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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 43148
 Plaintiff-Respondent,)
) Ada Co. Case No.
 v.) CR-2008-324
)
 JACOB DOUGLAS KEENE,)
)
 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**

HONORABLE RICHARD D. GREENWOOD
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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

MARK W. OLSON
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

**ATTORNEYS FOR
PLAINTIFF-RESPONDENT**

BEN P. MCGREEVY
Deputy State Appellate
Public Defender
P. O. Box 2816
Boise, Idaho 83701
(208) 334-2712

**ATTORNEY FOR
DEFENDANT-APPELLANT**

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STATEMENT OF THE CASE

Nature Of The Case

Jacob Douglas Keene appeals from the district court's order revoking his probation and imposing a commuted sentence.

Statement Of Facts And Course Of Proceedings

In 2008, pursuant to a plea agreement, Keene pled guilty to felony driving under the influence. (R., pp.72-77.) The state agreed to dismiss two other charges arising from the same incident. (Id.) The district court imposed a unified seven-year sentence with two years fixed, but suspended the sentence and placed Keene on probation for seven years. (Id.) The court also ordered that Keene serve 180 days in the Ada County Jail. (Id.)

In 2010, the state charged Keene with misdemeanor domestic assault. (PSI, pp.5, 49-51); see also Idaho Data Repository, State v. Keene, Ada County District Court Case No. CR-2010-08511. Keene ultimately pled guilty to an amended charge of disturbing the peace in that case. See id. Based upon this criminal conduct, and Keene's failure to pay required child support, fines, fees, and restitution, the state filed its first motion for probation violation in Keene's felony driving under the influence case. (R., pp.94-96.) Keene admitted that he violated his probation by committing the crime of disturbing the peace. (R., pp.95, 109-110.) The district court revoked and reinstated Keene's probation. (R., pp.111-115.)

In January 2011, the state filed its second motion for probation violation. (R., pp.127-133.) Keene admitted that he violated his probation by using

methamphetamine by failing to appear for a scheduled meeting with his supervising officer. (R., pp.160-161.) The district court revoked Keene's probation and retained jurisdiction. (R., pp.170-172.) Three months later, the district court again suspended Keene's sentence and placed him on probation. (R., pp.176-180.)

In June 2012, the state filed its third motion for probation violation. (R., pp.199-202.) Keene admitted that he violated his probation by consuming alcohol on multiple occasions. (R., pp.199-202, 208.) The district court revoked and reinstated Keene's probation and ordered that Keene successfully complete the drug court diversion program. (R., pp.212-217.)

Keene participated in the drug court program over the next 28 months. (R., pp.223-245.) In November 2014, the state filed a motion to discharge Keene from drug court. (R., pp.249-252.) The state alleged 22 violations of Keene's drug court agreement. (Id.) Keene admitted 13 of the violations, including that he failed to attend several required meetings, engaged in a romantic relationship with another drug court participant, missed scheduled urinalysis tests, and possessed three bottles of Zyprexa, an antipsychotic medication. (1/6/15 Tr., p.13, Ls.1-25.) The state agreed to withdraw the remaining allegations, but reserved the right to discuss all but one of them in making its disposition argument. (1/6/15 Tr., p.13, Ls.19-21.) After a hearing, the district court discharged Keene from the drug court program "for failing to adhere to Drug Court rules and regulations." (R., pp.257-261.)

The state filed its fourth motion for probation violation based upon Keene's failure to successfully complete drug court. (R., pp.246-248.) After an evidentiary hearing at which the state submitted the district court's order discharging Keene from the drug court program, the court found that Keene had violated his probation in the manner alleged by the state. (2/3/15 Tr., p.4, L.17 – p.6, L.13.)

At the conclusion of the probation violation evidentiary hearing, Keene requested that the district court set out the disposition hearing to give him the opportunity to obtain records from the drug court staff regarding Keene's participation in that program. (2/3/15 Tr., p.6, L.16 – p.8, L.10; see also R., pp.265-266.) The court granted the request and ordered the drug court staff to provide this information to Keene.¹ (R., pp.265-266.) These treatment records indicated that Keene disclosed his possession of the Zyprexa during the drug court intake process. (Confidential Exhibit, pp.7, 21-22, 34-35.)

At the probation disposition hearing, the district court acknowledged Keene's disclosure of the Zyprexa. (3/10/15 Tr., p.18, Ls.17-24.) However, the court noted that the Zyprexa issue was ultimately "not why [it] made the decision for the discharge [from drug court]." (3/10/15 Tr., p.18, Ls.24-25.) Keene requested that the district court place him back on probation, or in the alternative, to commute his sentence. (3/10/15 Tr., p.13, L.20 – p.14, L.3.) Citing the length of time Keene had taken to progress through the drug court program, and

¹ The Idaho Supreme Court granted Keene's motion to augment the appellate record with the treatment records provided by the drug court staff. (8/25/15 Order.) Citations to page numbers of this "Confidential Exhibit" correspond with the page numbers of the electronic file "Keene 43148 SEALED aug.pdf."

Keene's struggles to comply with the requirements of community supervision and drug court in the years since his 2008 felony DUI conviction, the district court revoked Keene's probation. (R., pp.269-272; 3/10/15 Tr., p.19, L.1 – p.22, L.12.) The court commuted Keene's unified seven-year sentence to 730 days in the Ada County Jail, with credit for 440 days, leaving 290 days to serve. (R., pp.269-272; 3/10/15 Tr., p.21, Ls.11-22.) Keene timely appealed. (R., pp.290-292.) Keene has since completed his sentence in this case. See Idaho Data Repository, State v. Keene, Ada County District Court Case No. CR-2008-00324.

ISSUES

Keene states the issues on appeal as:

1. Did the district court abuse its discretion when it revoked Mr. Keene's probation, because the district court's decision was tainted by factual error regarding Mr. Keene's disclosure of the Zyprexa to the drug court?
2. Did the district court commit fundamental error when it revoked Mr. Keene's probation, because the district court's decision was tainted by the drug court's legal error in basing the decision to discharge in part on Mr. Keene's supposed lack of progress in drug court?

(Appellant's brief, p.11.)

The state rephrases the issues on appeal as:

1. Are Keene's arguments on appeal moot?
2. Has Keene failed to demonstrate that the district court abused its discretion by revoking his probation?
3. Has Keene failed to demonstrate that the district court's revocation of his probation constituted fundamental error?

ARGUMENT

I.

Keene's Arguments On Appeal Are Moot

“An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief.” State v. Barclay, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010) (citations omitted). The mootness doctrine precludes review when “the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” Idaho Schools for Equal Educ. Opp. v. Idaho State Bd. of Educ., 128 Idaho 276, 281, 912 P.2d 644, 649 (1996) (quoting Bradshaw v. State, 120 Idaho 429, 432, 816 P.2d 986, 989 (1991)).

Keene has raised two issues in this case, both of which challenge the district court's decision to revoke probation. (Appellant's brief, pp.11-12.) As Keene notes (Appellant's brief, p.10 n.6), he has completed his commuted sentence in this case. See also Idaho Data Repository, State v. Keene, Ada County District Court Case No. CR-2008-00324. Even if this Court were to determine that the district court erred by revoking Keene's probation, such a determination would have no practical effect on the outcome of this case because Keene has completed his sentence, and thus, there is no longer a sentence to suspend. Keene therefore lacks a legally cognizable interest in the outcome of this appeal.

The state is aware of State v. Russell, 122 Idaho 488, 490 n. 3, 835 P.2d 1299, 1301, n. 3 (1992), in which the Idaho Supreme Court rejected the state's argument that Russell's challenge to the district court's revocation of his

probation became moot after Russell was subsequently released on parole. The Court noted that, had Russell been released on probation rather than parole, and had he then successfully completed his term of probation, he would have had the opportunity to request that the district court reduce his felony conviction to a misdemeanor. Id. Additionally, the penalties for violating a condition of probation can be less severe than that for a parole violation. Id. Thus, Russell still had a legally cognizable interest in the outcome of his challenge to the district court's decision to revoke his probation.

In this case, if the district court placed Keene back on probation following his discharge from drug court, and if Keene then successfully completed this term of probation, he could have requested, after his discharge from probation, that the district court reduce his felony DUI conviction to a misdemeanor pursuant to I.C. § 19-2604(3). This subsection, which was enacted in 2013, permits defendants to request the district court to reduce their felony convictions to misdemeanors after they are discharged from probation, regardless of whether the defendant previously violated the terms of his probation.² Id.

While both Keene and Russell could have theoretically requested that the district court reduce their felony convictions to misdemeanors (if they were reinstated onto probation and successfully completed probation), the facts of Russell are distinguishable from the facts of this case. Unlike Keene, Russell was still on parole under the supervision of the Idaho Department of Correction at the time his challenge to the district court's revocation of his probation was

² The statute contains some exceptions that do not appear to be applicable in this case.

considered by the Idaho Supreme Court. See Russell, 122 Idaho at 490 n. 3, 835 P.2d at 1301, n. 3. Russell, unlike Keene, was therefore not attempting to resurrect a completed sentence.

In any event, notwithstanding Russell and the relief theoretically available to Keene pursuant to I.C. § 19-2604(3), the state asserts that Keene's challenge to the district court's revocation of his probation is moot under the circumstances of this case. Keene has no "legally cognizable" interest in the outcome of this appeal because it is extremely likely that he will be in a worse position if he is successful. Keene, who has completed his sentence in this case, is requesting that this Court vacate the commutation and revocation order and, presumably, give him the opportunity to request that the district court place him back on probation, where he would again be subject to the liberty restrictions of community supervision, and where he would face the possible imposition of a multi-year prison sentence if he was once again unsuccessful on probation. Further, even in the event that Keene successfully completed probation, it is very unlikely that the district court would be willing to reduce his conviction in light of Keene's extensive criminal history, numerous failures on community supervision, and failure to successfully complete the drug court program. (See PSI, pp.1-6.) Thus, there is, in a practical sense, no clearly identifiable or cognizable relief available to Keene.

Additionally, at the probation violation disposition hearing, Keene requested that the district court either place him back onto probation or impose a commuted sentence. (3/10/15 Tr., p.13, L.20 – p.14, L.3.) Keene should not be

permitted to manufacture a legally cognizable interest in the outcome of this appeal by seeking to vacate an outcome he requested.³

Because Keene has already completed his sentence in this case, the issues he raises on appeal are moot. This Court should therefore decline to consider these issues.

II.

Keene Has Failed To Demonstrate That The District Court Abused Its Discretion By Revoking His Probation

A. Introduction

Keene contends that the district court abused its decision by revoking his probation. (Appellant's brief, pp.12-14.) A review of the record and applicable law reveals that the district court acted well within its discretion in revoking Keene's probation after Keene committed multiple probation violations and was discharged from drug court. Therefore, in the event that this Court determines that this issue is not moot, it should affirm the determination of the district court.

B. Standard Of Review

The decision to revoke probation is reviewed for an abuse of discretion. State v. Roy, 113 Idaho 388, 392, 744 P.2d 116, 120 (Ct. App. 1987); State v. Drennen, 122 Idaho 1019, 1021, 842 P.2d 698, 700 (Ct. App. 1992). "When a trial court's discretionary decision is reviewed on appeal, the appellate court

³ For similar reasons, Keene's challenges to the district court's revocation of his probation are precluded by the invited error doctrine. See State v. Abdullah, 158 Idaho 386, ___, 348 P.3d 1, 35 (2015) ("The invited error doctrine precludes a criminal defendant from 'consciously' inviting district court action and then successfully claiming those actions are erroneous on appeal.").

conducts a mulch-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason.” State v. Hedger, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

C. The District Court Acted Well Within Its Discretion In Revoking Keene’s Probation

A trial court has discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2603, 20-222; State v. Beckett, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); State v. Adams, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989); State v. Hass, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct. App. 1988). In determining whether to revoke probation, a court must examine whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society. State v. Upton, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); Beckett, 122 Idaho at 325, 834 P.2d at 327; Hass, 114 Idaho at 558, 758 P.2d at 717.

In this case, Keene concedes that there was substantial evidence in the record to support the district court’s finding that he violated his probation by failing to successfully complete drug court. (Appellant’s brief, p.12.) However, Keene argues that the district court’s decision to revoke his probation in light of this violation constituted an abuse of discretion because the decision was based upon a “factual error.” (Id.) Specifically, Keene contends that the court’s decision

to revoke his probation was based upon Keene's possession of bottles of Zyprexa during his participation in drug court, when, as the treatment records revealed, Keene disclosed his possession of the Zyprexa during the drug court intake process. (Appellant's brief, pp.12-15; Confidential Exhibit, pp.7, 21-22, 34-35.)

Keene's contention fails. By the time of the probation revocation disposition hearing, the district court was aware of, and expressly acknowledged, that Keene disclosed the Zyprexa during the drug court intake process. (3/10/15 Tr., p.18, Ls.17-25.) After noting that the Zyprexa issue was ultimately not why it chose to discharge Keene from drug court (3/10/15 Tr., p.18, Ls.24-25), the district court summarized the reasons for its decision to revoke Keene's probation. The court noted that Keene had a "rough go" through drug court and had been in the program for a significant length of time. (3/10/15 Tr., p.19, Ls.1-15.) The court explained that, from its experiences presiding over drug court, a participant's ability to benefit from the program becomes limited if they are in the program for too long. (Id.) The court acknowledged and discussed Keene's mental health issues, and the danger Keene poses to the community. (3/10/15 Tr., p.19, L.16 – p.20, L.1; p.20, L.19 – p.21, L.4.) The court also recognized that Keene's conviction was, by then, more than seven years old, and that Keene had spent much of that time in and out of jail after failing to comply with the terms of community supervision and drug court. (3/10/15 Tr., p.20, Ls.2-10.)

The district court also acknowledged that Keene had experienced some successes while participating in the drug court program, including staying sober

and not facing any new charges for driving under the influence. (3/10/15 Tr., p.20, Ls.12-18.) Accordingly, while it revoked probation, the district court also commuted Keene's seven-year unified sentence to 730 days in the Ada County Jail, 440 of which he had already served. (R., pp.269-272; 3/10/15 Tr., p.21, Ls.11-22.)

The district court's decision is supported by the record. Notwithstanding the Zyprexa issue, Keene admitted 12 other violations of his drug court agreement. (1/6/15 Tr., p.13, Ls.1-25.) Prior to his enrollment in drug court, Keene violated his probation numerous times. (R., pp.111-115, 170-172, 212-217.) Keene also has an extensive criminal history, which includes four convictions for driving under the influence, four convictions for unlawfully carrying a concealed weapon, and convictions for providing false information, resisting and obstructing an officer, possession of marijuana, possession of drug paraphernalia, driving on a suspended license, and disturbing the peace (which was amended from misdemeanor domestic assault). (PSI, pp.3-6, 48-51.)

The district court considered all of the relevant information and reasonably determined that Keene was no longer a viable candidate for community supervision. Keene's criminal history and repeated failures to comply with the requirements of community supervision and drug court did not entitle him to yet another opportunity on probation. Keene has therefore failed to establish that the district court abused its sentencing discretion.

III.

Keene Has Failed To Demonstrate That The District Court's Revocation Of His Probation Constituted Fundamental Error

A. Introduction

Keene contends that the district court committed fundamental constitutional error by revoking his probation. (Appellant's brief, pp.15-21.) Keene has failed to show any error, let alone fundamental error, in the district court's decision to revoke his probation. Therefore, in the event that this Court determines that this issue is not moot, it should affirm the determination of the district court.

B. Standard Of Review

The appellate courts of this state will only review unpreserved assertions of error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

C. The District Court Did Not Commit Error, Let Alone Fundamental Error, In Revoking Keene's Probation

Because Keene failed to raise a constitutional due process challenge to the district court's revocation of his probation below, he must demonstrate fundamental error on appeal. Perry, 150 Idaho at 226, 245 P.3d at 978. To do so, Keene must demonstrate: (1) a constitutional violation; (2) that the violation is clear and obvious without the need for additional information not contained in the appellate record; and (3) that prejudice resulted. Id. Keene cannot make such a showing.

“The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard.” State v. Blair, 149 Idaho 720, 722, 239 P.3d 825, 827 (Ct. App. 2010). In the context of parole and probation violation hearings, the Idaho Supreme Court has set forth the due process requirements as follows:

In *Morrissey [v. Brewer]*, 408 U.S. 471 (1972), the Supreme Court held that before the government could revoke a parolee’s parole, due process requires the following:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

408 U.S. at 489....

With regard to the revocation of probation, the Court subsequently held that “a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey*.” *Gagnon v. Scarpelli*, 411 U.S. 778, 782... (1973). Thus, the State “must provide the same process [found in *Morrissey*] when terminating a probationer from probation.” [*State v. Rogers*, 144 Idaho [738] at 742-43, 170 P.3d [881] at 885-86

[(2007)]. As a fundamental matter, this Court has affirmed the *Morrissey* and *Gagnon* holdings that “[p]robationers do not enjoy the full panoply of constitutional protections afforded criminal defendants.” *State v. Rose*, 144 Idaho 762, 765, 171 P.3d 253, 256 (2007). Nevertheless, “a probationer has a protected liberty interest in continued probation, and is therefore entitled to due process before probation may be revoked” - thus, we look first to *Morrissey* and *Gagnon* for those minimum due process requirements. *Id.* at 766, 171 P.3d at 257.

State v. Scraggins, 153 Idaho 867, 870-871, 292 P.3d 258, 261-262 (2012) (footnote omitted).

Under Morrissey, Gagnon and Scraggins, the “notice” required for due process in probation revocation hearings is “written notice of the claimed violations of [probation].” *Id.* The Idaho Supreme Court has held that drug court termination proceedings require the same restricted due process protections provided to parolees and probationers. State v. Rogers, 144 Idaho 738, 740-743, 170 P.3d 881, 883-886 (2007).

In this case, while Keene challenges the district court’s revocation of his probation, he does not claim that he was directly deprived of due process at his probation revocation disposition hearing. (See Appellant’s brief, pp.15-21.) Instead, he asserts that the district court committed constitutional error at the probation revocation disposition hearing by basing its decision to revoke probation upon the court’s *previous* decision to discharge Keene from drug court. (Id.) This previous decision, Keene asserts, violated his due process rights. (Id.) Specifically, Keene asserts that the district court erred by basing its decision to discharge him from drug court on a ground which was not referenced in the state’s motion for discharge – the significant amount of time Keene had taken to

progress through the program. Keene has failed to satisfy the Perry fundamental error standard with regard to this claim.

First, Keene cannot show clear constitutional error because he has not cited any cases standing for the proposition he raises in this case – that a district court violates constitutional due process at a probation disposition hearing when it bases its determination upon the result of a previous hearing, at which, Keene asserts, due process was not provided. The relevant cases cited above do not require district courts to verify and ensure that due process was provided at all previous sentencing hearings, probation revocation hearings, or diversionary program discharge hearings which may influence its contemporaneous determination.

Second, even if the process and notice provided to Keene at the drug court discharge hearing was somehow constitutionally relevant to the question of whether the district court violated Keene's due process rights at the subsequent probation revocation disposition hearing, Keene has failed to show that he was deprived of due process at the discharge hearing. The district court did not conclude that Keene *violated his drug court agreement* by failing to complete it within some period of time. Instead, the court considered this as a factor in making its *disposition determination* of whether to discharge Keene from drug court after it had concluded that he was in violation of the drug court agreement. (R., pp.257-261.) Keene has not cited any caselaw standing for the proposition that a district court commits constitutional error when it considers factors other than those expressly referenced in the state's motion for discharge from drug

court in making its ultimate determination whether to grant the motion. The state asserts that once it has been established that a defendant has violated the drug court agreement, it is entirely appropriate for the court to consider a wide range of factors including a defendant's character, criminal history, safety of the community, record on community supervision and drug court, etc., just as it would be entitled to do in a probation disposition or sentencing hearing. See Upton, 127 Idaho at 275, 899 P.2d at 985; Beckett, 122 Idaho at 325, 834 P.2d at 327; Hass, 114 Idaho at 558, 758 P.2d at 717; State v. Sanchez, 149 Idaho 102, 105-107, 233 P.3d 33, 36-38 (2009). Keene has therefore failed to satisfy the first prong of Perry because he has not established clear constitutional error.

Keene has also failed to satisfy the third prong of the Perry fundamental error test because he has failed to show prejudice. As discussed above, the district court's decisions to discharge Keene from drug court and revoke his probation were supported by a multitude of factors, including Keene's admissions to 12 violations of his drug court agreement (separate from the allegation pertaining to the Zyprexa issue), numerous probation violations, and Keene's significant criminal history.

Keene has failed to demonstrate error, let alone clear fundamental constitutional error, in the district court's decision to revoke his probation. This Court should therefore affirm the determination of the district court.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order revoking Keene's probation

DATED this 29th day of March, 2016.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of March, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

MWO/dd