11-24-2015

State v. Yost Appellant's Brief Dckt. 43313

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JESS WADE YOST, Defendant-Appellant.	NO. 43313 JEROME COUNTY NO. CR 2013-120 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Thirty-year-old Jess Wade Yost was on probation for sexual battery of a minor. After Mr. Yost admitted to violating his probation, the district court revoked probation, imposed his underlying twenty-five year sentence, and then reduced the fixed portion of his sentence from five to three years. Mr. Yost now appeals from the district court's order revoking probation. Mr. Yost contends that his rights under the Due Process Clause and Equal Protection Clause were violated by the district court's revocation of his probation based primarily on his indigent status. Mr. Yost also contends that the district court abused its discretion by revoking probation or by failing to further reduce his sentence.

Statement of the Facts and Course of Proceedings

In April of 2013, Mr. Yost pled guilty to sexual battery of a minor of sixteen or seventeen years of age. (R., pp.53–54, 69–70, 80–81.) The district court sentenced him to twenty-five years, with five years fixed, and retained jurisdiction ("a rider"). (R., pp.79–85.) At the rider review hearing in January of 2014, the district court suspended execution of Mr. Yost's sentence and placed him on probation for ten years. (R., pp.91–92, 93–97.) The district court also set a status hearing for April of 2014 to evaluate Mr. Yost's performance on probation. (R., pp.92, 96.)

Before the April status hearing, a Special Progress Report was provided to the district court. (R., p.120.) This Report stated that Mr. Yost was in compliance with most of the terms of his probation. (R., p.120.) At the status hearing, the district court noted that the "[r]eport looks positive" and told Mr. Yost to "[k]eep up the good work." (R., p.122.)

On November 20, 2014, a Report of Probation Violation was filed with the district court. (R., pp.126–29.) On January 26, 2015, Mr. Yost admitted to three violations for (1) the failure to attend sex offender treatment; (2) view and possession of pornographic media; and (3) access to the Internet to view pornography.[1] (R., pp.126–27, 146; Tr. Vol. I,[2] p.8, L.13–p.10, L.20.) With regard to the first violation, the only reason Mr. Yost had failed to attend treatment was because the program, H&H Treatment, discharged him for owing $324.00. (R., p.130.)

At the disposition hearing on March 2, 2015, Mr. Yost's counsel explained that Mr. Yost had "substantially struggled" to have the funds to pay for sex offender treatment. (Tr. Vol. I, p.16, Ls.21–24.) His counsel also explained:

> Mr. Yost understands how important that treatment is, Judge. And I think he actually gets a lot out of the treatment but has really struggled finding employment that works with that schedule and being able to pay. And when H&H is the only treatment provider in the vicinity, he's kind of at their mercy when he's unable to pay. And he understands why they would want to be paid in advance, but he is stuck between a veritable rock and a hard place where if he doesn't have the money to pay rent or those things, he's in violation of his probation, but if he doesn't pay for H&H, he's booted out of treatment and is in violation of his probation.

(Tr. Vol. I, p.18, Ls.1–14.) His counsel also argued that the other probation violations for accessing the Internet and viewing pornography were the result of Mr. Yost's lapse in treatment due to his inability to pay. (Tr. Vol. I, p.18, L.22–p.19, L.8.) Since the admit/deny hearing in January of 2015, however, Mr. Yost had gotten the funds to pay the $324.00 balance, so he was eligible to start treatment again. (Tr. Vol. I, p.17, Ls.8–15.) In addition, Mr. Yost informed the district court that he had been clean and sober

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[1] The State withdrew a fourth alleged violation regarding possession of sexually explicit images and videos of the victim. (R., p.146; Tr. Vol. I, p.10, L.21–p.11, L.3.)

[2] There are two transcripts on the appeal. The first, cited as Volume I, includes the admit/deny hearing and first disposition hearing, held on March 2, 2015. The second, cited as Volume II, includes the second disposition hearing, held on June 8, 2015.

for almost two years, which was the longest time he had been sober since he was a teenager. (Tr. Vol. I, p.20, Ls.10–13.) The district court decided to hold the disposition open for three months to see that Mr. Yost was fully engaged in treatment, current on his financial obligations, and otherwise in compliance with the terms of probation. (Tr. Vol. I, p.21, Ls.14–22.)

On June 8, 2015, the district court held a second disposition hearing. (R., pp.153–54.) A second Special Progress Report provided that Mr. Yost was not in compliance with the terms of his probation. (R., p.150.) This Report stated that Mr. Yost owed money towards the cost of supervision. (R., p.150.) It also stated that Mr. Yost was noncompliant with the requirement of sex offender treatment for his failure to attend certain group or individual sessions and that Mr. Yost failed to take a "biannual maintenance polygraph examination." (R., p.150.) Mr. Yost's counsel again explained that the noncompliance was due to financial issues.[3] (Tr. Vol. II, p.4, L.25–p.8, L.24.) Mr. Yost struggled to pay all of his expenses, including rent, the cost of supervision, the cost of sex offender treatment, the cost for polygraph tests, living expenses like gas and insurance to get to work, and other debts. (Tr. Vol. II, p.4, L.25–p.8, L.24.) The district court revoked probation and imposed the underlying twenty-five year sentence, with five years fixed. (Tr. Vol. II, p.10, Ls.13–45.) The district court then reduced the fixed portion of Mr. Yost's sentence to three years. (Tr. Vol. II, p.10, Ls.16–18.)

The district court entered an Order on Motion to Revoke Probation. (R., pp.155–58.) Mr. Yost filed a timely notice of appeal from the district court's order. (R., pp.161–63.)

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[3] Mr. Yost also submitted documentation of his exact attendance record and the invoices from H&H Treatment. (Def.'s Ex. A.)

ISSUES

1. Did the district court violate Mr. Yost's equal protection and due process rights when it revoked probation due to Mr. Yost's indigent status?

2. Did the district court abuse its discretion when it revoked Mr. Yost's probation?

ARGUMENT

I.

The District Court Violated Mr. Yost's Equal Protection And Due Process Rights When It Revoked Probation Due To Mr. Yost's Indigent Status

Even though the district court's decision to revoke probation is a matter within the court's discretion, *State v. Roy*, 113 Idaho 388, 392 (Ct. App. 1987), the court's decision must be consistent with "constitutional standards." *State v. Braaten*, 144 Idaho 606, 607 (Ct. App. 2007). The Equal Protection Clause of the Fourteenth Amendment guarantees "equal protection of the laws," and the Due Process Clause prohibits the State from depriving any person of "life, liberty, or property, without due process of law." U.S. Const., amend. XIV. Consistent with these constitutional standards, a deprivation of liberty based solely on the individual's indigent status may run contrary to the "fundamental fairness required by the Fourteenth Amendment." *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983); *see also Braaten*, 144 Idaho at 608. That is so because "there can be no equal justice where the kind of trial"—or sentence—"a man gets depends on the amount of money he has." *Bearden*, 461 U.S. at 664 (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion)).

Mr. Yost contends that his equal protection and due process rights were violated by the district court's revocation of his probation due to his indigent status. The district court revoked probation because Mr. Yost failed to attend sex offender treatment, but the only reason Mr. Yost failed to attend treatment was due to his inability to pay. Imprisoning Mr. Yost for his poverty is constitutionally impermissible.

To determine whether a criminal defendant's indigence may permissibly affect the sentence, the Court applies a balancing test with elements of both the due process

and equal protection analyses. *See Braaten*, 144 Idaho at 608. Separately, these two analyses are as follows:

> To determine whether this differential treatment [based on indigency] violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine.

Braaten, 144 Idaho 308–09 (quoting *Bearden*, 461 U.S. at 665–66). In *Bearden*, for example, the U.S. Supreme Court examined whether the defendant's equal protection and due process rights were violated by the revocation of his probation due to his failure to pay the imposed fine and restitution. 461 U.S. at 665–73. The U.S. Supreme Court held that the revocation of probation was "permissible" only if the defendant "did not make sufficient bona fide efforts to pay his fine" or "alternate punishment is not adequate to meet the State's interests in punishment and deterrence." *Id.* at 674; *see also id.* at 672–73. Whether this issue is "analyzed in terms of equal protection or due process," the factors to be considered are: "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose . . . ." *Braaten*, 144 Idaho at 609 (quoting *Bearden*, 461 U.S. at 666 (alterations in original)). Imprisoning a defendant "solely because he lacks funds to pay the fine," without considering the reasons for the inability to pay or examining alternatives, is constitutionally impermissible. *Bearden*, 461 U.S. at 674.

As an initial matter, Mr. Yost raises this issue under the fundamental error standard from *State v. Perry*, 150 Idaho 209 (2010). Under this standard, the Court may review an unobjected-to error for the first time on appeal if the error: "(1) violates one or

more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." *Id.* at 228. In this case, Mr. Yost did not object to the error, and thus the fundamental error standard applies to his claim. Mr. Yost has the burden to demonstrate all three prongs of the *Perry* standard. *Id.*

A. The District Court Violated Mr. Yost's Constitutional Rights To Equal Protection And Due Process Of Law

Under the first prong, Mr. Yost must show a violation of one or more unwaived constitutional rights. *See id.* Mr. Yost contends that his unwaived constitutional rights to due process and equal protection were violated by the district court's revocation of probation. Using the balancing test from *Bearden*, Mr. Yost's individual liberty interest outweighed the State's penological interests, and the district court failed to consider alternate means to effectuate the State's interests. *See Braaten*, 144 Idaho at 608 (discussing the balancing test).

Examining the first factor of "the nature of the individual interest," Mr. Yost has a constitutionally-protected interest in remaining on probation. The U.S. Supreme Court held as much in *Bearden*, recognizing "the significant interest of the individual in remaining on probation." 461 U.S. at 671 (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972)). The Court of Appeals in *Braaten* also recognized this liberty interest. 144 Idaho at 609 ("[T]he United States Supreme Court has held that one convicted of a crime has a significant liberty interest in remaining on probation or parole.") The Court of Appeals explained that this liberty interest "is so because [t]here is a crucial distinction between being deprived of a liberty

one has, as in parole, and being denied a conditional liberty that one desired." *Id.* at 609–10 (alteration in original) (quoting *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex,* 442 U.S. 1, 9 (1979)). Moreover, the extent to which Mr. Yost's liberty interest is affected by the disposition proceeding is great—Mr. Yost's probation would be either revoked or reinstated based on the district court's decision.

"The next factor to be weighed is the State's interest or purpose and the rationality of the connection between this purpose and the means used to accomplish it." *Id.* at 610. This factor also considers "the existence of alternate means" to effectuate the State's purpose. *Bearden*, 461 U.S. at 666; *see also State v. Sanchez*, 149 Idaho 102, 105 (2009) (discussing the required analysis of alternate means for non-willful violations generally). The U.S. Supreme Court has provided considerable guidance on this factor in the context of a revocation of probation. The U.S. Supreme Court cknowledged, "The State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment." *Id.* at 669. "The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State's penological interests do not require imprisonment." *Id.* at 670. Thus, the State's interests in punishment and deterrence are diminished when the defendant is already determined to be an appropriate candidate for probation. Moreover, a probationer, such as Mr. Yost, who has made "sufficient bona fide efforts" to pay for treatment, and "who has complied with the other conditions of probation,"[4] "has

[4] Mr. Yost acknowledges the two other probation violations for accessing the Internet and viewing pornography. But, as argued by his counsel, these violations occurred only because Mr. Yost was discharged from his treatment due to his inability to pay. (Tr. Vol. I, p.18, L.22–p.19, L.8.) Once Mr. Yost saved up enough money to pay for treatment

demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms." *Id.* This further diminishes the requirement of imprisonment "to satisfy the State's interests." *Id.*

Certainly, the State has an interest "in rehabilitating the probationer and protecting society." *Id.* at 671. The Court of Appeals examined this interest in the relinquishment context: "[T]he State has a strong and legitimate interest in protecting society from criminals and, therefore, in disallowing probation for an offender if the offender cannot be adequately supervised or if his conditional release will present an undue risk to society." *Braaten*, 144 Idaho at 610. At the same time, however, a person cannot be punished solely for his poverty. *Bearden*, 461 U.S. at 671.

Here, Mr. Yost presented an alternate means to effectuate the State's interests of rehabilitation and protection of society. Mr. Yost specifically requested that he meet with his probation officer to develop budgeting and money-management skills, with the first priority being payment of his supervision costs, polygraph expenses, and treatment fees. (Tr. Vol. II, p.6, L.25–p.7, L.11, p.8, Ls.17–24.) He also demonstrated "sufficient bona fide efforts" to pay for his treatment, such as working the graveyard shift and carrying extra money to pay for the treatment sessions. (Tr. Vol. I, p.16, L.21–p.17, L.15, p.18, Ls.1–5; Tr. Vol. II, p.5, L.9–p.6, L.6, p.7, L.12–p.8, L.3.) (*See also* Def.'s Ex. A of Mr. Yost's payments to H&H Treatment.) There were no claims that Mr. Yost "willingly refused to pay" for treatment "when he ha[d] the means to pay" or that he demonstrated "an insufficient concern" for the requirement of treatment. *Bearden*, 461 U.S. at 668. These kinds of allegations could justify imprisonment at the means to

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again, no further violations of this nature occurred. Other than the financial issues, Mr. Yost was in compliance with the terms of his probation. (R., p.150.)

effectuate the State's penological interests. *Id.* But here, Mr. Yost recognized his need for treatment and tried to pay to the best of his abilities. The district court failed to weigh these factors as required by *Bearden* and *Braaten.*

As stated in *Bearden*, "Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay." 461 U.S. at 672; *see also id.* ("[T]he court must consider alternate measures of punishment other than imprisonment."); *Sanchez*, 149 Idaho at 106. Mr. Yost submits that the district court violated his constitutional rights to due process and equal protection by punishing him for his indigency, without considering his bona fide efforts to pay and, most importantly, the alternate means to effectuate the State's interests.

B. The Constitutional Violation Is Clear From The Record

Second, Mr. Yost submits that this error is clear and plain from the record. *See Perry*, 150 Idaho at 228. At the second disposition hearing, the district court stated:

> All right. The Court, for purposes of disposition, does still consider the four goals of sentencing. Certainly given the nature of the underlying offense, protection of society remains this Court's primary concern. Although, the Court does and must still consider the related goals of rehabilitation, retribution, and deterrence. The Court also does still consider those factors under 19-2521 to determine whether probation or some form of incarceration is appropriate. The Court does consider the character of the offender, the nature of the underlying offense, as well as Defendant's performance on probation.
>
> The Court is very concerned about the nature of the violation. The Court, after the admissions were entered, did subsequently hold disposition open for purposes of allowing the defendant to come into compliance with the terms and conditions. *Certainly, the Court does understand the financial concerns; however, given the nature of the underlying offense, if the defendant does not have the financial ability to fully and completely participate in sex offender treatment, as required in*

> *the community, certainly that treatment is available in the correctional setting and financial ability does not interfere.*
>
> It does appear that while Mr. Yost did get re-engaged and began again attending in April of this year that even then, he missed three of the eight groups. There's still an indication, as of June 4, 2015, that the defendant has not scheduled his individual sessions and has not participated in the required maintenance polygraphs.
>
> Given the serious nature of the offense and the Court having revoked the defendant's probation, the Court will impose the sentence; however, the Court will modify the sentence from 25 years unified to 3 years fixed, 22 years indeterminate not to exceed 25. . . .

(Tr. Vol. II, p.9, L.4–p.10, L.18 (emphasis added).) Thus, the district court viewed prison as the solution to Mr. Yost's financial restrictions, without factoring into its analysis the alternate measures or Mr. Yost's efforts to pay. Further, there is no tactical or strategic reason for counsel to fail to object to a constitutional violation that leads directly to imprisonment. The error is clear from the record—the district court viewed Mr. Yost's inability to pay for treatment as its justification for imprisonment. *See Bearden*, 461 U.S. at 671.

C. The Error Was Not Harmless

Third, and finally, there is a reasonable possibility the error affected the outcome of the disposition proceeding. *See Perry*, 150 Idaho at 226. If Mr. Yost had the ability to pay for treatment, along with the cost of supervision, there is no indication from the record that the district court would have revoked probation. The other violations would not have occurred but for the lapse in treatment. The evidence indicates that Mr. Yost would have attended treatment as required and complied with all other terms of his probation.

In summary, Mr. Yost has met his burden to show that the district court violated Mr. Yost's unwaived constitutional rights to due process and equal protection when it revoked probation based primarily on his indigent status. Further, Mr. Yost has shown

that the error was clear from the record, and the error was not harmless. He respectfully requests that this Court vacate the district court's order revoking probation and remand for a new disposition hearing.

II.

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

The district court is empowered by statute to revoke a defendant's probation under certain circumstances. I.C. §§ 19-2602, -2603, 20-222. The Court uses a two-step analysis to review a probation revocation proceeding. *Sanchez*, 149 Idaho at 106. First, the Court determines "whether the defendant violated the terms of his probation." *Id.* Second, "[i]f it is determined that the defendant has in fact violated the terms of his probation," the Court examines "what should be the consequences of that violation." *Id.* The determination of a probation violation and the determination of the consequences, if any, are separate analyses. *Id.*

Here, Mr. Yost does not challenge his admissions to the probation violations. (Tr. Vol. I, p.8, L.13–p.10, L.20.) "When a probationer admits to a direct violation of her probation agreement, no further inquiry into the question is required." *State v. Peterson*, 123 Idaho 49, 50 (Ct. App. 1992). Rather, Mr. Yost submits that the district court abused its discretion by revoking his probation.

"After a probation violation has been proven, the decision to revoke probation and pronounce sentence lies within the sound discretion of the trial court." *Roy*, 113 Idaho at 392. "A judge cannot revoke probation arbitrarily," however. *State v. Lee*, 116 Idaho 38, 40 (Ct. App. 1989). "The purpose of probation is to give the defendant an opportunity to be rehabilitated under proper control and supervision." *State v. Mummert*, 98 Idaho 452, 454 (1977). "In determining whether to revoke probation a court must

consider whether probation is meeting the objective of rehabilitation while also providing adequate protection for society." *State v. Upton*, 127 Idaho 274, 275 (Ct. App. 1995). The court may consider the defendant's conduct before and during probation. *Roy*, 113 Idaho at 392.

In this case, Mr. Yost submits that the district court abused its discretion by revoking his probation because the violations did not justify revocation. As explained Mr. Yost's counsel, the only barrier between Mr. Yost and his treatment was its cost. (Tr. Vol. I, p.16, L.21–p.19, L.14; Tr. Vol. II, p.4, L.25–p.8, L.3.) There was no allegation that Mr. Yost failed to attend treatment for any reason other than his inability to pay. (Tr. Vol. I, p.19, Ls.2–4.) Mr. Yost wanted treatment, and he fully appreciated the need for treatment. (Tr. Vol. I, p.20, Ls.19–20, p.18, Ls.1–2, p.19, Ls.15–22; Tr. Vol. II, p.8, Ls.10–14.) For example, he worked the graveyard shift at a manufacturing plant to ensure that he could attend treatment. (Tr. Vol. I, p.17, Ls.1–2, p.18, Ls.2–5.) But, like many individuals, Mr. Yost struggled to follow a budget and stay up-to-date on all his expenses. Then, in April of 2015, Mr. Yost injured himself at the manufacturing plant, which compounded his financial difficulties. (Tr. Vol. II, p.5, Ls.9–17; Def.'s Ex. A, pp.13–14.) In order to succeed on probation, Mr. Yost simply needed instruction and guidance to learn how to manage his finances, which he specifically requested at the second disposition hearing. (Tr. Vol. II, p.6, L.25–p.7, L.11, p.8, Ls.17–24.) Instead of punishing Mr. Yost for his inability to pay with a twenty-five year prison sentence, Mr. Yost should have been given an opportunity to develop these money-management skills while on probation.

Other facts indicate the district court abused its discretion by revoking Mr. Yost's probation because his probation was achieving its rehabilitative objective. Mr. Yost had

been sober for almost two years. (Tr. Vol. I, p.20, Ls.10–14.) Remaining sober was an accomplishment for him as he began drinking alcohol at age nineteen, consuming at least twelve beers a day. (Tr. Vol. I, p.20, Ls.10–14; Presentence Investigation Report ("PSI"),[5] p.36.) Further, the initial probation violations for viewing pornography and accessing the Internet did not occur again once Mr. Yost had the funds to pay for treatment. Mr. Yost's counsel explained, "He knows that when he is in treatment and attending those sessions like he's supposed to be, the issues that arose in that probation violation don't come up in his life." (Tr. Vol. II, p.8, Ls.10–14.) In fact, the psychosexual evaluation found that Mr. Yost's treatment needs could be met in the community. (PSI, p.18.) Similarly, the Addendum to the PSI following Mr. Yost's rider found that he was amenable to sex offender treatment and recommended probation. (PSI, pp.52, 55.) In addition, Mr. Yost had full-time employment and a stable residence.[6] (R., p.150.) He also met with his probation officer as directed. (R., p.150.) Based on these facts, Mr. Yost's probation was achieving its rehabilitative objective. Mr. Yost submits that the district court abused its discretion by revoking probation or, in the alternative, by failing to further reduce his sentence in light of his progress on probation.

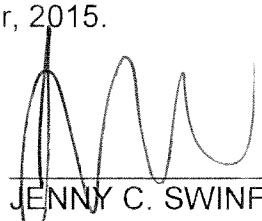
[5] Citations to the PSI refer to the sixty-three page electronic file titled "Appeal #43313 Jess Wade Yost Conf. Exhibits."

[6] Mr. Yost lived with his parents, but he paid them rent. (PSI, p.55; Tr. Vol. II, p.6, Ls.7–12.)

CONCLUSION

Mr. Yost respectfully requests that the district court's order revoking probation be vacated and his case be remanded to the district court for a new disposition hearing. Alternatively, he requests that this Court reinstate probation or further reduce his sentence as it deems appropriate.

DATED this 24th day of November, 2015.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th 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:

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