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## State v. Anderson Respondent's Brief Dckt. 43447

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 43447
Plaintiff-Respondent,	)	
	)	Ada County Case No.
v.	)	CR-2009-937
	)	
HYRUM WILLIAM ANDERSON,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Anderson failed to establish that the district court abused its discretion by revoking his probation and retaining jurisdiction?

Anderson Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Anderson pled guilty to grand theft by possession of stolen property and the district court imposed a unified sentence of 14 years, with three years fixed, and retained jurisdiction. (R., pp.49-51.) Anderson filed a timely Rule 35 motion for a

reduction of sentence, which the district court granted by suspending Anderson's sentence and placing him on supervised probation for 14 years. (R., pp.54-56, 59-67.)

Anderson subsequently violated his probation and the district court revoked probation, ordered the underlying sentence executed, and retained jurisdiction. (R., pp.153, 156-58.) Following the period of retained jurisdiction, the district court once again suspended Anderson's sentence and placed him on supervised probation. (R., pp.298-302.)

After Anderson violated his probation a second time, the district court revoked his probation, ordered the underlying sentence executed, and again retained jurisdiction. (R., pp.384-87.) Anderson filed a notice of appeal timely from the district court's June 30, 2015 order revoking probation and retaining jurisdiction. (R., pp.388-90.)

Anderson asserts that the district court abused its discretion by revoking his probation and retaining jurisdiction, rather than reinstating his probation, in light his "commitment to running his small business," his relationship with his son, his purported remorse, and his claim that his probation violations and the resulting new criminal charges were solely the result of his "relapse into substance abuse," which occurred because his parents "disowned him," resulting in his business being "thrown into flux." (Appellant's brief, pp.5-10.) Anderson has failed to establish an abuse of discretion.

"Probation is a matter left to the sound discretion of the court." I.C. § 19-2601(4). The decision to revoke probation lies within the sound discretion of the district court. State v. Roy, 113 Idaho 388, 392, 744 P.2d, 116, 120 (Ct. App. 1987); State v. Drennen, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992). When deciding whether to revoke probation, the district court must consider "whether the probation [was] achieving

the goal of rehabilitation and [was] consistent with the protection of society.” Drennen, 122 Idaho at 1022, 842 P.2d at 701.

At the disposition hearing for Anderson’s second probation violation in this case, the state addressed Anderson’s continued unwillingness to abide by the law or the terms of community supervision, the danger he presents to the community, and his failure to rehabilitate. (Tr., p.22, L.12 – p.28, L.21 (Appendix A).) The district court subsequently set forth its reasons for revoking Anderson’s probation and retaining jurisdiction. (Tr., p.43, L.19 – p.47, L.11 (Appendix B).) The state submits that Anderson has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts of the June 26, 2015 disposition hearing transcript, which the state adopts as its argument on appeal. (Appendices A and B.)

### Conclusion

The state respectfully requests this Court to affirm the district court’s order revoking Anderson’s probation.

DATED this 21st day of December, 2015.

/s/ \_\_\_\_\_  
LORI A. FLEMING  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of December, 2015, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BEN P. MCGREEVY  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

\_\_\_\_\_/s/\_\_\_\_\_  
LORI A. FLEMING  
Deputy Attorney General

## APPENDIX A

<p style="text-align: right;">Page 21</p> <p>1 MR. STEWART: Yes, Your Honor. On page 11  2 under "employment capabilities and comments."  3 THE COURT: Okay.  4 MR. STEWART: The second paragraph there, it  5 says: "IDOC case notes regarding the case Boise  6 Moving Company, that it appears to not be in  7 operation."  8 Mr. Anderson asserts that it's still in  9 operation, and he knows that he can get a job with  10 that business if he is released.  11 THE COURT: All right. Anything else?  12 MR. STEWART: Page 13, bottom paragraph  13 where it says "problematic areas identified by the  14 defendant." It's quoted, "drugs, my ego, and I  15 was in a relationship with Christina Case for  16 three or four months."  17 There was a discussion about that, but  18 in this particular instance when he said this, he  19 actually said "and the relationships with women,"  20 in a general sense, contributed to his criminal  21 conduct.  22 THE COURT: Okay.  23 MR. STEWART: Then finally on page 14, at  24 the top, he just wanted to add that he -- never  25 mind, Your Honor. I'll just leave that in</p>	<p style="text-align: right;">Page 22</p> <p>1 argument.  2 THE COURT: Okay. And does either party  3 contend there should be any additional  4 investigation or any additional evaluation of the  5 defendant before disposition?  6 MR. STEWART: No, Your Honor.  7 THE COURT: Okay. Just argument at this  8 point?  9 MR. GUNN: Yes.  10 MR. STEWART: Yes, sir.  11 THE COURT: Mr. Gunn, you may proceed.  12 MR. GUNN: Although since he wants to  13 rewrite the presentence report right at sentencing  14 and adding things that haven't been confirmed or  15 can't be confirmed now, maybe it would be a good  16 idea to see about this Valley County residence or  17 this job that we're hearing about now.  18 But I suppose we're this far, we should  19 just proceed to sentencing. I will note that  20 counsel reached out to the probation officer who  21 said, "Based on these acquittals, I guess he would  22 go along with the retained jurisdiction."  23 I'm asking the court to impose and not  24 follow that. The acquittals are the first PV that  25 was filed. While he was on probation, we ended up</p>
<p style="text-align: right;">Page 23</p> <p>1 having to amend the PVs to allege the crimes that  2 he did admit to, and he did get acquitted on the  3 possession with intent on the case where he had  4 about 45 grams of, in three separate bags, of  5 Spice.  6 He said that -- well, he testified at  7 that trial, and he said that he was -- he went to  8 Washington to get it -- well, let me back up a  9 little bit. The reason this came to anybody's  10 attention was he was driving in his vehicle. Two  11 separate people called him in as a reckless  12 driver. The first said he almost backed into him  13 at a red light, and then the second who I think  14 ended up following him indicated that he was going  15 through red lights and stopping at green lights.  16 And so he followed him, and when the  17 police came, he was parked in a neighborhood. The  18 police car turned around and then came up behind  19 him, and the defendant got out of his car and took  20 off running. Got to a fence he couldn't get over,  21 and so then turned around and came back at the  22 officer, and the officer demanded that he stop.  23 He didn't stop, and he had things in  24 his hands, sort of raised his hands, and the  25 officer tased him, and that's the RNO.</p>	<p style="text-align: right;">Page 24</p> <p>1 So that's a fairly alarming behavior  2 pattern. And then the drug dog came and sniffed  3 around the car, and they found a safe in the car.  4 And inside the safe was this three bags of Spice  5 that was several hundred dollars worth of Spice.  6 It was also baggies and scales, and thus the  7 charge of possession with intent to deliver.  8 It looked like he had probably been  9 selling it, but he told the jury that he was using  10 a lot of, a lot of Spice, so much that he would go  11 buy a whole bunch of it. And then came back, and  12 then he had the scales in the bag so that he could  13 parcel it out to himself and dose himself. And  14 that's why it looks like he was dealing, but he  15 wasn't. It was all personal use, and so that's  16 why he was convicted of possessing it.  17 But, again, there was a lot of it, and  18 his behavior the night that he got tased is quite  19 alarming. Then we see in the -- he has already  20 done a TC rider. He has done the jails class, and  21 he is still using and has been.  22 He was behind on his payments to the  23 court. He is behind on his child support. And he  24 talks in here as if this was just a relapse, and  25 in his own letter to the court, he just wants to</p>

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1 get back on track with everything.  
 2 There's never been a showing that he  
 3 ever was on track to begin with. This whole  
 4 probation, this is, what, his second probation  
 5 violation? Yes.  
 6 Had kind of an awkward beginning  
 7 because in this case he was given a rider by  
 8 Judge Wilper, but he had a pending misdemeanor  
 9 case. So they didn't send him on his rider until  
 10 that was going to get resolved. And then a lot of  
 11 time passed, and so Judge Wilper did a Rule 35 and  
 12 granted a Rule 35 back in November and then put  
 13 him on probation.  
 14 Then he violated, and then he got his  
 15 TC rider, and then he was out on a TC rider on his  
 16 probation, and here he is again using drugs and  
 17 creating a hazard in the community.  
 18 Counsel in this case did indicate,  
 19 didn't file a notice of intent. It's a motion for  
 20 a Rule 35. I don't see a motion, but I do  
 21 appreciate the notice. And as I just indicated,  
 22 he has had one already that was granted, and he  
 23 didn't go on a rider after he had been sentenced.  
 24 And I don't recall who actually made  
 25 the motion, if it was the judge's own motion, in

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1 which case he could probably make another one if  
 2 it was his motion, and I think he is barred from  
 3 it.  
 4 At any rate, I would ask the court not  
 5 to grant the motion. Whatever relief is being  
 6 requested under the Rule 35, we still don't know,  
 7 and so I imagine it's a reduced sentence.  
 8 He still owes a lot of money on this  
 9 case, and if he had been on track during all of  
 10 his probation before he relapsed, this sort of  
 11 makes sense if it's a single incident, relapse,  
 12 then we would have better performance on that. We  
 13 would have better performance on his child  
 14 support.  
 15 What we do have is someone who has  
 16 never really internalized any of the probation or  
 17 any of the treatment he has been given. His  
 18 sister is quoted in here that he has always been a  
 19 salesman, and she would like to support him, but  
 20 he has just never really been in touch with his  
 21 own reality.  
 22 And he is a good salesman, and so, as  
 23 she put it, he is the common denominator in a lot  
 24 of problems that kind of swirl around him. And we  
 25 see it in this case, his parents disowned him, and

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1 this happened, that happened. So then he had to  
 2 use drugs, and it was just a relapse.  
 3 And so his own stuff is minimized, and  
 4 the impact of -- well, this PSI says he victimized  
 5 himself. He wants to take on the victim stance to  
 6 explain everything and say that he doesn't have  
 7 the problems, but if these things would quit  
 8 happening to him, he would be fine.  
 9 But we see the residence, he tried to  
 10 change that today and maybe that is correct. I  
 11 don't know if he can go to Valley County or not.  
 12 He would have to get permission to transfer, but  
 13 the residence he did claim he doesn't have.  
 14 This constant contact with his son that  
 15 he claims is exaggerated. The mother says  
 16 otherwise, and it seems to be a realistic  
 17 statement that when he first came back from the  
 18 rider was pretty good, and then the last couple of  
 19 years he sort of tapered off and then he started  
 20 having better contact. He has been in jail some  
 21 of that time.  
 22 But all in all, his contact has sort of  
 23 decreased. But again, that's his whole  
 24 motivation, he says, for lots of things and hasn't  
 25 been taken care of like everything else hasn't

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1 been taken care of.  
 2 So after the rider, he has done a TC  
 3 rider. He is still a risk to himself and the  
 4 community. He is not making any progress. He  
 5 still has the same kind of attitudes that kind of  
 6 got him here in the first place. We don't know  
 7 about this job. That was something that just came  
 8 up.  
 9 And he wants to quibble with things  
 10 that are in quotation marks, because once he reads  
 11 it, it doesn't sound as good as maybe it did when  
 12 he said it. I would just ask this court to impose  
 13 sentence on this case. We can't have our  
 14 probationers having been tasered with a car full  
 15 of Spice.  
 16 Whether they're intending to deliver it  
 17 or just use it for themselves, it's bad behavior.  
 18 It created a risk to the community, and he hasn't  
 19 benefited. He had the jails program. He's had  
 20 the TC program. He has been through treatment in  
 21 custody, out of custody, and he is still a threat.  
 22 Thank you.  
 23 THE COURT: All right. Thank you, Mr. Gunn.  
 24 Mr. Stewart, your argument?  
 25 MR. STEWART: Thank you, Judge.

3 (Pages 25 to 28)



## APPENDIX B

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1 afterwards because I was able to phone my clients.  
 2 But I went over to my father's house,  
 3 and I got my clothes and my belongings due to my  
 4 brother being able to call them because they found  
 5 my brother's phone number on the Internet through  
 6 his business.  
 7 He left a message to my father saying  
 8 that I need to get my phone and I needed to get my  
 9 belongings. In that time, I was talking to my  
 10 dad, and my dad says, "We don't really have  
 11 anything to say to you."  
 12 I said, "Dad, I haven't done anything  
 13 wrong."  
 14 He goes, "They don't arrest people that  
 15 are innocent."  
 16 I told him that I had got my things,  
 17 and I looked at my father and I said, "Dad, I'm  
 18 happy that you" -- "I love you. I appreciate that  
 19 you believe in me. I thank you for that. I thank  
 20 you for believing in my company and telling my mom  
 21 and getting her on our side. I'm sorry I have  
 22 disappointed on you. This was not my intention."  
 23 Because up until that point I had done  
 24 everything that was asked of me on probation. I  
 25 never missed a UA, never failed a UA, any classes

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1 these probation violations and the allegations  
 2 from the prior and then obviously these.  
 3 Like I said before, I have no one to  
 4 blame for myself for my actions and my choices. I  
 5 chose to pick up that Spice. I chose to smoke it,  
 6 and I felt like I was obviously self-medicating to  
 7 deal with stresses and depression. And on  
 8 something I didn't know if I was going to do -- or  
 9 be imposed on a prison sentence due to something  
 10 that I hadn't done.  
 11 Anyway, I would like to take this time  
 12 to thank you for your time, thank my attorneys for  
 13 their time. I also would like to bring up one  
 14 more point that I had not once, not been ready or  
 15 willing to admit guilt to what I am guilty of.  
 16 I just was not ready to admit guilt to  
 17 things I was not guilty of, hence the timing that  
 18 this has taken. I thank you, Your Honor.  
 19 THE COURT: Thank you, Mr. Anderson.  
 20 Well, I have of course reviewed all the  
 21 presentence materials in the case and gone back  
 22 over the history of the case. It's fairly hard to  
 23 construct much of an argument that probation is  
 24 working in this case.  
 25 Now, one thing is certainly troubling

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1 anyway. I needed to talk to him about the  
 2 company, and he says that there's no more that we  
 3 need to talk about.  
 4 I said, "Dad, I just want you to know  
 5 that I love you, and I always have loved you."  
 6 He looked me straight in the eyes --  
 7 I'm sorry. Looked me straight in the eyes, and he  
 8 said, "Are we done?"  
 9 I said yes, and I picked up my clothes  
 10 and I left. I can't explain how this has affected  
 11 me like as far as losing my family. I think it's  
 12 really detrimental, and it's affected my  
 13 relationship with my son obviously.  
 14 I have definitely tried to reach out to  
 15 my son since I've been in here. I have tried to  
 16 call a couple times with the phone being  
 17 disconnected as well as I lost those phone calls,  
 18 as well as I tried to have a friend contact my  
 19 ex-wife, and she wasn't willing to talk to them  
 20 about me. I was just wanting to get the address  
 21 so I could write my son.  
 22 So that has been a huge punishment in  
 23 itself. I have not had one, have not been able to  
 24 contact my son whatsoever.  
 25 I have done almost nine months now on

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1 to me is that when I had you in here,  
 2 Mr. Anderson, early on after you were charged with  
 3 the probation violation, and as you mentioned, I  
 4 gave you bond. You posted bond, and then the  
 5 violations you ultimately admitted are new crimes  
 6 committed after I gave you bond in this case.  
 7 Certainly that's troublesome to me. I  
 8 don't, most of the time don't give alleged  
 9 probation violators bond. It's somewhat of a leap  
 10 of faith when I do that because a person in that  
 11 position isn't entitled to bond, and it's simply  
 12 an exercise of the court's discretion on when  
 13 somebody -- when somebody ought to be given bond  
 14 for some reason.  
 15 And I gave you that benefit, and then  
 16 this is what happened. The violations that we're  
 17 here today to deal with, the purchasing of Spice,  
 18 resisting and obstructing. So it's all very  
 19 concerning. As I said, I think it's difficult to  
 20 view this probation as a success.  
 21 Now, is using Spice the worst thing a  
 22 probationer has ever done? Well, that's certainly  
 23 true that it's not, but it is something that  
 24 presents a risk both to the probationer who is  
 25 engaged in that kind of conduct and to the

<p style="text-align: right;">Page 45</p> <p>1 community because of its effect on the 2 probationer's behavior. 3 Now, I think that what Mr. Stewart did 4 in checking in with your probation officer and 5 giving him updated information as to what went on 6 in the charges and checking in with him about what 7 effect that might have on his recommendation here 8 makes some sense to do, and it elicited a more 9 favorable outcome for you than your probation 10 officer's initial approach and recommendation when 11 he filed the reported violation in this case, at 12 which point he was asking for imposition of 13 sentence. 14 The presentence investigator suggesting 15 imposition of sentence, the state suggesting 16 imposition of sentence here today, it's not at all 17 hard to understand why all of those 18 recommendations were made. It wouldn't at all be 19 an inappropriate case in which to do that. 20 Now, for reasons I'm not sure I can 21 articulate very well, I am going to show a bit of 22 mercy and send you on a second rider and see where 23 that goes rather than just impose your prison 24 sentence outright. I'm not inclined to reduce 25 your sentence. Under Rule 35 on my own motion, I</p>	<p style="text-align: right;">Page 46</p> <p>1 don't think -- I just don't see good reason to do 2 that given how this probation is going. 3 So, Mr. Anderson, on your admission 4 that you violated the terms of your probation, I 5 find that you did violate it. I'm going to revoke 6 your probation and sentence you to the custody of 7 the Idaho State Board of Correction under the 8 Unified Sentence Law of the State of Idaho for an 9 aggregate term of 14 years. I'll specify a 10 minimum period of confinement of three years and a 11 subsequent indeterminate period of confinement of 12 11 years. 13 You'll be remanded to the custody of 14 the sheriff of this county to be delivered to the 15 proper agent of the state Board of Correction in 16 execution of this sentence. 17 I will, however, retain jurisdiction 18 over you for the first 365 days of this sentence 19 under Section 19-2601 of the Idaho Code. 20 And during that period of time, you 21 will be given an opportunity to serve a rider. 22 Your last rider was back in 2011. I'm hopeful 23 that a refresher will have some impact on you, and 24 that henceforth we can get on with probation and 25 have some indication that it's working.</p>
<p style="text-align: right;">Page 47</p> <p>1 There's nowhere to go from this point 2 but revocation and imposition, and so I'm hoping 3 to see some change and improvement. 4 I'll note for the record you're 5 entitled to credit for 622 days served prior to 6 the entry of this judgment today. 7 You have the right to appeal, 8 Mr. Anderson, and if you cannot afford an 9 attorney, you can request to have one appointed at 10 public expense. Any appeal must be filed within 11 42 days. 12 Anything else, counsel? 13 MR. STEWART: No, Your Honor. Thank you. 14 MR. GUNN: No, Your Honor. 15 THE COURT: We'll be in recess. 16 (3:58 p.m. Proceedings adjourned.) 17 18 -oo0oo- 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 48</p> <p>1 REPORTER'S CERTIFICATE 2 3 4 5 I, Dianne E. Cromwell, Official Court 6 Reporter, County of Ada, State of Idaho, hereby 7 certify: 8 That I am the reporter who took the 9 proceedings had in the above-entitled action in 10 machine shorthand and thereafter the same was 11 reduced into typewriting under my direct 12 supervision; and 13 That the foregoing transcript contains a 14 full, true, and accurate record of the proceedings 15 had in the above and foregoing cause, which was 16 heard at Boise, Idaho. 17 IN WITNESS WHEREOF, I have hereunto set 18 my hand September 8, 2015. 19 20 21 22 23 Dianne E. Cromwell, Official Court Reporter 24 CSR No. 21 25</p>