12-20-2012

State v. Latneau Appellant's Brief Dckt. 38416

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38416
	)	
v.	)	
	)	
NOAH LATNEAU,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

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

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STATEMENT OF THE CASE

Nature of the Case

Mr. Latneau timely appeals from the district court's order relinquishing jurisdiction. The district court initially imposed a unified sentence of seven years, with two years fixed, and retained jurisdiction for Mr. Latneau's guilty plea to attempted strangulation. On appeal, Mr. Latneau argues that the district court erred when it failed to inform him that his parental rights could be terminated as a direct consequence of his guilty plea. Alternatively, Mr. Latneau argues that his procedural and substantive due process rights were violated when the district court entered a no contact order which was tantamount to a decree terminating his parental rights. Additionally, Mr. Latneau argues that that the district court abused its discretion when it relinquished jurisdiction.

Statement of the Facts and Course of Proceedings

Mr. Latneau was charged with attempted strangulation and misdemeanor domestic assault and the charging information indicated that the misdemeanor domestic assault occurred in front of R.L. and C.L., which are Mr. Latneau's biological children. (R., pp.23-24.) Pursuant to a plea agreement, Mr. Latneau pleaded guilty to the attempted strangulation charge, and the State agreed to dismiss the misdemeanor domestic assault charge. (06/03/10 Tr., p.5, Ls.11-25.) In the guilty plea advisory form and at the change of plea hearing, the issue of Mr. Latneau having contact with his children was not addressed. (R., pp.40-46; see generally 06/03/10 Tr., pp.5-22.) Thereafter, the district court imposed a unified sentence of seven years, with two years fixed, and retained jurisdiction. (R., pp.51-53.)

At Mr. Latneau's rider review hearing, the State requested that the district court relinquish jurisdiction and enter a no contact order precluding Mr. Latneau from communicating with his two biological children, R.L. and C.L. (12/21/10 Tr., p.11, Ls.18-20.) Upon review of Mr. Latneau's period of retained jurisdiction (*hereinafter,* rider), the district court relinquished jurisdiction and entered a no contact order preventing Mr. Latneau from communicating with his children until June 24, 2017. (R., pp.58-60.) Mr. Latneau timely appeals. (R., pp.61-64.)

ISSUES

1. Did the district court's failure to advise Mr. Latneau that a no contact order prohibiting his contact with his children could be entered as a direct consequence of his guilty plea render the no contact order invalid?

2. Did the district court violate Mr. Latneau's procedural and substantive due process rights when it entered a no contact order which unduly restricts his fundamental right to parent?

3. Did the district court abuse its discretion when it relinquished its jurisdiction following Mr. Latneau's rider?

ARGUMENT

I.

The District Court's Failure To Advise Mr. Latneau That A No Contact Order Prohibiting His Contact With His Children Could Be Entered As A Direct Consequence Of His Guilty Plea Rendered The No Contact Order Invalid

A. Introduction

Before an Idaho court can accept a defendant's guilty plea, Idaho Criminal Rule 11requires the district court to warn the defendant about the direct consequences of entering a guilty plea. When a plea is accepted and the only infirmity in that acceptance is the failure to warn of a particular consequence, any order pertaining to the particular consequence is invalid. For example, if a criminal defendant is not warned that restitution can be order as a consequence of entering a guilty plea, and restitution is subsequently ordered, that restitution order is invalid. In this case, Mr. Latneau was never warned that a no contact order could be entered in regard to his children as a direct consequence of his guilty plea. Due to the district court's failure to warn Mr. Latneau of this consequence, the no contact order is invalid.

B. The District Court's Failure To Advise Mr. Latneau That A No Contact Order Prohibiting His Contact With His Children Could Be Entered As A Direct Consequence Of His Guilty Plea Rendered The No Contact Order Invalid

The following standards govern the acceptance of a plea agreement:

> Before accepting a guilty plea, the trial court must satisfy itself that the plea is offered voluntarily, knowingly and intelligently. The plea must be entered with "a full understanding of what the plea connotes and of its consequence." In Idaho, the trial court must follow the minimum requirements of I.C.R. 11(c) in accepting pleas of guilty. If the record indicates the trial court followed the requirements of I.C.R. 11(c), this is prima facie showing that the plea is voluntary and knowing.

State v. Mauro, 121 Idaho 178, 180 (1991) (citing *State v. Detweiler,* 115 Idaho 443 (Ct. App. 1989) (citations omitted). *State v. Banuelos*, 124 Idaho 569, 573 (Ct. App.

1993), held "that restitution is a direct consequence of entering a guilty plea and the sentencing court may not impose restitution upon a defendant who pleads guilty, unless defendant is advised of that possibility prior to entering his plea." The *Banuelos* opinion went on to note:

> Accordingly, we conclude that the order of restitution is invalid in the absence of the court's advisement before [Mr. Banuelos] pled guilty. Having previously determined that [Mr. Banuelos'] plea was otherwise voluntarily and intelligently made, the appropriate remedy is to strike the order of restitution from the sentence.

Id. In this case, the district court failed to advise Mr. Latneau at the change of plea hearing that it could enter a no contact order in regard to his children as a direct counsequence of his guilty plea. (*see generally* 06/03/10 Tr., pp.5-22.) Additionally, there was no reference to a no contact order in the guilty plea advisory form. (R., pp.40-46.) Since Mr. Latneau was never warned about the possibility of the no contact order, Mr. Latneau's guilty plea was not entered knowingly and said order is invalid pursuant to *Banuelos*, *supra*, and the appropriate remedy is for this Court to strike the no contact order.

In sum, in order to accept a knowing guilty plea, the district court must warn the defendant of the direct consequences of the plea. In the event a court fails to warn about a specific consequence of entering guilty plea, and an order pertaining to that consequence is entered, the order is invalid. Since Mr. Latneau was not warned about the potential no contact order in regard to his children, the no contact order is invalid. Accordingly, Mr. Latneau requests that this Court strike the portion of the no contact order which prevents Mr. Latneau from contacting his children, R.L. and C.L.

II.

The District Court Violated Mr. Latneau's Procedural And Substantive Due Process Rights When It Entered A No Contact Order Which Unduly Restricts His Fundamental Right To Parent

A. Introduction

Mr. Latneau has a fundamental right to right to parent, or in other words, a liberty interest in regard to his children. The Idaho legislature recognized the significance of this liberty interest and codified the Termination of Parental Child Relationship Act (*hereinafter,* TPCRA), which sets forth the procedures the State must adhere to in order to terminate a parent's fundamental right to parent. When followed, the TPCRA provides the parent, who is a party subject to the termination proceedings, with notice and an opportunity for a meaningful hearing, which are the basic requirements for procedural due process. In this case, the district court entered a no contact order, which was tantamount to an order terminating his parental rights, because it prevented Mr. Latneau from having any contact with his children. Mr. Latneau argues that this violated his procedural due process rights because he was not given notice before he entered his guilty plea that the State intended to use his plea to justify the termination of his parental rights. Additionally, Mr. Latneau argues that jurisdictional review hearing is not the appropriate forum to litigate parental rights because it does not provide for a meaningful review of those rights.

If it is determined that Mr. Latneau's procedural due process rights were not violated at his jurisdictional review hearing, Mr. Latneau argues, in the alternative, that the no contact order violated his substantive due process rights. Since the right to a parent is fundamental, strict scrutiny applies, and the district court's no contact order must be narrowly tailored to reduce its infringement on Mr. Latneau's fundamental right

to parent while meeting the State's interest in protecting Mr. Latneau's children. Mr. Latneau submits that the district court could adequately protect his fundamental right to parent and the State's interests in protecting his children by allowing Mr. Latneau to have supervised contact with his children. However, the no contact order as it stands, is not narrowly tailored because it circumscribes more behavior than is necessary to protect Mr. Latneau's children.

B. The District Court Violated Mr. Latneau's Procedural And Substantive Due Process Rights When It Entered A No Contact Order Which Unduly Restricts His Fundamental Right To Parent

1. The District Court Violated Mr. Latneau's Constitutional Right To Procedural Due Process When It Circumvented The Procedural Protections Codified In The Termination Of Parent Child And Relationship Act By Effectively Terminating Mr. Latneau's Parental Rights With A No Contact Order

The right of parents to make decisions regarding the care, custody, and control of their children has been recognized by the U.S. Supreme Court and the Idaho Supreme Court as a fundamental right. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Leavitt v. Leavitt*, 142 Idaho 664, 670 (2006). This liberty interest "does not evaporate simply because they have not been model parents . . . . Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer,* 455 U.S. 745, 753 (1982) .

The constitutions of both United States and the State of Idaho guarantee due process of law before the State can deprive a citizen's liberty interest. *See* U.S. CONST. amend. XIV; ID. CONST. art. I, §13.

> It is firmly established that due process requires notice and a meaningful opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Cole v. Arkansas*, 333 U.S. 196 (1948). The Due Process Clause of the Fourteenth Amendment also protects against arbitrary and capricious acts

> of the government. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Due process requires that judicial proceedings be "fundamentally fair." *Lassiter v. Department of Soc. Serv. of Durham Cty.*, 452 U.S. 18, 24 (1981).

State v. Card, 121 Idaho 425, 445 (1991) (*overruled on other grounds by State v. Wood*, 132 Idaho 88 (1998)). The question then becomes, what process is due? *See Goss v. Lopez*, 419 U.S. 565, 577 (1975). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Additionally, the Idaho Supreme Court has "applied the United States Supreme Court's standard for interpreting the due process clause of the United States Constitution to art. I, Section 13 of the Idaho Constitution." *Maresh v. State, Dept. of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 227 (1998) (citing *Smith v. Idaho Dep't of Correction*, 128 Idaho 768, 771 (1996)).

In parental right termination proceedings, the private interests affected by official action are great. In fact, the Idaho legislature recognized the importance of parental rights and procedural due process in regard to those rights when it enacted the TPCRA, which provides the formal procedures required for terminating parental rights. I.C. § 16-2001, *et seq.* One of the basic policies behind the TPCRA follows:

> Implicit in this chapter is the philosophy that wherever possible family life should be strengthened and preserved and that the issue of severing the parent and child relationship is of such vital importance as to require a judicial determination in place of attempts at severance by contractual arrangements, express or implied, for the surrender and relinquishment of children.

I.C. § 16-2002(2). In order to initiate termination proceedings, a person with an interest in the child or entity with statutory authorization must file a petition. I.C. § 16-2004. After the petition is filed, <u>personal notice</u> of the termination proceedings must be

provided to the parents of the child. I.C. § 16-2007 (emphasis added). The following guidelines control the mandatory termination hearing:

> The court's finding with respect to grounds for termination shall be based upon clear and convincing evidence under rules applicable to the trial of civil causes, provided that relevant and material information of any nature, including that contained in reports, studies or examinations, may be admitted and relied upon to the extent of its probative value. When information contained in a report, study or examination is admitted in evidence, the person making such report, study or examination shall be subject to both direct and cross-examination.

I.C. § 16-2009. In the event parental rights are terminated the district court must enter a written decree which recites "the findings upon which such order is based." I.C. § 16-2010(1).

In this case, the district court entered a no contact order, which in effect, is the functional equivalent of a decree terminating parental rights. The no contact order prevents Mr. Latneau from contacting his children until June 24, 2017. (R., pp.58.) However, the no contact order is even more draconian that a decree terminating parental rights because Mr. Latneau will incur criminal liability under the no contact order and as opposed to a termination decree which would not prevent him from speaking with his children. *See* I.C. § 18-920(C) ("A violation of a no contact order is punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment in the county jail not to exceed one (1) year, or both."); *compare with* I.C. § 16-2011 "An order terminating the parent and child relationship shall divest the parent and the child of all legal rights, privileges, duties, and obligations, including rights of inheritance, with respect to each other."). In addition, the no contact order does not sever any duties or obligations Mr. Latneau has in regard to his children, so he is still liable for child support, but is criminally liable if he communicates with his children. Therefore, the entry of the no contact order is tantamount to a decree terminating parental rights, but entails

harsher consequences than a termination decree alone because Mr. Latneau cannot speak with his children but is still potentially liable for their financial well being.

The use of a no contact order in lieu of a formal termination proceeding does not comport with the basic principles of procedural due process. As stated above, both basic due process and the TRCAP require that a parent receive notice that the State is going to attempt to deprive a liberty interest. Here, Mr. Latneau was not informed prior to the change of plea hearing that his plea could be used as a justification to terminate his parental rights. (*see generally* 06/03/10 Tr., p.5-22; R., pp.40-46.) While the guilty plea advisory form did mention, as a consequence for pleading guilty, that Mr. Latneau might be required to pay restitution and temporarily lose his ability to sit on a jury panel, the guilty advisory form did not mention that the State would seek a no contact order, which is in effect for approximately six and one-half years, in regard to his children as a consequence of his guilty plea. (R., pp.40-46, 58.) Therefore, Mr. Latneau was not provided with notice that his guilty plea could later be used as a justification to terminate his parental rights.

Even if it is determined that Mr. Latneau received enough notice to meet state and federal due process requirements, the use of a jurisdictional review hearing in lieu of a formal termination proceeding violates the meaningful hearing requirement of procedural due process. Section I.C. § 16-2009 of the Idaho Code, sets forth the right to have a termination hearing prior to the entry of a termination decree. Since the Idaho legislature proved a specific right to a hearing prior to a termination proceeding, a denial of that hearing constitutes a unique denial of due process. *See Lightner v. Hardison*, 149 Idaho 712, 718 (Ct. App. 2010) ("When the language of state statutes and regulations create a right, that right is entitled due process protection.") (citing

Mendoza v. Blodgett, 960 F.2d 1425, 1432-33 (9th Cir.1992)) (holding that the termination of visiting privileges violated due process where the prison regulation contained explicit mandatory language that visiting privileges could be suspended only after a finding of guilt); *see also Taylor v. Armontrout,* 894 F.2d 961, 964-65 (8th Cir. 1989) (holding that a regulation that stated that people whose names appeared on a list "shall" be allowed to visit created a right to visitation entitled to due process protection).

The use of a jurisdictional review hearing to address Mr. Latneau's parental rights did not function as an adequate alternative to an I.C. § 16-2009 hearing because the jurisdictional review hearings have significantly lower evidentiary standards than hearings held pursuant to I.C. § 16-2009. The Idaho Legislature set forth the following procedures to govern a formal termination hearing:

> The court's finding with respect to grounds for termination shall be based upon clear and convincing evidence under rules applicable to the trial of civil causes, provided that relevant and material information of any nature, including that contained in reports, studies or examinations, may be admitted and relied upon to the extent of its probative value. When information contained in a report, study or examination is admitted in evidence, the person making such report, study or examination shall be subject to both direct and cross-examination.

I.C. § 16-2009. In a formal termination proceeding, the court must use a clear and convincing evidence standard, which is higher than the normal civil preponderance of the evidence standard. *See Hibbler v. Fisher*, 109 Idaho 1007, 1001 (Ct. App. 1985) (Clear and convincing evidence is a higher evidentiary standard than preponderance of the evidence). Additionally, the rules of evidence apply at a termination proceeding. I.C. § 16-2009. Conversely, at a jurisdictional review hearing, since criminal liability has already been determined, the rules of evidence do not apply and the district court has a very broad range of discretion to consider evidence not admissible at trial. Concerning this issue the Idaho Court of Appeals noted:

> After a criminal defendant's guilt has been established, the trial court has greater latitude regarding the information that it may consider for sentencing than could have been considered while the state was attempting to establish that guilt at trial. The rules of evidence do not apply to sentencing proceedings. The trial court, therefore, has broad discretion in the admission of evidence at a sentencing proceeding and properly may consider a wide range of relevant evidence in determining an appropriate sentence for the particular defendant before it. Moreover, it is essential that the trial court receive all information available about the defendant before imposing sentence so that such sentence will reflect the character and propensity of the defendant as well as the circumstances of the offense.

State v. Hoover, 138 Idaho 414, 422 (Ct. App. 2003).

Due to the lower evidentiary standards at a jurisdictional review hearing, the State was able to submit evidence in support of the no contact order, which it would not have been able to submit at a formal termination hearing. At the jurisdictional review hearing, for example, Mrs. Latneau provided a victim impact statement, which was replete with prejudicial information that would not have been admissible under the rules of evidence. For example, character evidence in the form of prior bad acts was adrnitted when the victim asserted that Mr. Latneau slit the truck on the Mrs. Latneau's tire, abused their children. (12/21/10 Tr., p.2, Ls.15-21.) Additionally the victim made speculative assertions that their children did not want to see Mr. Latneau. (12/21/10 Tr., p.3, Ls.4-8.) Since these assertions were made in the form of a victim impact statement, Mr. Latneau was denied the ability to cross examine the witness, an opportunity which would have been provided at a formal termination proceeding. *See* I.C. § 16-2009. Moreover, Mr. Latneau lost his ability to cross examine the mental health evaluator and the PSI evaluator. I.C. § 16-2009 ("When information contained in a report, study or examination is admitted in evidence, the person making such report, study or examination shall be subject to both direct and cross-examination.").

In sum, Mr. Latneau has a fundamental right to parent, which is considered a liberty interest in the context of Fourteenth Amendment jurisprudence. The Idaho Legislature provided for specific procedures Idaho courts must adhere to in order to legally terminate this right. In this case, that procedure was abandoned and the district court entered a no contact order, which had, in effect, terminated Mr. Latneau's parental rights. Since Mr. Latneau was not informed about this consequence at the change of plea hearing he did not receive adequate notice. Moreover, a jurisdictional review hearing did not provide Mr. Latneau with a meaningful opportunity to be heard concerning the termination of his parental rights. Therefore the district court's no contact order violated Mr. Latneau's procedural due process rights and should be struck by this Court.

2. The District Court's No Contact Order Violated Mr. Latneau's Fundamental Right To Parent Because A Less Restrictive Means To Protect His Children Exists

Mr. Latneau asserts that the no-contact order unconstitutionally interferes with his fundamental right to parent, which is a substantive due process right. Since the right to a parent is fundamental, strict scrutiny applies, and the district court's no contact order must be narrowly tailored to meet the State's interest in protecting Mr. Latneau's children. Mr. Latneau submits that the district court could adequately protect his children by ordering supervised contact instead of an absolute no contact order.

The right of parents to make decisions regarding the care, custody, and control of their children has been recognized by the U.S. Supreme Court and the Idaho Supreme Court as a fundamental right. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Leavitt v. Leavitt*, 142 Idaho 664, 670 (2006). The Due Process Clause of the Fourteenth Amendment has a substantive component which provides heightened protections

against governmental interference where fundamental rights and liberty interests are at stake. *Troxel*, 530 U.S. at 65. The interest of parents in the care, custody, and control of their children is "perhaps the oldest of the fundamental liberty interests," recognized by the courts. *Id.* This interest includes the right of parents to "establish a home and bring up children." *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). A strict prohibition against a parent having any contacts whatsoever with his or her child is necessarily an interference with this fundamental right. As such, the imposition of the no contact order issued in this case is subject to the strict requirements of substantive due process since the terms of that order interfere with Mr. Latneau's fundamental rights as a parent.

The Idaho Supreme Court has established that the State may not interfere with the exercise of the fundamental rights of a parent absent clear and convincing proof that the State's action is necessary for the protection or best interests of the child. *In the Interests of Doe*, 144 Idaho 534 (2007) (State action terminating a parent's rights must be supported by clear and convincing evidence); *Leavitt*, 142 Idaho at 670, 132 P.3d at 427 (applying clear and convincing evidence standard to decisions regarding the visitation rights of grandparents); *see also Santosky v. Kramer*, 455 U.S. 745, 747-748 (1982). Here, the district court made a factual finding that Mr. Latneau's children have been adversely affected by his actions. (12/21/10 Tr., p.25, Ls.21-24.) In coming to this conclusion, the district court relied on the manner in which Mr. Latneau treated his wife, but it did not base this conclusion on any his interactions Mr. Latneau had with his children. (12/21/10 Tr., p.25, Ls.21-24.) The district court went on to State that the existence of the no contact order and the impact it has on his parental rights was contingent upon his potential divorce decree. (12/21/10 Tr., p.27.) The record does not

contain clear and convincing evidence that Mr. Latneau should not have contact with his children.

Additionally, when the State infringes upon a fundamental liberty interest, that infringement must be narrowly tailored to meet the State's interest. According to the United State's Supreme Court, "the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (citing *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992) ; *Bowers v. Hardwick,* 478 U.S. 186, 191 (1986)) (emphasis in original). While, the State does have a compelling interest in the protection of Mr. Latneau's children, Mr. Latneau submits that severing all contact between him and his children constitutes an overly restrictive means to achieve that end. Mr. Latneau should be allowed to have supervised visitation rights with his children. The State can have a third party monitor and be present during his visits to ensure that Mr. Latneau acts appropriately or engage in other practices that will protect the children. Since there is a less restrictive means to achieve the State's interest, the no contact order is not narrowly tailored, and, therefore, violates his substantive due process rights.

In light of the fact that clear and convincing evidence was not presented that the no contact order was necessary for the protection of Mr. Latneau's children and since supervised visits are sufficient to meet the State's interest in protecting his children, the State has violated Mr. Latneau's fundamental rights as a parent by entering a no contact order severing and criminalizing all contacts with his children.

III.

The District Court Abused Its Discretion When It Relinquished Its Jurisdiction Following Mr. Latneau's Rider

A. Introduction

The IDOC recommended that Mr. Latneau be placed on probation. The Presentence Investigation Report (*hereinafter,* PSI) investigator recommended that Mr. Latneau be placed on probation. When this is viewed in light of the mitigating factors it supports the conclusion that the district court abused its discretion when it relinquished its jurisdiction.

B. The District Court Abused Its Discretion When It Relinquished Its Jurisdiction Following Mr. Latneau's Rider

1. The District Court's Factual Finding That Mr. Latneau's Disposition Of His Property Constituted Illegal Or Bad Behavior Was Clearly Erroneous

Before relinquishing jurisdiction, the district court made an unsupported factual finding pertaining to the disposition of Mr. Latneau's property located in the State of Arizona. This Court has held, "[f]indings are clearly erroneous only when unsupported by substantial and competent evidence." *State v. Kinser,* 141 Idaho 557, 560 (Ct. App. 2005) (citing *State v. Thomas,* 133 Idaho 682, 686 (Ct. App. 1999) . Idaho appellate courts will overturn a district court's factual findings if they are clearly erroneous. (*See State v. Wright*, 134 Idaho 73, 75 (2000).

The district court's implied conclusion that Mr. Latneau acted either illegally or inappropriately in regard to his chattel property located in Arizona was not supported by substantial and competent evidence. Mr. Latneau owned two homes in Arizona and Mr. Latneau had given his brother permission or a license to enter those homes and

remove any chattel property contained thereon. (PSI, pp.99-105; 12/21/10 Tr., p.8, Ls.9-20; *See Tanner Companies v. Arizona State Land Dept.*, 142 Ariz. 183, 193 (Ct. App. 1984). ("A license is an authority or permission to do a particular act or series of acts upon the land of another without possessing any interest or estate in such land." (citations omitted)). Mr. Latneau's brother did some chattel property from the homes. (12/21/10 Tr., p.8, LS.9-25.)

Throughout the course of the jurisdictional review hearing there were various unsupported assumptions made about Mr. Latneau's property by both the State and the district court. The State initially characterized Mr. Latneau's actions in regard to the homes in Arizona as "conspiracy to commit grand theft" because it was marital property. (12/21/10 Tr., p.8, L.9 – p.9, L.13.) the district court made the following statement concerning this issue:

> I don't know if you saw the jail conversations. They're not actually word for word. Basically they say what you said. So I don't know quite what to think about them. To me, I am looking at the investigator's report and jail conferences. There is certainly some reasonable inferences that you were involved in that kind of conduct to try and get items sold. You needed money.
>
> And I understand the home was in foreclosure so your wife and children were not living there. I don't know if they plan on going back there. I don't know that happened to all the marital property. I assume your personal items were moved from the house.

(12/21/10 Tr., p.24, Ls.3-17.) These assertions are unsupported because they presuppose that the property at question was martial or community property. Absent a valid judgment, there is no way to any party could ascertain the nature of the property interests involved. This assumption is not supported by evidence because the record does not indicate specifically what was removed, if the property was obtained during the duration of the community, and even if it was, whether it falls into one of Arizona's

statutory exceptions to community property. For example, Section 25-211of the Arizona Revised Statutes, state that property obtained acquired by gift, devise or descent is not community property even though it was obtained during the existence of the community. Since there was no legal division of the community assets the property at issue could have been Mr. Latneau's separate property, and any assertion it was community property could not be supported by substantial and competent evidence.

Additionally, the record indicates that a divorce proceeding had been filed, but it does not indicate in which state it was filed. (12/21/10 Tr., p.24, L.12 – p.25, L.1.) There could be choice of law issues, whether Idaho or Arizona laws apply, and jurisdictional issues if the divorce action was filed in Idaho.

In the event the property at issue is in fact community property, and Arizona law controls, Mr. Latneau's actions might not have been illegal because either spouse has the ability to sell community property, prior to the service of a petition for dissolution of marriage. *See* A.R.S. § 25-214(C) ("Either spouse separately may acquire, manage, control or dispose of community property or bind the community, except that joinder of both spouses is required . . ., after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment . . . .")

In addition, the district court also implicitly asserted that Mr. Latneau had property removed from his homes in Arizona to defraud creditors. (12/21/10 Tr., p.23, Ls.12-19.) This implicit assumption was not support by substantial and competent evidence because the record contains no evidence that the creditors at issue had any interests in the property removed from the Arizona homes. Again, a choice of law issues arises and a legal determination of the nature of the property interests at issue would need to be

made in order to conclude that Mr. Latneau's creditors had any cognizable interests in the property removed. For example, the district court asked Mr. Latneau if any fixtures had been removed from the homes upon his requests. (12/21/10 Tr., p.23, Ls.12-13.) In both Idaho and Arizona, the defining property as a "fixture" requires a legal determination. *See* A.R.S. § 47-9102; *See also* I.C. § 28-9-102.

In sum, the record does not contain enough information to make any assumptions about Mr. Latneau's disposition of his property in Arizona. Any conclusions about his actions are clearly erroneous because the record is bereft of substantial or competent evidence to support said conclusions.

2. The District Court Abused Its Discretion When It Relinquished Its Jurisdiction Following Mr. Latneau's Rider

The decision to relinquish jurisdiction lies within the sound discretion of the trial court. *State v. Rhoades*, 122 Idaho 837, 837 (Ct. App. 1992) (*citing to State v. Lee,* 117 Idaho 203, 205-06 (Ct. App.1990) . "When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry. The sequence of the inquiry is: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." *State v. Hedger*, 115 Idaho 598, 600 (1989) (*citing to Associates Northwest, Inc. v. Beets,* 112 Idaho 603, 605 (Ct. App.1987)). Mr. Latneau does not contest whether the district court appropriately perceived its ability to relinquish jurisdiction as one of discretion. However, Mr. Latneau does contest that the district court acted outside of the outer boundaries of its discretion and that it did not reach its decision by an exercise of reason.

As a preliminary note, Mr. Latneau received two separate probation recommendations one in the PSI and one in the APSI - both of which were presented to the district court after Mr. Latneau completed his rider. (PSI, pp.24, 26.) The district court received the PSI after Mr. Latneau completed his rider because the PSI was created during Mr. Latneau's rider and his performance on the rider was considered by the district court and both parties as part of the presentences process. (06/03/10 Tr., p.8, Ls.4-12; 06/24/10 Tr., p.5, Ls.9-20.) The rider review hearing could be characterized as a hybrid sentencing hearing and a rider review hearing. With that in mind, Mr. Latneau is a viable candidate for probation because he received two probation recommendations from professionals specifically tasked with evaluating his amenability to rehabilitation and the risk he poses to society.

In addition to the foregoing probation recommendations, there are various mitigating factors which support the conclusion that Mr. Latneau is amenable to rehabilitation and does not pose a significant risk to society. Specifically, Mr. Latneau has family support. In *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that support of family and friends were mitigating factors. Here, Mr. Latneau's mother will allow him to stay at her Arizona residence when he is released from custody. (PSI, p.20.) His mother will also send him money for living expense until he can get transferred from Idaho to Arizona. (PSI, p.20.) In addition, Mr. Latneau has enough personal savings to support him for approximately one year after his release from custody. (PSI, p.126.) Mr. Latneau's family support and his personal savings reduce any risk he poses to society because he will have no incentive to engage in any financially motive offenses upon his release from custody.

Additionally, in *State v. Hagedorn*, 129 Idaho 155, 161 (Ct. App. 1996), it was deemed appropriate to consider a defendant's employment background as a mitigating factor. Here, Mr. Latneau has been self-employed for over a decade, installing residential and commercial air quality systems. (PSI, p.22.) Mr. Latneau characterized this business as lucrative. (PSI, p.22.) This is evinced by the fact that, Mr. Latneau has saved enough money to support himself for a year. (PSI, p.22.) Mr. Latneau's work ethic is also evidenced by the fact that he earned his G.E.D., performed over eighty hours of community service, and completed his assigned programming all while on his rider. (PSI, pp.22, 30.) The IDOC stated the following about Mr. Latneau's community service:

> Mr. Latneau additionally completed over (80) hours of community service while at NICI. Offenders are tasked with developing a plan to use their time in a productive and prosocial manner. Besides studying his programs, Mr. Latneau was able to volunteer and work with others on the compound to stay busy and be an active participant in his own life. This is important as many offenders will perform the minimum requirements and never aspire to succeed beyond expectation.

(PSI, p.30.)

Additionally, Mr. Latneau's substance addiction is a mitigating factor. The Idaho Supreme Court has held that substance addiction is a mitigating factor. *State v. Nice*, 103 Idaho 89 (1982). Mr. Latneau admitted that he is an alcoholic. (PSI, p.22.) The district court did not consider Mr. Latneau's substance addiction as a mitigating factor, and implicitly stated it was an aggravating factor. (12/21/10 Tr., p.25, Ls.21-24.) Therefore, the district court erred when it considered Mr. Latneau's substance addiction as an aggravating factor.

Further, Mr. Latneau's mental health is a mitigating factor. In *State v. Payne*, 146 Idaho 548, 569-70 (2008), the Idaho Supreme Court held that even in instances where

there is no nexus between a crime and the defendant's mental health issue(s), mental health evidence is relevant to sentence mitigation. Mr. Latneau has been diagnosed with bi-polar disorder and was not medicated for this illness when he committed the underling offense. (PSI, p.31.) The potential for a nexus between the commission of the offense and his unmediated bi-polar disorder was so great the IDOC recommended that he obtain a mental health evaluation. (PSI, p.31.) The district court decided to continue the rider review hearing so a mental health evaluation could be prepared. (12/02/10 Tr., p.26, L.6 – p.29, L.1.) While the mental health evaluator disagreed with the bi-polar diagnoses, it did conclude that Mr. Latneau suffered from mental health issues. (PSI, pp.128-29.)

Finally, the fact that this is Mr. Latneau's first felony conviction is a mitigating factor. (PSI, p.23.) In *State v. Lee*, 117 Idaho 203, 206, (Ct. App. 1990), the Idaho Court of Appeals considered a defendant's first felony offense as a mitigating factor.

In light of the two probation recommendations and the mitigating factors, the district court abused its discretion when it relinquished jurisdiction.

CONCLUSION

Mr. Latneau respectfully requests that this Court strike the no contact order in regard to his children R.L. and C.L. Additionally, Mr. Latneau respectfully requests that this Court place Mr. Latneau probation and remand this case with instructions for the district court order terms of probation it deems appropriate.

DATED this 20th day of December, 2011.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of December, 2011, 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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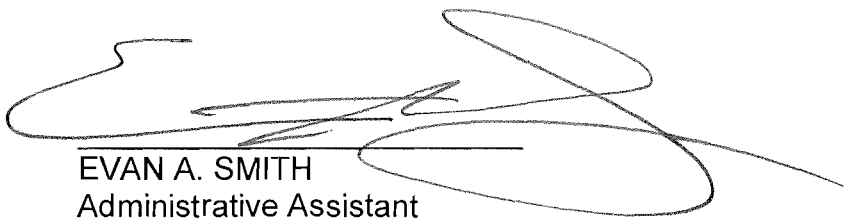

EVAN A. SMITH
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SFW/eas