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State v. Cole Appellant's Brief Dckt. 44809

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 44809, 44810, & 44811
Plaintiff-Respondent,)	
)	KOOTENAI COUNTY NOS. CR 2015-386,
v.)	CR 2016-16265, & CR 2016-20904
)	
LEVI WESLEY COLE,)	APPELLANT’S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

After Levi Wesley Cole admitted to violating his probation and pled guilty to new offenses, the district court revoked his probation, executed the underlying sentence, and imposed a sentence for the new offenses. Mr. Cole requested the district court retain jurisdiction, but the district court declined. Mr. Cole appeals, arguing the district court abused its discretion by not retaining jurisdiction.

Statement of Facts and Course of Proceedings

In January of 2015, the State alleged Mr. Cole committed the two counts of felony domestic battery in the presence of a child, in violation of I.C. §§ 18-903, -918(3)(c), (4) (CR

2015-386) . (R., pp.11–12, 29–30.) According to the police report, Mr. Cole slapped and “head-butted” his girlfriend in the presence of their one-year-old son. (Presentence Investigation Report (“PSI”),¹ pp.10, 24–27.) Following a preliminary hearing, the magistrate found probable cause for the offenses and bound Mr. Cole over to district court. (R., pp.32–36, 37.) The State then filed an Information charging Mr. Cole with the two counts of felony domestic battery in the presence of the child. (R., pp.40–41.) Pursuant to a plea agreement, Mr. Cole entered an *Alford*² plea to one count of felony domestic battery in the presence of a child, and the State agreed to dismiss the other charge. (R., pp.75–76, 77, 81, 83–84.) In late August of 2015, the district court sentenced Mr. Cole to seven years, with three years fixed, and retained jurisdiction (“a rider”). (R., pp.85–88, 89–91.) About eight months later, in April of 2016, the district court held a rider review hearing and placed Mr. Cole on supervised probation for three years. (R., pp.99, 101–03.)

Then, in August of 2016, the State filed another Criminal Complaint alleging Mr. Cole committed the crimes of attempted strangulation, in violation of I.C. § 18-923, felony domestic battery with traumatic injury, in violation of I.C. §§ 18-903, -918(3)(c) and misdemeanor assault, in violation of I.C. § 18-901 (CR 2016-16265). (R., pp.203–04, 230–31 (Amended Complaint).) According to the police report, Mr. Cole choked and hit his fiancé and assaulted her mother. (R., pp.192–93.) The district court issued a no contact order for his fiancé. (R., p.208.) The State subsequently alleged Mr. Cole committed three counts of intimidation of a witness, in violation of I.C. § 18-2604(3), and three counts of violation of the no contact order, in violation of I.C. § 18-920(3), based on jail calls between Mr. Cole and his fiancé (CR 2016-20904). (R., pp.325–27, 330–33.) This district court consolidated the two cases. (R., p.206.) After a

¹ Citations to the PSI refer to the seventy-one page electronic document with the confidential, sealed exhibits.

² *North Carolina v. Alford*, 400 U.S. 25 (1970).

preliminary hearing in CR 2016-16265, the magistrate found probable cause for the offenses and bound Mr. Cole over to district court. (R., pp.225–29, 223.) The State filed an Information charging Mr. Cole with attempted strangulation, felony domestic battery with traumatic injury, and misdemeanor assault. (R., pp.238–39.) In CR 2016-20904, Mr. Cole waived a preliminary hearing, and the magistrate bound him over to district court. (R., pp.339, 340.) The State filed an Information charging him with three counts of intimidation of a witness and three counts of violation of the no contact order. (R., pp.341–44.) The State also moved to revoke Mr. Cole’s probation in CR 2015-386 due to the new offenses in CR 2016-16265 and his alcohol consumption. (R., pp.123–24, 125–30.)

In November of 2016, the district court held a joint entry of plea and admit/deny hearing. (*See generally* Tr. Vol. I,³ p.5, L.1–p.21, L.8; R., pp.138–39, 268–69, 270, 345–46, 347.) Pursuant to a plea agreement, Mr. Cole pled guilty to felony domestic violence with traumatic injury in CR 2016-16265 and one count of intimidation of a witness and one count of violation of the no contact order in CR 2016-20904. (Tr. Vol. I, p.15, Ls.12–22, p.16, L.5–p.18, L.4.) He also admitted to violating his probation. (Tr. Vol. I, p.20, Ls.2–18.)

On December 7, 2016, the district court held a joint sentencing/disposition hearing. (*See generally* Tr. Vol. II,⁴ p.5, L.1–p.21, L.25; R., pp.140–41, 273–74, 348–49.) Mr. Cole and the State recommended the district court retain jurisdiction a second time. (Tr. Vol. II, p.10, Ls.9–10 p.11, Ls.23–24.) In CR 2016-20904, the district court imposed concurrent sentences of five years, with three years fixed, for intimidation of a witness and violation of the no contact order.

³ There are three transcripts on appeal. The first, cited as Volume I, contains the entry of plea and admit/deny hearing, held on November 23, 2016. The second, cited as Volume II, contains the sentencing/disposition hearing, held on December 7, 2016. The third, cited as Volume III, contains the Rule 35 motion hearing, held on January 20, 2017.

(Tr. Vol. II, p.20, Ls.12–15, p.21, L.23–p.22, L.1.) In CR 2016-16265, the district court sentenced Mr. Cole to ten years, with five years fixed, also to be served concurrently with sentences in CR 2016-20904. (Tr. Vol. II, p.22, Ls.2–5, p.23, Ls.2–5.) In CR 2015-386, the district court revoked his probation and executed imposition of his seven-year sentence. (Tr. Vol. II, p.22, Ls.6–11.) The district court did not retain jurisdiction. (Tr. Vol. II, p.22, Ls.12–13.) Thus, Mr. Cole received an aggregate sentence of ten years, with five years fixed. (*See* R., pp.144–45 (judgment on probation violation), 279–81 (judgment in CR 2016-16265), 350–52 (judgment in CR 2016-20904).)

Mr. Cole filed a timely Rule 35 motion in all three cases. (R., pp.142, 282, 353.) He also filed timely notices of appeal. (R., pp.146–48, 287–89, 360–62.) The district court held a hearing on his motion. (R., pp.156–59, 307–10, 369–72; *see generally* Tr. Vol. III, p.3, L.1–p.27, L.4.) Mr. Cole, his mother, and his fiancé testified.⁵ (Tr. Vol. III, p.4, L.20–p.14, L.25.) Mr. Cole requested the district court retain jurisdiction in all three cases or reduce his sentence in CR 2016-16265 to seven years, with three years fixed. (Tr. Vol. III, p.14, Ls.17–18, p.18, Ls.17–20.) The district court did not retain jurisdiction, but reduced his sentence in CR 2016-16265 to seven years, with three years fixed. (Tr. Vol. III, p.25, Ls.2–20.) The district court issued an Amended Judgment in CR 2016-16265. (R., pp.311–13.)

ISSUE

Did the district court abuse its discretion when it declined to retain jurisdiction?

⁴ This transcript does not contain line numbers. For ease of reference, the lines have been counted from the top of each page down and numbered 1 through 25.

⁵ In CR 2016-16265, Mr. Cole submitted an article “The Adolescent and Emerging Adult Brain—Lessons from Neuroscience,” by Douglas A. Gentile, Ph.D., in support of his Rule 35 motion. (R., pp.296–306.)

ARGUMENT

The District Court Abused Its Discretion When It Declined To Retain Jurisdiction

Mr. Cole asserts the district court abused its discretion at the joint sentencing/disposition hearing when it declined to retain jurisdiction in all three cases. He argues a second rider was appropriate to provide him with additional programming while also providing the district court with new information on his suitability for probation.

The district court's decision to revoke probation and its sentencing decision are both reviewed for an abuse of discretion. *State v. Oar*, 161 Idaho 550, 556 (Ct. App. 2016); *State v. Roy*, 113 Idaho 388, 392 (Ct. App. 1987). "In determining whether to revoke probation a court must consider whether probation is meeting the objective of rehabilitation while also providing adequate protection for society." *State v. Upton*, 127 Idaho 274, 275 (Ct. App. 1995). The court may consider the defendant's conduct before and during probation. *Roy*, 113 Idaho at 392. "A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution." *State v. Delling*, 152 Idaho 122, 132 (2011).

"The primary purpose of the retained jurisdiction program is to enable the trial court to gain additional information regarding the defendant's rehabilitative potential and suitability for probation." *State v. Jones*, 141 Idaho 673, 676 (Ct. App. 2005). "[P]robation is the ultimate objective of a defendant who is on retained jurisdiction." *Id.* at 677. The district court's decision to retain jurisdiction is reviewed for an abuse of discretion. *Id.* "There can be no abuse of discretion in a trial court's refusal to retain jurisdiction if the court already has sufficient information upon which to conclude that the defendant is not a suitable candidate for probation." *Id.*

Here, the district court abused its discretion by declining to place Mr. Cole on a second rider. After the first rider, Mr. Cole was unable to handle the stressors of everyday life and turned to alcohol to cope. (Tr. Vol. II, p.7, L.15–p.8, L.5, p.12, Ls.6–13, p.15, Ls.16–24.) Turning to alcohol was the norm for Mr. Cole, who began drinking alcohol at age twelve or fourteen, but possibly tried alcohol for the first time at five years old. (PSI, pp.17, 51.) Mr. Cole started drinking alcohol daily around the same time his mother was in and out of jail. (Aug. R., p.1.) His mother had issues with alcohol as well. (Aug R., p.1.) During these formative teenage years, Mr. Cole did not have a stable home—he was homeless, living with friends, or in foster care. (Aug. R., p.1.) Finally, in 2012, his mother completed her second rider and then the Good Samaritan program. (Aug. R., pp.1, 4.) Mr. Cole saw his mother change and become a sober parent. (Aug. R., p.1.) His mother firmly believed the Good Samaritan program changed her life. (Aug. R., p.4.) She now wanted the same thing for her son. (Aug. R., p.4.) Mr. Cole’s fiancé also fully supported his participation in the Good Samaritan program. (Aug. R., pp.3, 5–6.) She recognized that Mr. Cole used alcohol to self-medicate and believed the Good Samaritan program would help him address these issues. (Aug. R., pp.3, 5–7.) Mr. Cole also hoped to participate in the Good Samaritan program after a second rider. (Aug. R., p.1; Tr. Vol. II, p.17, Ls.13–22.)

In addition, Mr. Cole was very motivated and determined to succeed with the second rider. (*See* Aug. R., p.1.) He realized that he cannot drink any alcohol, even in moderation. (Tr. Vol. II, p.17, Ls.2–6.) He acknowledged that he has significant mental health issues. Even though Mr. Cole had suspected he “suffered from something mentally,” he never wanted to accept reality and admit he needed help. (Tr. Vol. II, p.16, Ls.10–25.) He did not have a mental health assessment during his first rider. (Tr. Vol. II, p.16, Ls.13–14.) But, while in jail for the

instant offenses, Mr. Cole obtained an assessment and was diagnosed with anxiety, depression, and bipolar disorder. (Tr. Vol. II, p.16, Ls.15–18.) After taking the proper medication for two months, Mr. Cole informed the district court that he noticed a change in himself and his thought process. (Tr. Vol. II, p.16, Ls.19–25, p.17, Ls.1–2.) He explained that he was finally ready to change his life and take advantage of the rider program. (Aug. R., p.1; Tr. Vol. II, p.17, Ls.13–22.) In light of this information, Mr. Cole submits the district court abused its discretion by declining to retain jurisdiction.

CONCLUSION

Mr. Cole respectfully requests that this Court vacate the district court’s judgments in CR 2016-20904 and CR 2016-16265 and its order revoking probation in CR 2015-386 and remand these cases with instructions to the district court to retain jurisdiction or to conduct a new sentencing/disposition hearing.

DATED this 13th day of July, 2017.

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of July, 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:

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INMATE #116463
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SHERIFF'S OFFICE
1150 WALL STREET
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DISTRICT COURT JUDGE
E-MAILED BRIEF

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CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

JCS/eas