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State v. Keene Appellant's Reply Brief Dckt. 43148

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 43148
)	
v.)	ADA COUNTY NO. CR 2008-324
)	
JACOB DOUGLAS KEENE,)	REPLY BRIEF
)	
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

**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**

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

**BEN P. MCGREEVY
Deputy State Appellate Public Defender
I.S.B. #8712
P.O. Box 2816
Boise, ID 83701
(208) 334-2712**

**KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**

**ATTORNEYS FOR
DEFENDANT-APPELLANT**

**ATTORNEY FOR
PLAINTIFF-RESPONDENT**

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STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Jacob Douglas Keene pleaded guilty to felony operating a motor vehicle while under the influence of alcohol. The district court imposed a unified sentence of seven years, with two years fixed, suspended the sentence, and placed Mr. Keene on probation for a period of seven years. Mr. Keene later admitted several times to probation violations, and the district court eventually reinstated his probation with the special condition that he complete drug court. Mr. Keene was accepted into drug court, but the drug court later discharged him. The drug court based its decision to discharge in part on Mr. Keene's failure to disclose the medication Zyprexa to the drug court, but during Mr. Keene's probation violation proceedings the district court acknowledged Mr. Keene had actually disclosed the Zyprexa. Nonetheless, the district court revoked Mr. Keene's probation based on his failure to successfully complete drug court, and commuted his sentence.

Mr. Keene appealed, asserting the district court abused its discretion when it revoked his probation because the district court's decision was tainted by factual error regarding Mr. Keene's disclosure of the Zyprexa to the drug court. Mr. Keene also asserted that the district court committed fundamental error when it revoked his probation, because the district court's decision was tainted by the drug court's legal error of basing the decision to discharge in part on a violation not alleged in the State's motion for discharge.

In its Respondent's Brief, the State argues Mr. Keene's arguments on appeal are moot, Mr. Keene has not shown the district court abused its discretion by revoking his

probation, and Mr. Keene has not shown the district court's revocation of his probation constituted fundamental error. (Resp. Br., pp.6-21.) This Reply Brief is necessary to establish that Mr. Keene's arguments on appeal are not moot.

Statement of Facts and Course of Proceedings

The statement of facts and course of proceedings were previously articulated in Mr. Keene's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

- I. 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?
- II. 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?

ARGUMENT

I.

The District Court Abused 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

Mr. Keene asserts the district court abused its discretion when it revoked his probation, because the district court's decision was tainted by factual error regarding Mr. Keene's disclosure of the Zyprexa to the drug court. See *State v. Upton*, 127 Idaho 274, 276 (Ct. App. 1995).

A. Mr. Keene's Arguments On Appeal Are Not Moot

As a preliminary matter, the State argues Mr. Keene's arguments on appeal are moot. (Resp. Br., pp.6-9.) However, Mr. Keene's arguments on appeal are not moot. Mootness is an issue of law subject to an appellate court's free review. *State v. Manley*, 142 Idaho 338, 342 (2005). "Generally, appellate review of an issue will be precluded where an issue is deemed moot." *Id.* at 343. An issue is moot "if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome." *Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281 (1995) (internal quotation marks omitted). A case becomes moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id.* (internal quotation marks omitted).

In support of its mootness argument, the State contends that even if the Court were to determine the district court erred by revoking Mr. Keene's probation, "such a determination would have no practical effect on the outcome of this case because [Mr.] Keene has completed his sentence, and thus, there is no longer a sentence to

suspend. [Mr.] Keene therefore lacks a legally cognizable interest in the outcome of this appeal.” (Resp. Br., p.6.) But the Idaho Supreme Court has held that “a felony conviction has collateral consequences and the fact that [an appellant] has fully served his sentence does not moot [that appellant’s] appeal.” *State v. Lute*, 150 Idaho 837, 839 (2011) (quoting *Butler v. State*, 129 Idaho 899, 901 (1997), *abrogated on other grounds by Rhoades v. State*, 149 Idaho 130, 137 (2010)) (internal quotation marks omitted) (alterations in original). Similarly, the United States Supreme Court has stated that “a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.” *Sibron v. New York*, 392 U.S. 40, 57 (1968); *see Lute*, 150 Idaho at 839 (quoting *Sibron*).

Here, the State has recognized the theoretical possibility that, if Mr. Keene were to prevail on appeal, be reinstated on probation, and successfully complete probation, he would be able to request the reduction of his felony conviction to a misdemeanor under I.C. § 19-2604(3). (See Resp. Br., pp.7-8.) The State contends it is extremely likely that Mr. Keene would be in a worse position if he won on appeal. (Resp. Br., p.8.) However, the State has not shown there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. *See Sibron*, 392 U.S. at 57. Thus, even though Mr. Keene has completed his sentence, his appeal is not moot for that reason. *See Lute*, 150 Idaho at 839. Contrary to the State’s contention, Mr. Keene’s arguments on appeal are not moot.

B. The Invited Error Doctrine Does Not Apply Here

The State further argues Mr. Keene's "challenges to the district court's revocation of his probation are precluded by the invited error doctrine." (Resp. Br., p.9 n.3.) The State bases this argument on Mr. Keene's request at the probation violation disposition hearing "that the district court either place him back onto probation or impose a commuted sentence." (See Resp. Br., p.8.) However, the invited error doctrine does not apply here because Mr. Keene did not invite the district court to impose the commuted sentence actually given.

Under the invited error doctrine, "one may not successfully complain of errors one has acquiesced in or invited. Errors consented to, acquiesced in, or invited are not reversible." *State v. Owsley*, 105 Idaho 836, 838 (1983) (citation omitted). The invited error doctrine "applies to sentencing decisions as well as rulings made during trial." *State v. Edghill*, 155 Idaho 846, 849 (Ct. App. 2014).

Here, Mr. Keene did not invite the district court to impose the commuted sentence actually given. At the probation violation disposition hearing, Mr. Keene recommended the district court place him back on probation, or alternatively commute the sentence in his case by keeping him in jail until May 1, 2015. (See Tr., Mar. 10, 2015, p.13, L.20 – p.14, L.3.) The district court instead commuted Mr. Keene's sentence to 730 days in the Ada County Jail, with credit for 440 days served, leaving a balance of 290 days to serve. (Tr., Mar. 10, 2015, p.21, Ls.14-17; R., pp.269-72.) In other words, the district court imposed a different, longer commuted sentence than the commuted sentence Mr. Keene requested as an alternative to probation. Thus,

Mr. Keene did not consent to or acquiesce in the commuted sentence actually given by the district court. See *Owsley*, 105 Idaho at 838.

Under the State's argument, the invited error doctrine would be stretched beyond recognition with respect to sentencing decisions. For example, the State's logic would preclude an appellant from making an excessive sentence claim on appeal where the appellant recommended a term of imprisonment and the district court imposed a different, longer term of imprisonment. But the invited error doctrine only precludes challenges to "errors one has acquiesced in or invited." See *Owsley*, 105 Idaho at 838. The State's argument is unconvincing, and the invited error doctrine does not apply here because Mr. Keene did not invite the district court to impose the commuted sentence actually given.

C. The District Court's Decision To Revoke Mr. Keene's Probation Was Tainted By Factual Error Regarding His Disclosure Of Zyprexa To The Drug Court

Mr. Keene asserts that because he had actually disclosed the Zyprexa to the drug court, the drug court's decision to discharge, and by extension the district court's decision to revoke probation, were tainted by factual error. See *Upton*, 127 Idaho at 276. It does not appear from the record here that the result would have been the same without the factual error. See *id.* at 276-77. Thus, because the district court's discretionary decision to revoke Mr. Keene's probation was tainted by factual error, the decision to revoke probation should be vacated and the case should be remanded for a new, error-free discretionary determination by the district court. See *id.* at 276.

The State argues that "the district court acted well within its discretion in revoking [Mr.] Keene's probation after [Mr.] Keene committed multiple probation violations and

was discharged from drug court.” (Resp. Br., p.9.) The State’s argument on this issue (Resp. Br., pp.9-12), is unremarkable, and no further reply is necessary. Mr. Keene would therefore direct this Court’s attention to Pages 12-14 of the Appellant’s Brief.

II.

The District Court Committed 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

Mr. Keene asserts that the district court committed fundamental error when it revoked his probation, because the district court’s decision was tainted by the drug court’s legal error. See *State v. Rogers*, 144 Idaho 738, 742 (2007); *Upton*, 127 Idaho at 276-77.

As discussed above in Part I, the State’s arguments that this issue is moot or procedurally barred by the invited error doctrine are not convincing. The State also argues Mr. Keene has not shown “any error, let alone fundamental error, in the district court’s decision to revoke his probation.” (Resp. Br., p.13.) The State’s argument on this issue (Resp. Br., pp.13-17), is unremarkable, and no further reply is necessary. Mr. Keene would therefore direct this Court’s attention to pages 15-21 of the Appellant’s Brief.

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Keene respectfully requests that this Court vacate the district court's order revoking probation and remand the case for a new, error-free discretionary determination by the district court.

DATED this 11th day of May, 2016.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of May, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JACOB DOUGLAS KEENE
2022 S LATAH
BOISE ID 83705

RICHARD D GREENWOOD
DISTRICT COURT JUDGE
EMAIL BRIEF

CHARLENE W DAVIS
DEPUTY PUBLIC DEFENDER
EMAIL BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL - CRIMINAL DIVISION
EMAIL BRIEF

_____/s/_____
MARY ANN LARA
Administrative Assistant

BPM/mal