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State v. Luna Respondent's Brief Dckt. 44251

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44251
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2011-12220
)	
AERRIAL LUNA,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Luna failed to establish that the district court abused its discretion when, upon revoking her probation, it declined to retain jurisdiction?

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

In 2011, the state charged Luna with burglary, petit theft, and possession of burglarious instruments. (R., pp.25-26.) Pursuant to a plea agreement, Luna pled guilty to burglary and the state dismissed the remaining charges and agreed to recommend a unified sentence of six years, with two years fixed, and that the court retain jurisdiction.

(R., p.34.) The district court imposed a unified sentence of six years, with two years fixed, suspended the sentence, and placed Luna on supervised probation for six years.

(R., pp.53-58.)

Less than a year and one-half later, the state filed a motion for probation violation alleging that Luna had violated the conditions of her probation by committing the new crimes of burglary and grand theft, and by failing to pay her court-ordered financial obligations. (R., pp.67-69.) The district court issued a bench warrant for the probation violation on July 24, 2013; however, Luna was not located and served with the warrant until October 22, 2013. (R., pp.77-78.) Luna subsequently admitted that she had violated the conditions of her probation by committing the new crime of burglary and, in exchange, the state dismissed the remaining allegations and agreed to recommend the retained jurisdiction program. (R., p.85.) The district court reinstated Luna on supervised probation for six years. (R., pp.88-92.)

On December 8, 2015, the state filed a second motion for probation violation alleging that Luna had violated the conditions of her probation by again committing the new crimes of burglary and grand theft; purchasing narcotic drugs for which she had no prescription, including “Norco, Oxy, and methamphetamine”; using methamphetamine “on and off” for a three-month period between June and September 2015; testing positive for methamphetamine in September 2015 and November 2015; keeping a shotgun in her bedroom; and failing to maintain employment. (R., pp.97-99.) Luna admitted that she had violated the conditions of her probation by pleading guilty to the new crime of aiding and abetting burglary and the state dismissed the remaining allegations. (R., p.131; 5/2/16 Tr., p.4, Ls.8-13; p.5, Ls.17-21.) The district court

revoked Luna's probation and ordered the underlying sentence executed. (R., pp.133-35.) Luna filed a notice of appeal timely from the district court's order revoking probation and ordering her underlying sentence executed. (R., pp.151-53.)

Luna asserts that the district court abused its discretion by declining to retain jurisdiction upon revoking her probation in light of her substance abuse, attempt to "take responsibility," acknowledgement that she failed to take advantage of the community-based treatment offered to her and her new desire to participate in the retained jurisdiction program, and because her "significant other had put her in 'somewhat of a time out.'" (Appellant's brief, pp.4-8.) Luna has failed to establish an abuse of discretion.

The decision whether to retain jurisdiction is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). The primary purpose of a district court retaining jurisdiction is to enable the court to obtain additional information regarding whether the defendant has sufficient rehabilitative potential and is suitable for probation. State v. Jones, 141 Idaho 673, 677, 115 P.3d 764, 768 (Ct. App. 2005). Probation is the ultimate goal of retained jurisdiction. Id. There can be no abuse of discretion if the district court has sufficient evidence before it to conclude that the defendant is not a suitable candidate for probation. Id. Contrary to Luna's assertions on appeal, the record supports the district court's determination that Luna was no longer a suitable candidate for probation.

At the disposition hearing for Luna's second probation violation, the state addressed Luna's incessant thieving, her failure to demonstrate rehabilitative progress

despite numerous treatment opportunities, and the need for a significant penalty to promote deterrence. (5/23/16 Tr., p.6, L.11 – p.8, L.9 (Appendix A).) The district court subsequently articulated its reasons for ordering Luna’s sentence executed rather than retaining jurisdiction. (5/23/16 Tr., p.12, L.20 – p.14, L.25 (Appendix B).) The state submits that Luna has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts of the May 23, 2016 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 Luna’s probation and ordering her underlying sentence executed without retaining jurisdiction.

DATED this 19th day of October, 2016.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of October, 2016, 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.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

5	<p>1 BOISE, IDAHO 2 Monday, February 8, 2016, 2:58 p.m. 3 4 THE COURT: Aerial Luna. Okay. What would 5 you like to do? 6 MR. MARX: Your Honor, we are going to ask 7 the Court to set this over another two weeks. The 8 Canyon County charge was set out for trial in May 9 on her last attendance over there. 10 In addition to that, Mr. White has 11 indicated and there is evidence in the report of 12 violation that an Ada County detective was 13 involved in the search of Ms. Luna's house when 14 she was found with items that relate to the Canyon 15 County charges. Mr. White has indicated that Ada 16 County is also likely going to be pursuing 17 theft-related charges against her. 18 We would ask for another couple of 19 weeks to get that sorted out. Mr. White indicates 20 he is in trial until 2:00 today. 21 THE COURT: All right. Sounds reasonable. 22 February 22 at 1:30 for admit/deny. 23 (Proceedings concluded 3:00 p.m.) 24 -oooOooo- 25</p>	7	<p>1 retail theft case. Nearly identical facts. She 2 was reinstated here. She was given probation 3 again over in Canyon County. We're back again 4 after her original sentencing. And after her 5 reinstated sentence with yet another felony retail 6 theft case again over in Canyon County. 7 She has continued to steal to support 8 her lifestyle over and over and over again for a 9 period of five years. This is not a situation in 10 which Ms. Luna has been showing substantial times 11 of wanting to change, actually making different 12 decisions. She has been doing the exact same 13 thing for five years over and over and over again. 14 She has been given access to just about 15 every imaginable community resource to turn this 16 around and she has not changed in the State's view 17 at all in that entire time. So if she is not 18 going to change in five years, I don't see what a 19 three- to six-month retained jurisdiction program 20 is going to do at this point that five or six 21 years on probation is not going to show her that 22 she has to stop doing this. 23 And if she is not going to understand 24 that from five years on probation, then she is not 25 going to get from three to six months what she</p>
6	<p>1 BOISE, IDAHO 2 Monday, May 23, 2016, 3:31 p.m. 3 4 THE COURT: State v. Aerial Luna. Is the 5 State ready to proceed? 6 MR. WHITE: Yes, Your Honor. 7 THE COURT: Defense? 8 MR. MARX: Yes, Your Honor. 9 THE COURT: All right. What's the State's 10 recommendation? 11 MR. WHITE: Thank you, Your Honor. Your 12 Honor, in this case the State is going to 13 recommend that you impose the previously suspended 14 sentence in this case. I am not asking that the 15 Court retain jurisdiction. I am aware that she 16 was sentenced on a new felony over in Canyon 17 County and that she got a retained jurisdiction 18 for that. And in light of that, we are still 19 objecting. 20 Ms. Luna has been here since 2011. The 21 original underlying case here was a retail theft. 22 This was not the first time that Ms. Luna has been 23 involved in something like this. She has been 24 doing it for a long time. She violated probation 25 by going over to Canyon County picking up a new</p>	8	<p>1 needs is a penalty. A penalty that she can 2 associate in her mind that when I keep going out 3 and I keep ripping people off and stealing, bad 4 things are going to happen. And the bad things 5 that are going to happen are going to be prison. 6 So the State is recommending at this 7 time that the Court not go along with Canyon 8 County and impose the previously suspended 9 sentence. Thank you. 10 THE COURT: Defense. 11 MR. MARX: Ms. Luna certainly has been in 12 front of this Court for a long time. I have had 13 her for primarily the entire time she has been 14 back and forth in front of this Court. She has 15 certainly had opportunities on probation. She has 16 had her battles with addiction. She has gone up 17 and down at times where she has been successful on 18 probation. There has been times where she has 19 been back and forth here. 20 This was an aid and abet burglary. She 21 certainly knew what was going to happen with 22 people using her car. She certainly knew what was 23 being brought back in to the house and ended up in 24 a position where she was with a felony charge. 25 I agree to the extent that community</p>

APPENDIX B

<p>9</p> <p>1 based programming has not been successful to work 2 on her addictions. The criminal behavior I think 3 is tied into the addiction process. Certainly it 4 is poor choices and poor associates, but there are 5 things that need to get addressed and haven't been 6 addressed as well.</p> <p>7 My recollection from one of the prior 8 probation violations was that the PO wasn't 9 exceedingly thrilled how the probation violation 10 came out because she was making some progress with 11 Ms. Luna. Certainly this crept up and that 12 changed her opinion on where probation is.</p> <p>13 She has been in and out of court on 14 this most recent probation violation with Your 15 Honor since January. So from a punishment 16 perspective, she has sat for many months now on 17 this probation violation. If the Court sends her 18 on a rider as Canyon County has done on the new 19 case and her probation violation there, then she 20 will have several more months of in-custody time.</p> <p>21 I think given the problems with people 22 getting adequate programming when their sentences 23 are imposed, I think giving her a rider at this 24 point doesn't hurt anything. Certainly community 25 programming hasn't been successful for her but</p>	<p>11</p> <p>1 satisfaction then I think certainly the Court can 2 relinquish jurisdiction when she comes back. I 3 think she certainly was involved in the case, the 4 new felony that leads her to court this time. She 5 admitted responsibility in Canyon County for that. 6 She pled guilty at the risk of having a sentence 7 imposed here and there. She is trying to take 8 responsibility. And I think it would be prudent 9 to see what she is going to do on the rider and 10 see whether she is actually going to make the 11 changes and start making the changes that she is 12 talking about.</p> <p>13 THE COURT: Ms. Luna, your comments. 14 THE DEFENDANT: I have battled with 15 addiction from a very young age; whether it be 16 stealing or using methamphetamines. And I have 17 done time in and out of jail and I have gone back 18 out on the street with six months under my belt of 19 doing time in jail and then going and doing this 20 out there programs and it is only once a week.</p> <p>21 And I should have, yes, I should have 22 took fully advantage of those programs and that 23 was my wrongdoing that I didn't. And I did 24 relapse. And I fell back into the same pattern 25 that I have done for many years. And I'm just</p>
<p>10</p> <p>1 that doesn't mean a rider can't be successful. 2 Her issues need to be addressed. She's probably 3 mentally in the best position she has been in the 4 duration of this case. Not just on this probation 5 violation, but in the entire time that she has 6 been on supervision where she has finally thrown 7 her hands up and realized what is working hasn't 8 worked to date.</p> <p>9 Her significant other has put her in 10 somewhat of a time out in terms of not that he is 11 not supportive of her, but he is tired of her 12 behavior and she is having to earn his trust back 13 and work through that process as well. She can 14 say that she wants to be successful for her kids, 15 but she knows that she has to make some changes 16 that haven't been there. And I think her attitude 17 and demeanor, the longer she sat in custody has 18 certainly changed.</p> <p>19 And she's started to realize from her 20 comments that what she has been doing in the past 21 hasn't been successful. That she needs to try 22 something different. She is willing to try the 23 rider. Canyon County has sent her on that. She's 24 going to need to do some programming. If she 25 hasn't performed on the rider to the Court's</p>	<p>12</p> <p>1 asking for a chance at this rider. And, you know, 2 I'm not saying that I -- things that I have done 3 is okay because it is not. And this process, not 4 only am I suffering from it, my family is and so 5 are my children. I am just asking that you give 6 me a chance to do this rider.</p> <p>7 And when I come back before you 8 hopefully everything that, you know, I am sitting 9 here telling you today that I can be done and I 10 won't come back before you. Hopefully the next 11 time I do it is to be getting off probation 12 because this is not the lifestyle I want to live. 13 It is not what I want for my kids. And I am tired 14 of it. And so I just ask for you to take that 15 into consideration.</p> <p>16 THE COURT: Is there a legal cause why we 17 should not proceed? 18 MR. WHITE: No, Your Honor. 19 MR. MARX: No, Your Honor. 20 THE COURT: Well, the defendant came before 21 this Court in February of 2012 with a shop -- 22 basically a what I refer to as shoplifting 23 burglary. Then it's flagged she has a quote 24 problem unquote with stealing merchandise. Wire 25 cutters and pliers are used to cut electric tags.</p>

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1 And at that point she says she thinks she could
 2 get classes because stealing is like a rash.
 3 Although she knows it is wrong and is truly sorry
 4 and would like help with her stealing addiction.
 5 She gave multiple versions of the same offense.
 6 She had significant juvenile problems all kind of
 7 the same type of offense.
 8 But I decided to go ahead and try some
 9 other options and place her on probation and see
 10 if she could pull it around. November 25, 2013,
 11 she was sentenced on a probation violation. She
 12 admitted to committing a burglary in Canyon County
 13 on March 14 of 2013. At that point I did follow
 14 what looked like was going to be a Canyon County
 15 approach on that particular type of burglary, and
 16 so I did reinstate and we tried many other
 17 options.
 18 I did not note problems arising in
 19 2014. And I will just leave it there. Just say
 20 my notes don't reflect that the case came before
 21 me then. Then November 23 of 2015, she said she
 22 was buying and using methamphetamine, Oxy and
 23 Norco. There was a shotgun found in her bedroom.
 24 Over \$2000 worth of stuff was taken from the TJ
 25 Maxx. When the police went to the defendant's

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1 house, there were a number of items with price
 2 tags on them and many pairs of jeans stacked up on
 3 the shelves, numerous different brands. The
 4 person who had been engaged directly with theft
 5 threatened the clerk. There were high end matters
 6 taken.
 7 There is just so much criminality and
 8 criminal thinking here. I think there have to be
 9 consequences. I have no confidence that a
 10 short-term program can deal with this. This is
 11 the third time, the same kind of offense that has
 12 come before the Court over and over again. It
 13 seems to me that this indicative of criminal
 14 thinking by a person who is basically in a way of
 15 becoming multiple offender. It is crime after
 16 crime. I am revoking probation and imposing
 17 sentence I am not retaining jurisdiction.
 18 I think there need to be consequences
 19 for this. I think basically we have tried every
 20 other option. I have given the defendant lots of
 21 chances. She continues to do what she knows to be
 22 wrong. And I am not sure that the best treatment
 23 is in consequences for actions that are wrongly
 24 deliberately chosen. I am not following Canyon
 25 County this time.

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1 MR. WHITE: Thank you, Your Honor.
 2 THE COURT: You do have 42 days in which to
 3 appeal.
 4 (Proceedings concluded 3:44 p.m.)
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1 CERTIFICATE OF REPORTER
 2
 3 STATE OF IDAHO)
 4) ss.
 5 COUNTY OF ADA)
 6
 7 I, NICOLE L. JULSON, Official Court
 8 Reporter of the County of Ada, hereby certify:
 9
 10 That I attended the hearing in the
 11 above-entitled matter and reported in stenograph
 12 the proceedings had thereat: That I thereafter,
 13 from the shorthand record made by me at said
 14 proceedings; that the foregoing 15 pages
 15 constitutes said transcript and that said
 16 transcript contains a full, true, complete and
 17 correct transcript of said proceedings.
 18
 19 IN WITNESS WHEREOF, I have hereunto set
 20 my hand this 11th day of July, 2016.
 21
 22
 23
 24
 25

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