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State v. Foster Appellant's Brief Dckt. 43146

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 43146
)	
v.)	BONNEVILLE NO. CR 2012-17456
)	
MELVIN P. FOSTER,)	
)	
Defendant-Appellant.)	APPELLANT'S BRIEF
_____)	

STATEMENT OF THE CASE

Nature of the Case

Melvin Foster appeals from the district court's order revoking his probation and ordering into execution his originally imposed sentence of six years, with two years fixed. On appeal, Mr. Foster asserts that the district court abused its discretion by failing to adequately consider that Mr. Foster's probation was achieving its desired goal of rehabilitation and as a result, the district court should not have revoked his probation and imposed the underlying sentence.

Statement of the Facts and Course of Proceedings

In November of 2012, Mr. Foster was charged by Information, and later Amended Information, with felony burglary and grand theft. (R., pp.32-33, 42-43.) Mr. Foster entered into a plea agreement with the State wherein he agreed to plead guilty to grand theft and the State agreed to dismiss the burglary charge. (R., pp.45-48.) The district court imposed a unified sentence of six years, with two years fixed, upon Mr. Foster. (R., pp.71-73.) The district court suspended the execution of the sentence and placed Mr. Foster on probation for five years. (R., pp.71-73.) After a stint on probation, the State filed a Report of Probation Violation alleging that Mr. Foster violated six conditions of his probation. (R., pp.83-85.) Mr. Foster admitted each allegation and the district court revoked Mr. Foster's probation and retained jurisdiction over him. (R., pp.91-96.)

At the conclusion of the rider, the district court suspended Mr. Foster's sentence and placed him on probation for five years. (R., pp.103-104.) Thereafter, the State filed a Report of Violation alleging that Mr. Foster violated his probation by: (1) failing to maintain employment; (2) failing to complete required programming; (3) failing to notify his probation officer when he has contact with law enforcement; (4) changing his residence without notifying his probation officer; and (5) absconding from supervision. (R., pp.107-109.) Mr. Foster admitted to each alleged violation and the district court revoked his probation and ordered into execution his original sentence of six years, with two years fixed. (R., pp.119-121.) Mr. Foster filed a Notice of Appeal timely from the

district court's Judgment and Commitment on Conviction of Probation Violation.¹
(R., pp.117-118.)

ISSUE

Did the district court abuse its discretion when it revoked Mr. Foster's probation and executed his underlying sentence of six years, with two years fixed?

ARGUMENT

The District Court Abused Its Discretion When It Revoked Mr. Foster's Probation

Mr. Foster asserts that the district court abused its discretion when it revoked his probation and executed his original sentence of six years, with two years fixed. He asserts that the violations did not justify revoking probation, especially in light of the goals of rehabilitation and the fact that the protection of society could be best served by her continued supervision under the probation department.

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

¹ Mr. Foster also filed an Idaho Criminal Rule 35 motion for a reduction in sentence, but failed to submit any new evidence in support thereof. See *State v. Huffman*, 144 Idaho 201 (2007).

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).

Here, Mr. Foster asserts that the district court erred in revoking his probation because his probation was achieving its intended goal of rehabilitation. Although Mr. Foster admitted to absconding, his trial counsel indicated that Mr. Foster left Idaho to move to Colorado to work for Garden Thyme. (Tr., p.12, Ls.8-12.) Mr. Foster indicated that he was attempting to seek better employment than previously and had actually "made a significant improvement" in his life. (Tr., p.19, Ls.12-15.) Donna Marksbury, with Garden Thyme indicated that Mr. Foster was first hired as a general worker, but discovered that he had a talent for repairing machinery and was Microsoft certified. (3/17/14 Marksbury Letter, p.1.) Ms. Marksbury indicated that Mr. Foster was able to develop a way to streamline the way Garden Thyme tracked equipment repairs and

maintenance and would teach employees Microsoft Word and Excel. (3/17/14
Marksbury Letter, p.1.)

In addition to his employable skills, Mr. Foster expressed to the district court that he has a family that he loves and needs him. (Tr., p.19, Ls.15-17.) Mr. Foster also indicated that he has housing in the area for stability. (Tr., p.19, Ls.17-19.) Finally, it is important to note that while Mr. Foster did violate the terms of his probation, he was not out committing new crimes in either Colorado or Idaho. (Tr., p.14, Ls.11-14.)

Accordingly, in light of the foregoing, Mr. Foster asserts that the district court abused its discretion in revoking his probation.

CONCLUSION

Mr. Foster respectfully requests that this Court remand his case to the district court with an order that he be placed on probation.

DATED this 16th day of November, 2015.

_____/s/_____
ERIC D. FREDERICKSEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of November, 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:

MELVIN P FOSTER
INMATE #107262
SICI
PO BOX 8509
BOISE ID 83707

JON J SHINDURLING
DISTRICT COURT JUDGE
E-MAILED BRIEF

SCOTT J DAVIS
BONNEVILLE COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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

_____/s/_____
EVAN A. SMITH
Administrative Assistant

EDF/eas