

10-8-2015

State v. McIntosh Appellant's Brief Dckt. 43066

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

Recommended Citation

"State v. McIntosh Appellant's Brief Dckt. 43066" (2015). *Not Reported*. 2280.
https://digitalcommons.law.uidaho.edu/not_reported/2280

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.

SARA B. THOMAS
State Appellate Public Defender
I.S.B. #5867

SALLY J. COOLEY
Deputy State Appellate Public Defender
I.S.B. #7353
P.O. Box 2816
Boise, ID 83701
(208) 334-2712

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 43066
)	
v.)	ADA COUNTY NO. CR 2006-1537
)	
AARON DEAN MCINTOSH,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Aaron McIntosh pled guilty to one count of felony DUI, the district court retained jurisdiction and then placed Mr. McIntosh on probation. Nearly five years later, Mr. McIntosh violated his probation, and the district court revoked his probation, but retained jurisdiction. Mr. McIntosh was then placed back on probation, but violated his probation again, and was revoked. On appeal, he contends that the district court erred in failing to commute or reduce his sentence upon revoking his probation.

Statement of the Facts & Course of Proceedings

On November 9, 2006, Aaron McIntosh went through a red light while driving his mother's 1994 Cadillac Fleetwood sedan. (Presentence Investigation Report (*hereinafter*, PSI),¹ p.236.) Law enforcement stopped Mr. McIntosh for running the red light and observed the odor of alcohol on Mr. McIntosh, as well as glassy eyes, slurred speech, and impaired memory. (PSI, p.236.) Mr. McIntosh refused all sobriety tests. (PSI, p.236.) Mr. McIntosh was charged by Information with one count of felony DUI, and one count of driving without privileges (*hereinafter*, DWP). (R., pp.30-31.)

Pursuant to a plea agreement, Mr. McIntosh pled guilty to felony DUI and the misdemeanor DWP was dismissed. (R., pp.40-41.) At sentencing, the district court sentenced Mr. McIntosh to five years, with one year fixed. (R., pp.48-51.) However, the district court retained jurisdiction for 180 days. (R., p.49.) After a successful period of retained jurisdiction, the district court placed him on supervised probation for a period of five years. (R., pp.57-62.)

A mere 38 days away from successfully completing the five year period of probation, Mr. McIntosh was arrested for misdemeanor petit theft, misdemeanor malicious injury to property, and misdemeanor telephone harassment of his mother. (R., p.72.) A Motion for Probation Violation was filed which alleged that Mr. McIntosh violated the terms and conditions of his probation by committing three new

¹ Appellant's use of the designation "PSI" includes the packet of documents grouped with the electronic copy of the PSI, including the original PSI, any addendum to the PSI, the substance abuse evaluations, mental health evaluations, and letters submitted in support of Mr. McIntosh.

misdemeanor crimes, consuming alcohol on one occasion, and using “spice.”² (R., pp.90-106.) After Mr. McIntosh admitted to violating some of the terms and conditions of his probation, the district court revoked his probation but retained jurisdiction. (R., pp.114-119.) After a successful rider, the district court placed Mr. McIntosh on probation until midnight on June 19, 2017—a period of four years and 12 days (1473 days). (R., pp.121-126.)

A Report of Probation Violation was filed approximately 18 months later. (R., pp.146-150.) It alleged that Mr. McIntosh violated the terms and conditions of his probation by being charged with misdemeanor assault, failing to attend substance abuse treatment, failing to submit to UA tests, operating a motor vehicle, drinking alcohol, using marijuana, speaking to a person with whom he had been forbidden from speaking or having contact, failing to obey his probation officer’s request to return a vehicle he had just purchased, leaving the district without his probation officer’s permission, and failing to report to his probation officer. (R., pp.146-150.)

Mr. McIntosh admitted to violating some of the terms and conditions of his probation. (R., p.169; 1/21/15 Tr., p.8, L.21 – p.9, L.13, p.16, L.12 – p.17, L.24.) At Mr. McIntosh’s probation violation disposition, his counsel asked the district court to commute the case, or, alternatively, to reduce the sentence pursuant to I.C.R. 35. (3/25/15 Tr., p.30, Ls.5-21.) The district court revoked Mr. McIntosh’s probation and ordered his underlying sentence to be executed without reduction. (R., pp.174-176;

² When Mr. McIntosh was arrested, he exhibited dramatically fluctuating behaviors from being cooperative, crying, saying he needed a hug, to using extremely profane language towards officers and with regards to his mother, to smashing his head against the cage in the patrol vehicle. (PSI, pp.23-24.) Mr. McIntosh told law enforcement that he was drunk and had been “on a rampage” of using spice. (PSI, p.24.) Family members noted that such behavior was not normal for Mr. McIntosh. (PSI, pp.4, 22.)

3/25/15 Tr., p.36, Ls.21-25.) Mr. McIntosh filed a Notice of Appeal timely from the district court's Order of Revocation of Probation and Imposition of Sentence and Commitment. (R., pp.177-178.)

Mr. McIntosh contends on appeal that the district court abused its discretion by failing to commute or reduce his sentence upon revoking his probation.

ISSUE

Did the district court abuse its discretion when it revoked Mr. McIntosh's probation and executed his underlying sentence of five years, with one year fixed, without commutation or reduction?

ARGUMENT

The District Court Abused Its Discretion When It Revoked Mr. McIntosh's Probation Without Commutation Or Reduction

Mr. McIntosh asserts that the district court abused its discretion when it revoked his probation and executed his original sentence of five years, with one year fixed, without commutation or reduction. He asserts that the violations did not justify revoking probation without commutation or reduction of his sentence. Even if the district court did not err in revoking Mr. McIntosh's probation, it certainly erred in revoking his probation without commutation or reduction, particularly in light of the fact that Mr. McIntosh had more or less been supervised on felony probation for eight years. (R., pp.174-176.)

There are generally two questions that must be answered by the district court in addressing allegations of probation violations: first, the court must determine whether the defendant actually violated the terms and conditions of his probation; and second, if a violation of probation has been found, the trial court must then decide the appropriate

remedy for the violation. *State v. Sanchez*, 149 Idaho 102, 105 (2009). “The determination of whether a probation violation has been established is separate from the decision of what consequence, if any, to impose for the violation.” *Id.* (quoting *State v. Thompson*, 140 Idaho 796, 799 (2004)). Once a probation violation has been found, the district court must determine whether it is of such seriousness as to warrant revoking probation. *State v. Chavez*, 134 Idaho 308, 312 (Ct. App. 2000). However, probation may not be revoked arbitrarily. *State v. Adams*, 115 Idaho 1053, 1055 (Ct. App. 1989). The district court must decide whether probation is achieving the goal of rehabilitation and whether probation is consistent with the protection of society. *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001). 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; *Leach*, 135 Idaho at 529.

Only if the trial court determines that alternatives to imprisonment are not adequate in a particular situation to meet the state's legitimate interest in punishment, deterrence, or the protection of society, may the court imprison a probationer who has made sufficient, genuine efforts to obey the terms of the probation order. *State v. Lafferty*, 125 Idaho 378, 382 (Ct. App. 1994).

When reviewing an excessive sentence claim, appellate courts “conduct an independent review of the record, focusing on the nature of the offense and the character of the offender.” *Id.* Review of a sentence executed after the revocation of probation is not based “upon the facts existing when the sentence was imposed. Rather, [appellate courts] examine all the circumstances bearing upon the decision to revoke probation and execute the sentence, including events that occurred between the

original pronouncement of the sentence and the revocation of probation.” *Id.* “A sentence will not be reduced on appeal unless it is excessive under any reasonable view of the facts.” *Id.*

After a probation violation has been established, the district court may order the suspended sentence to be executed, but the court is also authorized under Idaho Criminal Rule 35 to reduce the sentence. *State v. Hanington*, 148 Idaho 26, 27 (Ct. App. 2009). The standard of review and factors considered in such a decision are the same as those used for the initial sentencing. *Id.*

Even if the district court did not abuse its discretion by revoking Mr. McIntosh’s probation, it did abuse its discretion by not commuting or reducing his sentence, even if only in recognition of his serious mental health issues and his prolonged efforts on probation to that point.

As to the first issue before the district court, Mr. McIntosh concedes that he violated conditions of his probation as he admitted that he had done so. (1/21/15 Tr., p.8, L.21 – p.9, L.13, p.16, L.12 – p.17, L.24.) However, Mr. McIntosh asserts that the district court abused its discretion in finding that his probation violations justified revocation without commutation or reduction. Mr. McIntosh asserts that a sentence commutation or reduction would achieve the goals of his rehabilitation and the protection of society. This is especially apparent in light of the fact that Mr. McIntosh was successful on his initial period of probation for just 38 days shy of five years. (R., p.93.) While Mr. McIntosh did not complete a perfect probation for those five years,³ he was regularly employed⁴ and attending substance abuse treatment classes.

³ Mr. McIntosh did admit to using spice in 2011. (PSI, pp.17-18.)

(PSI, pp.192, 199-200.) Such a lengthy period of probation without violation demonstrate that Mr. McIntosh is rehabilitatable.

Mr. McIntosh admitted he violated his probation and took responsibility for his poor decisions to disturb the peace, use alcohol and marijuana, and to leave the district without permission. (PSI, pp.59-60; 1/21/15, L.12 – p.17, L.14.) Although Mr. McIntosh's violations were serious, they did not justify revoking his probation without commutation or reduction. As Mr. McIntosh told the district court at his disposition hearing:

Your Honor, I can't sit here and make no justification for anything I've done. I did it. I tried to do my best out in the community. I knew when I screwed up I went to my PO, I gave him written admissions. That is the best I could do, taking accountability. And that is what the programming I have done throughout this time has taught me.

And I would like to say I tried my best. I know I can give more effort. Given the cards that are dealt to everybody in normal-day life, sometimes things become hard for an addict. And I don't want to say that to [] try to justify anything.

(3/25/15 Tr., p.31, L.25 – p.32, L.13.)

However, in sentencing Mr. McIntosh, the district court relied on its mistaken belief that Mr. McIntosh had originally been charged with felony assault, which he then pled guilty to misdemeanor disturbing the peace; however, this is inaccurate. 3/25/15 Tr., p.34, L.24 – p.35, L.5.) The incident giving rise to the charge of misdemeanor assault charge was one where Mr. McIntosh was in a neighborhood, repeatedly honking the horn on his car. (R., p.128; PSI, p.45.) A resident asked him to stop and Mr. McIntosh got out of his car, "took an aggressive fighting posture," and told him, "I

⁴ Mr. McIntosh worked as an apprentice electrician and in flooring at Nashua Homes. (PSI, pp.48, 199-200, 242-243.)

can kill you, you little faggot.” (PSI, pp.45, 50.) Mr. McIntosh then got back into his car and the resident called the police who arrested Mr. McIntosh for misdemeanor assault. (R., p.50.) Thus, the district court’s concern for community protection was based on a misapprehension of the facts and the nature of the offense charged.

Mr. McIntosh is a valuable member of the community and a valued family member. The district court received supportive letters from his employers, his fiancée, his grandmother, his sister, his brother, and his mother. (PSI, pp.194-200.) His fiancée instructed the district court on Mr. McIntosh’s strong sense of duty and his generosity. (PSI, p.195.) For example, when she had a brain tumor removed, Mr. McIntosh was “very kind, attentive and gentle in caring for [her] fragile condition.” (PSI, p.195.) Further, during her period of recovery, Mr. McIntosh maintained a full-time job and provided for her and her two children. (PSI, p.195.) Mr. McIntosh’s mother also wrote a letter detailing the vital assistance Mr. McIntosh has provided for his elderly grandparents. (PSI, p.194.) Before he was incarcerated, Mr. McIntosh was assisting his disabled grandfather with activities of daily living such as showering and dressing, helping his grandfather up whenever he fell, and was providing security and reassurance at night, as his grandparents had been burglarized in the past. (PSI, pp.194, 248, 255-256.) Mr. McIntosh’s grandmother implored the district court to allow him to return home to be able to assist her in taking care of Mr. McIntosh’s grandfather, who has dementia. (PSI, p.196.) Mr. McIntosh’s sister also asked the district court to allow Mr. McIntosh to care for his grandparents. (PSI, p.197.)

At the time his sentence was executed, Mr. McIntosh had received credit for 712 days already served in his case, and he had been supervised on felony probation for

over eight years on an underlying sentence of five years for the DUI offense. (3/25/15 Tr., p.28, Ls.12-14, p.37, Ls.19-22; R., pp.174-176.) In light of these circumstances, Mr. McIntosh had been appropriately punished and he was not a danger to the community. In denying defense counsel's request for commutation or reduction of Mr. McIntosh's sentence, the district court abused its discretion.

CONCLUSION

Mr. McIntosh respectfully requests that this Court commute or reduce his sentence as it deems appropriate.

DATED this 8th day of October, 2015.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of October, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

AARON DEAN MCINTOSH
INMATE #84858
ISCC
PO BOX 70010
BOISE ID 83707

TIMOTHY HANSEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

DANICA COMSTOCK
ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

SJC/eas