date as recommended by Dr. Hadlock, such conduct shall constitute a probation violation.

R 168; T pg. 58, ln. 8-11.

The court stated that, "I'm here to tell you, Mr. Standley, that is, in fact, a zero-tolerance probation." It concluded:

> Here's the things that will get you in trouble: Obviously using alcohol, it's a trigger; using any drugs, that's clearly going to violate you; associating with people you shouldn't associate with. . . . Your probation officer has the authority to tell you who to not associate

with.

T pg. 58, ln. 13-20. There was no objection to the zero-tolerance provision and Mr. Standley accepted the terms of the probation. T pg. 58, ln. 25 - pg. 59, ln. 9. No Notice of Appeal was filed from the judgment and sentence.

2. Probation violation proceedings

The state filed a motion to revoke probation alleging two probation violations. Count I alleged that Mr. Standley had "unapproved contact with Danielle Schreiner and Matt Lewis, who are both under IDOC supervision." R 191. Count II alleged that he was "failing to take his Suboxene medication as prescribed. And therefore failing to participate in the Suboxene Program with Dr. Hadlock as ordered by the Court." R 191. Mr. Standley entered a denial to those allegations. R 207.

(a) *Count I*

Probation Officer Frank Neumeyer testified that during a probationary search of Mr. Standley's home, another P.O. noted some "odd texts" on a cell phone "that just didn't seem right." T pg. 63, ln. 12-14. Mr. Standley told P.O. Neumeyer that they were from Danielle Schreiner and that he had in-person contact with her too. Ms. Schrenier was on probation and a participant in Drug Court. The cell phone also showed a phone call to Matt Lewis' number. Mr. Lewis was also on probation. T pg. 63, ln. 9-25. Copies of the text messages were admitted into evidence. T pg. 67, ln. 8-9; State's Exhibit 1. Some of them showed that Mr. Standley was aware that Ms. Schrenier was on probation. T pg. 71, ln. 20 - pg. 72,

ln. 4. The text message exchange between them was initiated by her. She texted Mr. Standley with the message that she just saw Matt Lewis, who wants to contact him. It may be that she is seeking drugs from Mr. Standley for both herself (claiming she had hurt her back) and for Mr. Lewis, who she claims "likes the opiates big time." Mr. Standley says that she could take a quarter of a strip of Suboxene for the pain. State's Exhibit 1 (Evidentiary Hearing).

The court originally found that Count I had not been proved, noting:

> The provision that is alleged to have been violated is number 24 of the general conditions. Mr. Standley acknowledged or says, the defendant shall not associate with any persons designated by any agent of IDOC. The allegation is that he had unauthorized contact. What's lacking in this case is evidence that he was told of this condition, and maybe we do this case again. I don't know. That's your choice. But I am not going to find that he is in violation of Count 1 because the State has simply not presented substantial evidence on that allegation.

T pg. 112, ln. 4-13.

After the conclusion of the evidentiary hearing, the state filed a second *Ex Parte* Motion to Revoke Probation. R 227. The single count alleged that Mr. Standley had "unapproved contact with Danielle Schreiner and Matt Lewis, who are both known felons and under IDOC supervision." R 228. This allegation was substantially similar to the original Count I which alleged that Mr. Standley had "unapproved contact with Danielle Schreiner and Matt Lewis, who are both under IDOC supervision." R 191.

This second probation violation proceeding to evidentiary hearing without objection from defense counsel. After hearing additional evidence, the court took

judicial notice of the general condition of probation #24, which prohibited Mr. Standley from associating with any person designated by the IDOC. It continued: "It is undisputed that Alice McClain [a probation officer] told Mr. Standley at the time he signed up for probation that he was not allowed to associate with any known felons, anyone in the speciality courts, or anyone involved in criminal conduct without the permission of an IDOC officer." T pg. 157, ln. 7-11. Defense counsel conceded and the court found that Mr. Standley had prohibited contact with Ms. Schriener. It did not find, however, that he had prohibited contact with Mr. Lewis. T pg. 157, ln. 19 - pg. 159, ln. 20.

(b) *Count II*

During the search of Mr. Standley's home, the probation officer found that Mr. Standley had not been taking all of the Suboxene prescribed to him. During a time period where Mr. Standley should have taken 44 strips, only ten were missing from his prescription box. When questioned about that, Mr. Standley said that "he was trying to wean himself off that prescription." T pg. 73, ln. 24-25.

Mr. Standley agreed as part of the Suboxene program treatment to take the medication only as prescribed and to not skip or adjust the dose on his own. T pg. 75, ln. 5-12; State's Exhibit 2, pg. 1.

Dr. Hadlock testified that Mr. Standley had been participating in all components of the Suboxene program and that Mr. Standley's performance was "phenomenal." T pg. 82, ln. 22. Dr. Hadlock explained that it is "addict behavior"

for patients "to actually practice medicine on themselves" and part of the goal of treatment is "to change that behavior, that's part of the addictive behavior." T pg. 83, ln. 22 - pg. 84, ln. 4. And, while the treatment agreement requires patients to take the medication as prescribed, only about 70% of patients who are required to take medications twice a day, as Mr. Standley was, actually do so and noncompliance "is a national problem." T pg. 84, ln. 25.

The doctor noted that Suboxene works so well in stopping the craving mechanism that it is not uncommon for patients to forget to take it. Unlike other medications, when patients miss a dose of Suboxene they are instructed to not take it. "[W]ith Suboxene, if you miss a dose you're instructed specifically don't take the dose." T pg. 85, ln. 1-8. The doctor testified that the problem occurs when patients use extra strips, not when they miss a strip. "I don't want them to use extra without permission. If they forget a strip, that kind of follows the national standards. The medication has such a long half life that it will actually stay in their system for three days so they won't have withdrawals by missing a strip." T pg. 85, ln. 17-22. Missing a strip does not worry the doctor, instead, "I'm worried . . . when they take extra strips, that would be addict behavior." T pg. 90, ln. 18-20. He noted that Mr. Standley could have accumulated the extra strips if he had missed just five strips a month of the approximately 60 prescribed for each of the ten months he has been in treatment. T pg. 96, ln. 22-25.

The doctor testified that Mr. Standley was still in his Suboxene program and

that special arrangements had been made for him since he was in jail. T pg. 90, ln. 23-25. There was no evidence presented that Mr. Standley had not meaningfully participated in the treatment, notwithstanding the violation of one of the terms of the agreement. The doctor explained that the treatment agreement is "not a legal document," but is only intended to set out the ground rules for treatment. It is not unusual for patients to be noncompliant and the doctor gives them "some latitude" when they have violations of the agreement. T pg. 88, ln. 19-20; pg. 89, ln. 4-11.

When asked if Mr. Standley was noncompliant with the program, the doctor answered:

> No. That's – all of his urines have been clean for me and for his probation officers on a weekly basis. He's attended IOP aftercare, relapse prevention. He still was attending community support meeting. I wish I could get the rest of my patients to be that compliant in the education piece because the medication piece is just a small piece. He took to that and was actually leading some of the meetings, from what I was told by his counselors.

T pg. 100, ln. 12-19.

Nevertheless, the court found that Mr. Standley had violated the special condition that he complete Dr. Hadlock's treatment program. The court ruled:

> So there were two components of that order. One component is if he quits, he violates probation, no question about it. And second, that he complete the program. Well, there is no question in my mind that Mr. Standley has not followed that program like he was directed. I don't care whether Officer Neumeyer thinks it's a violation or not, I don't care whether Dr. Hadlock thinks it was a violation or not. And clearly failing to follow the prescribed routine of taking two Suboxenes a day was the deal. It's not up to Mr. Standley to make that decision. I could care less whether 90 percent or a hundred percent of the world failed under these programs and failed to follow the instructions. That's not

> the issue. The issue is you were told what to do. You made a different decision. That isn't a medical issue. It is an issue, Mr. Standley, very simply that you on your own decided to change the program. That violates the probation, and you are, in fact, in violation of probation on Count 2.

T pg. 113, ln. 11 - pg. 114, ln. 3.

(c) *Disposition*

At the dispositional hearing, the state asked the court to "make good on your word and send the defendant to the penitentiary today because . . . he was given a zero-tolerance contract[.]" T pg. 171, ln. 20-23. Defense counsel asked the court to reinstate Mr. Standley on probation. T pg. 176, ln. 6-7.

Before ruling, the court acknowledged that there was no evidence that Mr. Standley was "still in the drug business" or that "he's continued to use while he was out of jail," but noted that it had made it "absolutely clear that this was a zero tolerance probation." T pg. 178, ln. 22 - pg. 179, ln. 13. It also acknowledged to Mr. Standley that, "I set you up to fail. And guess what? You failed." T pg. 180, ln. 6.

It then noted how it knew Danielle Schreiner. She's one of my probationers. After many riders, I put her in drug court. And I am particularly offended in this case that we had a defendant who was trying to manipulate someone in the drug court system." T pg. 180, ln. 15-19. And it asked, "why would anyone who has a drug association with Matt Lewis . . . ever make a phone call to someone from their past? . . . [W]hy would a defendant who has totally changed his life, who wants to get out of the drug world, go back and start associating with someone who is deeply

involved in the drug world, and he knows it?" T pg. 181, ln. 4-14. The court then revoked probation, imposed the life sentence and announced it would not reduce the sentence. T pg. 181, ln. 25 - pg. 182, ln. 1.

A timely Notice of Appeal was filed. R 262.

III. ISSUES PRESENTED ON APPEAL

1. Was there sufficient evidence to prove that Mr. Standley violated his special term of probation that he not quit his Suboxene treatment program or the general term of probation that he meaningfully participate in the Suboxene treatment program?

2. Did the court abuse its discretion in revoking probation and imposing the original sentence?

IV. ARGUMENT

A. *There was not sufficient evidence to prove that Mr. Standley violated his special term of probation that he complete his Suboxene treatment or the general term of probation that he meaningfully participate in his Suboxene treatment program.*

1. Introduction and standard of review

In general, probation revocation proceedings present three potential issues on review: First, was there a probation violation? Second, does the violation justify revocation? Third, if revocation is justified, what prison sentence should be ordered? *State v. Leach*, 135 Idaho 525, 529, 20 P.3d 709, 713 (Ct. App. 2001). A trial court's finding of a probation violation will be upheld on appeal if there is substantial evidence in the record to support the finding. *Id.* This is one of those

rare cases where the evidence does not support the court's finding.

2. Why relief should be granted

While the state alleged a violation of both general condition of probation #15 and special condition (e), R 191, the court only addressed special condition (e) in its oral findings. T pg. 113, ln. 11 - pg. 114, ln. 3. However, there was not sufficient evidence presented to find Mr. Standley violated either provision.

First, Mr. Standley did not violate special condition (e) because the undisputed evidence was that he was still enrolled in the program and thus had not "quit[] the program prior to the completion date recommended by Dr. Hadlock," in violation of the special condition. In fact, he was continuing his treatment even though he was in custody pending the resolution of the probation violation proceedings. (While he had not "complete[d] the Suboxene program," no one argued that he should have done so in the time he was on probation.)

The court only found that Mr. Standley was not in strict compliance with all of the terms of the treatment agreement because he wasn't taking all of his medication. That fact does not constitute a violation of special condition (e) that he not quit and eventually complete Dr. Hadlock's treatment program. Consequently, there was insufficient evidence to support Count II.

Mr. Standley anticipates that the state will be tempted to argue that the error above is harmless because there was sufficient evidence to find he violated general condition of probation #15, that he "meaningfully participate" in the

Suboxene treatment. R 117. Such an argument would be without merit because the court did not find that Mr. Standley violated that general condition and moreover the state failed to present sufficient evidence to support such a finding. To the contrary, the evidence was that Mr. Standley was doing a phenomenal job. Further, the doctor noted that is not uncommon for patients to forget to take all their Suboxene and, when patients miss a dose, they should not try to catch up. Nor is missing a dose necessarily a problem. Dr. Hadlock did not expect perfect compliance with the treatment agreement; it is not unusual for patients to be noncompliant and "some latitude" is given when they have violations of the agreement. T pg. 88, ln. 19-20; pg. 89, ln. 4-11. In addition, all of his urine tests were clean and he attended IOP aftercare and relapse prevention. And, he was attending community support meetings and actually leading some of the meetings. T pg. 100, ln. 12-19. In light of the above, any argument that Mr. Standley was not meaningfully participating in the treatment program would be frivolous in addition to being irrelevant.

The error is not harmless even though the court found Mr. Standley had violated part of Count I by having unauthorized contact with a drug court participant. It does not appear from the record that the court would have revoked Mr. Standley's probation based solely on that contact and should not have, as is explained below. Thus, this Court should vacate the probation revocation and remand for further proceedings.

B. *The district court abused its discretion in revoking probation and imposing sentence.*

1. Standard of review

When deciding whether revocation of probation is appropriate, the court must consider whether the probation is achieving the goal of rehabilitation and whether continued probation is consistent with the protection of society. *State v. Jones*, 123 Idaho 315, 318, 847 P.2d 1176, 1179 (Ct. App.1993); *State v. Hass*, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct. App.1988). In reviewing the propriety of a probation revocation, the focus of the inquiry is the conduct underlying the trial court's decision to revoke probation. *State v. Morgan*, 153 Idaho 618, 621, 288 P.3d 835, 838 (Ct. App. 2012). If a knowing and intentional probation violation has been proved, a district court's decision to revoke probation will be reviewed for an abuse of discretion. I.C. § 20–222; *State v. Corder*, 115 Idaho 1137, 1138, 772 P.2d 1231, 1232 (Ct. App.1989). In determining whether an abuse of discretion has been shown, this Court must determine whether the district court acted within the boundaries of its discretion, consistent with any legal standards applicable to its specific choices, and whether the district court reached its decision by an exercise of reason. *State v. Beckett*, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992). An appellate court conducts an independent review of the entire record to determine if the record supports the district court's decision to revoke probation. *State v. Easley*, 156 Idaho 214, 218, 322 P.3d 296, 300 (2014).

2. Why relief should be granted

Here the record shows that the court abused its discretion in revoking probation and executing the sentence.

First, the court did not act consistently with the applicable legal standards because it disregarded both Mr. Standley's rehabilitation and the protection of society when it revoked probation. It revoked despite acknowledging that there was "no evidence" that Mr. Standley had used any illegal drugs or distributed drugs while on probation. T pg. 178, ln. 22 - pg. 179, ln. 2. While the court said it was "particularly offended" that Mr. Standley "was trying to manipulate someone in the drug court system," T pg. 180, ln. 15-19, its perceived manipulation of Ms. Schreiner is not supported by the record. The text message exchange between Mr. Standley and Ms. Schreiner was initiated by her. She is the one who texted Mr. Standley with the message that she just saw Matt Lewis and he wants to get in touch with Mr. Standley, while mentioning Mr. Lewis likes opiates. She forwarded Mr. Lewis' number to Mr. Standley without being asked to do so. She, not Mr. Standley, says that it "[s]ucks I can't take anything," after complaining that she was "prolly gonna pass out" because her "back got fucked today at work[.]" State's Exhibit 1 (Evidentiary Hearing). If anything, Ms. Schreiner was attempting to manipulate Mr. Standley. The same is true for Mr. Lewis, who testified that he had a ten minute phone call with Mr. Standley where he was "hinting toward" getting some Suboxene but that Mr. Standley didn't take the hint. T pg. 144, ln 16 - pg. 145, ln. 6.

Second, its decisions to revoke and impose were not made by the exercise of reason. Instead, it noted that it had made it "absolutely clear that this was a zero tolerance probation, " while telling Mr. Standley that, "I set you up to fail. And guess what? You failed." T pg. 178, ln. 22 - pg. 179, ln. 13. T pg. 180, ln. 6. However, probation is not a game of "mother-may-I?" Certainly, the text messages here or a ten minute conversation with a drug user do not amount to a rational basis to revoke probation and impose a life sentence, especially when the state has acknowledged a life sentence was not appropriate. And, Mr. Standley never promised to follow all terms and conditions of the treatment program. He promised to not quit, to meaningfully participate and to eventually complete the program. He was in compliance with the first two and would have completed the program, had he been allowed to.

The text messages here do not amount to a valid or rational reason to put Mr. Standley or the state to the extreme human and large financial cost of a 15 to life prison sentence, especially when he was doing phenomenally well in rehabilitation and was not distributing drugs. Instead of allowing him to succeed and provide an example to others, the court's irrational decision harms both parties with no increase in rehabilitation or public safety. It was an abuse of the court's discretion and should be vacated.

V. CONCLUSION

For the reasons set forth above, Wesly Standley asks this Court to vacate the order revoking his probation and remand to the district court for further proceedings.

Respectfully submitted this 8th day of October, 2015.

Dennis Benjamin
Attorney for Wesly Standley

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have on this 8TH day of October, 2015, caused two true and correct copies of the foregoing document to be placed in the United States mail, postage prepaid, addressed to:

Idaho Attorney General
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P.O. Box 83720
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Dennis Benjamin