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## State v. Cooney Appellant's Brief Dckt. 44569

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 44569
	)	
v.	)	NEZ PERCE COUNTY
	)	NO. CR 2011-6409
JACK J. COONEY, JR.,	)	
	)	APPELLANT'S BRIEF
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Jack J. Cooney, Jr., pleaded guilty to one count of felony operating a motor vehicle while under the influence of alcohol. The district court imposed a unified sentence of five years, with two years fixed, and retained jurisdiction. The district court later suspended Mr. Cooney's sentence and placed him on probation for a period of five years. Mr. Cooney subsequently admitted to violating his probation by committing the new offense of felony operating a motor vehicle while under the influence of alcohol, and the district court also found Mr. Cooney had violated his probation by being found guilty, following a jury trial, of that new offense. The district court revoked Mr. Cooney's probation and ordered into execution his sentence. On appeal, Mr. Cooney asserts the

district court, when it revoked his probation, abused its discretion by ordering into execution his sentence.

### Statement of the Facts & Course of Proceedings

Corporal Leavitt of the Lewiston Police Department stopped Mr. Cooney after seeing the car driven by Mr. Cooney travel 42 mph in a 25 mph zone and weave within the roadway and onto the opposite lane. (No. 40501 R., p.17.)<sup>1</sup> Mr. Cooney had slurred speech, bloodshot and watery eyes, and had the odor of an alcoholic beverage coming from his breath. (No. 40501 R., p.18.) He also had trouble manipulating documents and dropped his driver's license on the ground. (No. 40501 R., p.18.) After administering field sobriety tests, Corporal Leavitt arrested Mr. Cooney and transported him to jail. (No. 40501 R., p.18.) Mr. Cooney refused to submit a breath or blood test sample, and he had his blood involuntarily drawn by a phlebotomist at a medical center. (No. 40501 R., p.18.)

The State charged Mr. Cooney with one count of operating a motor vehicle while under the influence of alcohol, felony, I.C. §§ 18-8004(1)(a) and 18-8005(6). (No. 40501 R., pp.62-63.) Mr. Cooney entered a guilty plea and was accepted into the Nez Perce County DUI Court. (No. 40501 R., pp.64-75.) Mr. Cooney subsequently admitted to violating the terms of the DUI Court program and was conditionally expelled. (See No. 40501 R., p.86.) The district court imposed a unified sentence of five years, with two years fixed, and retained jurisdiction. (No. 40501 R., pp.94-97.)

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<sup>1</sup> The Idaho Supreme Court has ordered that the Record on Appeal in this case be augmented to include the Clerk's Record in Mr. Cooney's prior appeal No. 40501, along with a Limited Clerk's Record. (Order Augmenting Prior Appeal, Oct. 28, 2016.)

Mr. Cooney filed a Notice of Appeal timely from the district court's Judgment of Conviction. (No. 40501 R., pp.108-11.) The Idaho Supreme Court later granted Mr. Cooney's motion to dismiss that appeal. (See No. 40501, Order Granting Motion to Dismiss, Apr. 9, 2013.)

Meanwhile, Mr. Cooney had been placed in a Therapeutic Community "rider." (No. 40501 R., pp.112-13.) After Mr. Cooney participated in the rider, the district court suspended his sentence and placed him on probation for a period of five years. (R., pp.22-26.)<sup>2</sup> About two years later, Mr. Cooney's driving privileges were restored. (See R., p.40.) Some five months afterwards, the district court transferred Mr. Cooney to unsupervised probation. (R., pp.40-42.)

About five months later, the State filed a Motion for Summons alleging Mr. Cooney had violated the terms of his probation. (R., pp.43-45; see R., pp.46-52.) Mr. Cooney admitted to violating his probation by committing the new offense of felony operating a motor vehicle while under the influence of alcohol; the district court also found Mr. Cooney had violated his probation by being found guilty, following a jury trial, of that new offense in Nez Perce County No. CR 2015-8103 (*hereinafter*, the new offense case).<sup>3</sup> (R., p.68; Tr., p.25, Ls.5-15; see R., pp.61-67.)

At the probation violation disposition hearing, the district court noted the updated presentence report prepared in the new offense case recommended "a lengthy period of local incarceration along with probation term for Mr. Cooney." (Tr., p.26, Ls.1-5; see

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<sup>2</sup> All citations to "R." refer to the 91-page Limited Clerk's Record.

<sup>3</sup> Nez Perce County No. CR 2015-8103 is the subject of Mr. Cooney's appeal in No. 44547.

No. 44547 Presentence Update Report (*hereinafter*, Updated PSI), p.10.)<sup>4</sup> Mr. Cooney requested the district court follow the recommendation of the updated presentence report writer by giving him a lengthy period of local jail time and then placing him back on probation. (Tr., p.26, L.9 – p.28, L.2.) The State asked the district court to instead execute Mr. Cooney’s sentence. (See Tr., p.29, Ls.17-20.) The district court revoked Mr. Cooney’s probation and ordered into execution his sentence. (R., pp.70-72.) The sentence was to run concurrently with the unified sentence of ten years, with three years fixed, imposed in the new offense case. (See R., pp.69, 71.)

Mr. Cooney filed a Notice of Appeal timely from the district court’s Order Revoking Previously Suspended Sentence and Imposing Sentence. (R., pp.73-76.)

### ISSUE

Did the district court, when it revoked Mr. Cooney’s probation, abuse its discretion by ordering into execution his unified sentence of five years, with two years fixed?

### ARGUMENT

#### The District Court, When It Revoked Mr. Cooney’s Probation, Abused Its Discretion By Ordering Into Execution His Underlying Sentence Of Five Years, With Two Years Fixed

Mr. Cooney asserts the district court, when it revoked his probation, abused its discretion by ordering into execution his sentence, because the district court could only reasonably conclude from his conduct that probation was achieving its rehabilitative purpose. The district court should have instead followed the recommendation of

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<sup>4</sup> All citations to the Updated PSI refer to the 125-page electronic PDF document filed as a confidential exhibit in No. 44547, which is the subject of a Motion to Augment filed contemporaneously with this brief.

Mr. Cooney and the updated presentence report writer by giving him a lengthy period of local jail time and then placing him back on probation.

“A district court’s decision to revoke probation will not be overturned on appeal absent a showing that the court abused its discretion.” *State v. Sanchez*, 149 Idaho 102, 105 (2009). Appellate courts use a two-step analysis in reviewing a probation revocation proceeding. *Id.* at 105. First, the appellate court reviews the district court’s finding on “whether the defendant violated the terms of his probation.” *Id.* “If it is determined that the defendant has in fact violated the terms of his probation, the second question is what should be the consequences of that violation.” *Id.*

Mr. Cooney concedes he admitted to violating his probation. (See R., p.68; Tr., p.25, Ls.5-15.) When a probationer admits to a direct violation of his probation agreement, no further inquiry into the question is required. *State v. Peterson*, 123 Idaho 49, 50 (Ct. App. 1992). Thus, this Court may go to the second step of the analysis and determine whether the district court, when it revoked Mr. Cooney’s probation, abused its discretion by ordering his sentence into execution.

Mr. Cooney submits the district court, when it revoked his probation, abused its discretion by ordering his sentence into execution. The district court may revoke probation if it reasonably concludes from the defendant’s conduct that probation is not achieving its rehabilitative purpose. *State v. Adams*, 115 Idaho 1053, 1055 (Ct. App. 1989). The district court may consider the defendant’s conduct both before and during the probationary period. *State v. Roy*, 113 Idaho 388, 392 (Ct. App. 1987).

Here, the district court could only reasonably conclude from Mr. Cooney’s conduct that probation was achieving its rehabilitative purpose. As stated in the

Presentence Update Report prepared in the new offense case, “Mr. Cooney appears to have done well overall during this most recent period of supervision and was even transferred to unsupervised probation.” (Updated PSI, p.9.) According to the Presentence Update Report, Mr. Cooney “stated he loved [the Therapeutic Community] program and feels it was the best thing that has ever happened to him. He said he was able to maintain his sobriety for over two years after completing this program.” (Updated PSI, p.9.)

While the updated presentence report writer stated “incarceration would appear the most appropriate sentence” based on Mr. Cooney’s prior record and continued drinking and driving, the writer further noted, “based on his most recent performance on probation and the fact that he did so well and was even transferred to unsupervised early, it is difficult to recommend prison.” (Updated PSI, p.10.) The Presentence Update Report concluded: “Mr. Cooney has proven he can do well on probation, but there should be consequences for his actions; therefore a lengthy period of local incarceration is recommended.” (Updated PSI, p.10.)

At the probation violation disposition hearing, Mr. Cooney’s counsel stated the belief that Mr. Cooney “will do well while he’s supervised.” (Tr., p.26, Ls.18-19.) Counsel added, “[t]he hope is that while he’s getting that supervision, he then gets everything in order so that knowing he’s eventually not going to be on probation, and he’s not going to have [a] watchful eye on him, that he will be able to live a clear and sober lifestyle after that.” (Tr., p.26, Ls.19-24.) Counsel also mentioned that “Mr. Cooney does have a lot of support from members of the community that are in the clean and sober community. Several of them are in court at every one of his

appearances, they counsel him.” (Tr., p.27, Ls.7-10.) The district court noted one of Mr. Cooney’s supporters was sitting in the courtroom during the hearing and stated, “I know how he regards you and he values you for the services you have provided to his business.” (Tr., p.31, Ls.6-9.)

According to the Presentence Update Report, “Mr. Cooney reported he owns his own painting company, Jesus & Jack Painting. He said he does all of the painting for Ray J. White and has approximately 15-20 other contracts. He stated he had two employees working for him at the time of his arrest [in the new offense case].” (Updated PSI, p.5.) At the probation violation disposition hearing, the district court recognized Mr. Cooney had “a well regarded business. I think people really value your painting services.” (Tr., p.31, Ls.4-6.)

In light of the above, the district court could only reasonably conclude from Mr. Cooney’s conduct that probation was achieving its rehabilitative purpose. Thus, Mr. Cooney asserts the district court, when it revoked his probation, abused its discretion by ordering into execution his sentence.

#### CONCLUSION

For the above reasons, Mr. Cooney respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 8<sup>th</sup> day of March, 2017.

\_\_\_\_\_/s/\_\_\_\_\_  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8<sup>th</sup> day of March, 2017, 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:

JACK J COONEY JR  
INMATE #45916  
C/O NEZ PERCE COUNTY SHERIFF'S OFFICE  
1150 WALL STREET  
LEWISTON ID 83501

JEFF M BRUDIE  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

GREGORY R HURN  
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E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BPM/eas