11-14-2016

State v. Hocking Appellant's Brief Dckt. 44318

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44318
Plaintiff-Respondent,	)	
	)	BANNOCK COUNTY NO. CR 2012-19069
v.	)	
	)	
KAY LYNN HOCKING,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Kay Hocking contends the district court abused its discretion when it revoked his probation, or alternatively, when it denied his oral Idaho Criminal Rule 35 motion (*hereinafter*, Rule 35 motion) for sentence reduction. He asserts that a sufficient consideration of the mitigating factors in the record demonstrates that either option would serve all the goals of sentencing better than the district court's decision to revoke probation and execute his sentences without modification. Therefore, this Court should vacate the order revoking probation, or alternatively, the denial of his oral Rule 35 motion, and either remand this case for a new disposition by the district court or reduce his sentence as it deems appropriate.

Statement of the Facts & Course of Proceedings

Mr. Hocking had been serving probation in this case based on sentences imposed pursuant to a binding plea agreement, in which he pled guilty to two counts of possession of materials depicting the sexual exploitation of a child.[1] (*See* R., pp.57-60, 544-57.) During that period of probation, Mr. Hocking had tried to begin taking classes at Idaho State University in an attempt to complete his collegiate degree so that, despite being 62 years old, he could be productive with his life. (Tr., p.44, Ls.7-14; Presentence Investigation Report (*hereinafter*, PSI), p.2.)[2] However, his probation officer decided that was not a viable option, given the nature of Mr. Hocking's underlying offense. (*See* Tr., p.45, Ls.10-13 ("I was told, no, I can't go because you might go out and do -- see kids on the campus, and you can't be there.").) Mr. Hocking admitted, when his probation officer informed him of that, he "gave up on himself." (Tr., p.45, Ls.13-18, 46, Ls.22-23.) Later, Mr. Hocking asserted he recognized the problems that caused, and so, would not let it happen again. (Tr., p.46, Ls.22-23.)

Nevertheless, a probation search of his home during that time uncovered several sexually-explicit stories, and two concerning pictures.[3] (R., p.591) The report of probation violation also alleged that Mr. Hocking had engaged in unauthorized use of

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[1] The underlying sentences imposed on Mr. Hocking were for a unified term of ten years, with five years fixed, and a consecutive unified term of ten years, with three years fixed, for an aggregate term of twenty years, with eight years fixed. (*See, e.g.,* R., pp.574.) The district court had suspended those sentences for a fifteen-year term of probation. (R., p.574.)

[2] Although the transcripts in this case are provided in two separate volumes, they are consecutively paginated.

[3] Mr. Hocking's probation officer ultimately stated that, apart from the alleged probation violations, Mr. Hocking's possession of those two pictures was unlikely to result in new charges because there was some concern that those pictures were not, in fact, illegal. (*See* Tr., p.38, Ls.10-13.)

the Internet from an ISU computer, and had used it to search for "young erotic stories."[4] (R., pp.591-92, 652.) At the initial sentencing hearing in this case, the district court had acknowledged, "a lot of his erotic writing helps him with regard to therapy, I guess, and she [Mr. Hocking's psychologist] conducted part of the treatment might allow some of that. [sic]" (Tr., p.16, Ls.11-14.) To that point, Mr. Hocking explained that he had written the stories found in his house after his probation officer told him he could not attend classes at ISU, but, when he realized doing so was not helping him in his rehabilitative efforts, he had thrown them away. (Tr., p.45, Ls.16-24.) He also explained that the pictures had been on an old disc he had forgotten was still in the house.[5] (Tr., p.45, L.24 - p.46, L.1.)

Mr. Hocking admitted the alleged probation violations. (Tr., p.33, L.4 - p.34, L.16.) Defense counsel recommended the district court continue Mr. Hocking's probation, noting that simply executing his underlying sentences would basically mean "we're giving up on Mr. Hocking and any potential rehabilitation." (Tr., p.43, Ls.23-25.) Mr. Hocking added that he had found a sponsorer who was willing to accompany him to church, which meant he would now have access to the support system offered through

[4] Some of the details of the allegation about Mr. Hocking's internet use are more fully set out in the report of probation violation filed in Mr. Hocking's concurrent federal case. (*See* R., p.562.) The parties agreed the report filed in the federal case mirrored the allegations filed in the state case, and so, the district court took judicial notice of the report filed in the federal case. (*See* Tr., p.31, Ls.6-23, p.35, L.13 - p.36, L.12.) Prior to the admit/deny hearing in this case, Mr. Hocking admitted violating the terms of his federal probation, and while his federal sentence had been executed as a result, application of credit for time served had resulted in his federal sentence being discharged as fully served. (*See* Tr., p.31, Ls.2-5.)

[5] The prosecutor contested Mr. Hocking's explanations of the violations, stating, for example, "the flash drives, the disks and everything, that was hidden quite well, is my understanding." (Tr., p.49, L.24 - p., L.19.)

that community. (Tr., p.47, Ls.5-14.) Based on that information, defense counsel also made an oral motion requesting, even if the district court revoked probation, it modify Mr. Hocking's sentences so each would be for a term of ten years, with three years fixed, to be served concurrently. (Tr., p.48, L.23 - p.49, L.12.)

The district court rejected both requests, concluding Mr. Hocking was still engaging in behavior similar to that which led to his original charges, and thus, probation was not achieving the goal of rehabilitation. (Tr., p.53, Ls.6-8.) As such, it revoked Mr. Hocking's probation and executed his sentences without modification. (Tr., p.53, Ls.24-25, p.54, Ls.12-22.) Mr. Hocking filed a notice of appeal timely from the order reinstating sentences without modification. (R., pp.661, 667.)

ISSUES

1. Whether the district court abused its discretion by revoking Mr. Hocking's probation.
2. Whether the district court abused its discretion by denying Mr. Hocking's Rule 35 motion.

ARGUMENT

I.

The District Court Abused Its Discretion By Revoking Mr. Hocking's Probation

The decision to revoke probation is one within the district court's discretion. *State v. Chavez*, 134 Idaho 308, 312 (Ct. App. 2000). The district court must determine "whether the probation is achieving the goal of rehabilitation and whether continuation of the probation is consistent with the protection of society." *Id*. In this case, a sufficient

consideration of the mitigating factors demonstrates continuing Mr. Hocking's probation would be consistent with rehabilitation and protection of society.

For example, he acknowledged that allowing himself to give up on himself after his probation officer told him he could not continue going to college only created problems in his rehabilitative efforts. (*See* Tr., p.45, Ls.10-22.) Therefore, he asserted he would not let that happen again. (Tr., p.46, Ls.22-23.) That represents not only an acceptance of responsibility for his actions, but also a step toward continued rehabilitation. *See State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010). Additionally, he had found a sponsorer, which meant he would be able to begin going to church again and would have access to the support network offered through that community. (Tr., p.47, Ls.5-14.) This is important because it increased the potential for successful rehabilitation. Furthermore, as defense counsel pointed out, Mr. Hocking is getting older. (*See* Tr., p.43, Ls.1-23; PSI, p.37.) As a result, the threat he might pose to the community is decreasing, and sentences are to be crafted so they do not force the prison system to continue detaining a person once rehabilitation or age has decreased the risk of recidivism. *Cook v. State*, 145 Idaho 482, 489-90 (Ct. App. 2008); *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988).

Defense counsel also pointed out that Mr. Hocking was experiencing more issues related to his diabetes, as it was becoming harder for him to manage his symptoms. (Tr., p.41, Ls.5-11.) Additionally, defense counsel noted that Mr. Hocking had been placed on a completely liquid diet because he needed tooth implants, which he had not been able to get due to his continued incarceration. (Tr., p.41, Ls.12-14.) The defendant's poor health is another factor which indicates a more lenient sentencing

alternative is appropriate. *See State v. Turner*, 136 Idaho 629, 636 (Ct. App. 2001). That is particularly true in Mr. Hocking's case, as, for example, defense counsel explained that Mr. Hocking could get the needed tooth implants if he were not in custody. (Tr., p.41, Ls.14-16.)

Finally, as defense counsel noted, executing the underlying sentences rather than continuing probation would effectively be giving up on the possibility of rehabilitation. (Tr., p.43, Ls.23-25.) As such, the district court's decision to revoke Mr. Hocking's probation fails to address one of the goals of sentencing, one which the Idaho Supreme Court has explained should be the "initial consideration" in making a sentencing decision. *State v. McCoy*, 94 Idaho 236, 240 (1971), *superseded on other grounds as stated in State v. Theil*, 158 Idaho 103 (2015). For all those reasons, the district court abused its discretion when it revoked Mr. Hocking's probation.

II.

The District Court Abused Its Discretion By Denying Mr. Hocking's Oral Rule 35 Motion

A motion to alter an otherwise-lawful sentence pursuant to Rule 35 is addressed to the sound discretion of the sentencing court and is essentially a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Huffman*, 144 Idaho 201, 203 (2007). When petitioning for a sentence reduction pursuant to Rule 35, the defendant must show his sentence is excessive in light of new or additional information presented to the sentencing court. *Id*. "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). In that regard, the protection of society is the primary

objective the court should consider. *State v. Charboneau*, 124 Idaho 497, 500 (1993). However, the Idaho Supreme Court has also held that rehabilitation "should usually be the initial consideration in the imposition of the criminal sanction." *McCoy*, 94 Idaho at 240.

In this case, Mr. Hocking based his oral Rule 35 motion on the new or additional evidence that had been presented to the district court during the disposition hearing. (Tr., p.48, Ls.23-25.) Therefore, for the reasons discussed in Section I, *supra*, the district court should have, at least, reduced Mr. Hocking's sentences, such that they would be for concurrent terms of ten years, with three years fixed. (*See* Tr., p.49, Ls.1-12.) This would better serve all the goals of sentencing because, in addition to still requiring some period of incarceration, it would not forego the possibility of rehabilitation. (*See* Tr., p.43, Ls.23-25.) Instead, it would provide that Mr. Hocking would be parole-eligible in a reasonable amount of time, and thus, would provide the opportunity for him to continue his rehabilitative efforts. Therefore, the district court abused its discretion at least by denying Mr. Hocking's oral Rule 35 motion.

CONCLUSION

Mr. Hocking respectfully requests that this Court vacate the order revoking his probation, or alternatively, the denial of his oral Rule 35 motion, and either remand this case for a new disposition by the district court or reduce his sentence as it deems appropriate.

DATED this 14th day of November, 2016.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of November, 2016, 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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DISTRICT COURT JUDGE
E-MAILED BRIEF

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BANNOCK COUNTY PUBLIC DEFENDER
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_____/s/_____
EVAN A. SMITH
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BRD/eas