3-21-2017

State v. LeVeque Respondent's Brief Dckt. 43877

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 43877**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR-2013-11265**
	)	
KILO J. LE VEQUE,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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Nature Of The Case

Kilo J. Le Veque appeals from the district court's order relinquishing jurisdiction. On appeal, he argues that the district court abused its discretion both when it relinquished jurisdiction and when it revoked Le Veque's probation.

Statement Of The Facts And Course Of The Proceedings

The state charged Le Veque with burglary, possession of methamphetamine, and driving without privileges. (R., pp.54-55.) Pursuant to a plea agreement, the state dismissed the count of driving without privileges and Le Veque pleaded guilty to both the burglary and possession charges. (R., pp.90-91.) The district court entered judgment against Le Veque and imposed concurrent sentences of ten years with four years fixed for the burglary and seven years with four years fixed for the possession of methamphetamine, but retained jurisdiction. (R., pp.103-05.) Following that initial period of retained jurisdiction, the district court suspended Le Veque's sentence and placed him on probation for a period of three years. (R., pp.121-25.)

After reviewing Le Veque's criminal history, probation officers discovered that he had a sex offense conviction out of South Dakota within ten years and, following their standard procedures, placed him on sex-offender probation. (Tr., p.37, Ls.3-14; p.70, L.19 – p.74, L.5; see also R., pp.257-74.) Le Veque repeatedly tried to get out of his sex-offender terms and conditions. (See R., pp.134-36, 281-83; Tr., p.106, L.19 – p.109, L.2.) And he did not perform well under those terms and conditions: He engaged in an unapproved sexual relationship, provided false answers on polygraph examinations, and was removed from his treatment program after failing to accept any

responsibility for his prior crime. (R., pp.215-19, 225-56; Tr., p.111, Ls.3-6.) He also tested positive for using alcohol and a controlled substance, Kratom. (R., pp.127, 137; see also Tr., p.116, L.20 – p.117, L.5.)

The state filed an allegation that Le Veque violated the terms and conditions of his probation by committing new crimes and by failing to comply with the requirements of the Department of Correction by (1) engaging in an unapproved sexual relationship, (2) being terminated from his sex offender treatment program, and (3) lying on his polygraph examinations. (R., pp.215-19.) Le Veque denied the allegations (Tr., p.5, Ls.14-18), and the district court held an evidentiary hearing (Tr., pp.16-118). Following that hearing, the district court found that Le Veque had willfully violated his probation. (Tr., p.111, L.3 – p.112, L.2.) The court revoked probation and executed the underlying sentence, but again retained jurisdiction. (Tr., p.115, L.4 – p.116, L.13; R., pp.311-13.) Though the court specifically noted that it did not view Le Veque as a good candidate for probation, it wanted him to engage in treatment and gave him an opportunity to prove the court wrong. (Tr., p.116, L.4 – p.117, L.17.) At a later jurisdictional review hearing, the district court determined that Le Veque accomplished neither of those objectives and relinquished jurisdiction. (Supp. Tr., p.8, L.2 – p.11, L.7; Aug., pp.1-2.)

Le Veque filed a notice of appeal timely from the order revoking probation (R., pp.314-16) and a later notice timely from the order relinquishing jurisdiction (Order to Suspend Briefing, Sept. 27, 2016).

ISSUES

Le Veque states the issues on appeal as:

> I. Whether the district court erred by relinquishing jurisdiction solely because Mr. Le Veque had not taken a full-disclosure polygraph during his period of retained jurisdiction.
>
> II. Whether the district court abused its discretion by refusing to consider Mr. Le Veque's challenges to the propriety of the terms of probation at the revocation hearing.

(Appellant's brief, p.8.)

The state rephrases the issues as:

1. Has Le Veque failed to show that the district court abused its discretion when it relinquished jurisdiction?

2. Has Le Veque failed to show that the district court abused its discretion when it revoked Le Veque's probation after finding that he had violated the terms and conditions of that probation?

ARGUMENT

I.
Le Veque Has Failed To Show That The District Court Abused Its Discretion When It Relinquished Jurisdiction

A. Introduction

As part of his treatment while on probation, Le Veque was required to answer questions under polygraph examination regarding his sexual history. (Tr., p.31, L.18 – p.32, L.22.) When asked about his prior conduct in an unrelated case out of South Dakota, the polygraphs indicated that Le Veque was deceptive in his answers. (See R., pp.231, 244-45, 255-56.) Le Veque would not accept responsibility for his conduct, or even that his conduct had a victim. (R., pp.232, 253-54.) This led to Le Veque's being dismissed from treatment and, ultimately, resulted in two of his violations of his probation agreement. (See R., p.232; Tr., p.29, L.5 – p.33, L.25.)

During the subsequent probation violation hearing, Le Veque complained that he was never allowed to retake the polygraph. (Tr., p.100, Ls.10-21.) Le Veque also appears to have expressed some desire to the district court for an opportunity to "rectify" the problems and be eligible again for treatment. (Tr., p.114, Ls.9-13.) Based on his violations and lack of success, the district court did not believe that probation was appropriate for Le Veque, but nonetheless gave him a chance during a period of retained jurisdiction to show that he was a viable candidate for probation and treatment. (Tr., p.115, L.4 – p.117, L.17.) In its order retaining jurisdiction, the district court

> specifically recommend[ed] sex offender treatment after [Le Veque] fully discloses his involvement in his South Dakota crime and that his disclosure is verified with a polygraph. This offender needs as much cognitive restructuring as possible. He is not honest.

(Supp. Tr., p.8, Ls.17-22; see also R., p.312.) But rather than place Le Veque in the sex offender treatment program, the Department of Correction instead had him participate in the drug offender treatment program, and never administered the district court's recommended polygraph examination. (R., pp.319-20; Supp. Tr., p.7, Ls.5-12.)

At the subsequent jurisdictional review hearing, the district court noted that Le Veque had not "done anything to correct the same problem that existed back prior to February" and determined that placing him on probation would be an exercise in futility. (Supp. Tr., p.9, Ls.4-24.) Le Veque again complained that he did not "have an opportunity to do a polygraph test" because he had been incarcerated and otherwise lacked funds. (Supp. Tr., p.10, Ls.4-12.) Le Veque assured the district court that if he "had two weeks, [he] could obviously do one," and asked for a couple more weeks to take another polygraph test. (Supp. Tr., p.10, L.14 – p.11, L.9.) The district court responded that Le Veque had already had the opportunity to take care of that and had not, and relinquished jurisdiction. (Supp. Tr., p.8, L.2 – p.11, L.24.)

On appeal, Le Veque asserts that the district court erred when it relinquished jurisdiction. (Appellant's brief, pp.9-11.) Application of the correct legal standards to the facts before the district court shows no error.

B. Contrary To Le Veque's Argument, This Case Is Entirely Distinguishable From This Court's Opinion In *State v. Van Komen*

Le Veque asserts that his case is "essentially" the same as State v. Van Komen, 160 Idaho 534, 376 P.3d 738 (2016), and should be controlled by its analysis. (Appellant's brief, pp.9-11.) If there are similarities between this case and Van Komen, they are found in anything but the essentials. In Van Komen, the district court ordered

the defendant to undergo a polygraph examination to see if he had used drugs or alcohol or had recently engaged in sexual activity with a sixteen-year-old girl, a criminal offense with which had not yet been charged. Id. at 537, 376 P.3d at 741. At a later hearing, defense counsel explained that "he would advise Defendant to assert his Fifth Amendment rights with respect to his involvement with the girl because that could lead to additional charges." Id. Subsequently, the district court revoked Van Komen's probation and explained,

> [t]he reason that I am revoking your probation is you haven't done what I ordered you to do when I sent you on a rider, and that was to get a polygraph evaluation to assess both the truthfulness of no alcohol or drugs after March 28th, 2013, and the extent of any sexual activity with the sixteen-year-old girl.

Id. at 538, 376 P.3d at 742 (internal brackets omitted).

The Idaho Supreme Court held that the Fifth Amendment privilege against self-incrimination applies "wherever the answer might tend to subject to criminal responsibility him who gives it." Id. (citing McCarthy v. Arndstein, 266 U.S. 34, 40 (1924)). The Court recognized that, "[h]ad Defendant submitted to the polygraph examination and made incriminating statements, those statements may have been held not to have been compelled and therefore admissible in a subsequent criminal prosecution." Van Komen, 160 Idaho at 539, 376 P.3d at 743 (citing Minnesota v. Murphy, 465 U.S. 420, 440 (1984)). The Court further reflected that "[t]he only apparent purpose for seeking to interrogate Defendant about the extent of his sexual relationship with the girl was to obtain information that could lead to new felony charges." Van Komen, 160 Idaho at 540, 376 P.3d at 744. Under those circumstances, the Court determined that "the district court clearly violated Defendant's right against self-

incrimination in seeking to force him to incriminate himself regarding those potential charges." Id.

This case is clearly distinguishable from Van Komen. First, unlike the defendant in Van Komen, at no time during the proceedings below did Le Veque invoke his Fifth Amendment right against self-incrimination. To the contrary, as shown above, Le Veque did the exact opposite: Several times during both the probation revocation and jurisdictional review hearings—and even afterwards—he requested the opportunity to retake his failed polygraph examination, even if he never followed through on those requests. (See Tr., p.100, Ls.10-21; p.114, Ls.9-13; Supp. Tr., p.10, L.4 – p.11, L.9; Aug., pp.4-9.) Choosing to "maintain his silence," as Le Veque now describes this lack of follow through (see Appellant's brief, p.7), does not invoke the right against self-incrimination. See Salinas v. Texas, 133 S.Ct. 2174, 2178 (2013) ("a witness does not [invoke the privilege against self-incrimination] by simply standing mute"). Rather, the right must be affirmatively invoked. Murphy, 465 U.S. at 427-28. The district court could not violate Le Veque's "right against self-incrimination in seeking to force him to incriminate himself" where Le Veque never invoked that right.

Moreover, under the facts of this case, Le Veque had no Fifth Amendment right against self-incrimination to invoke. Before the privilege against self-incrimination can apply, there must first be the potential for incrimination. See Murphy, 465 U.S. at 426. There was no such potential in this case. The polygraph was meant to ascertain what had happened in relation to Le Veque's criminal conduct out of South Dakota, for which he had already been tried, convicted, and sentenced. Unlike the defendant in Van Komen, who could have faced additional criminal charges, Le Veque could not be

placed in jeopardy of further conviction or greater punishment in relation to his crime for which he had already been convicted and sentenced, and his already completed sentence from South Dakota could not be further enhanced.

Nor could Le Veque receive a greater sentence in relation to his Idaho case. When it entered judgement against Le Veque, the district court imposed concurrent underlying sentences of ten years with four years fixed and seven years with four years fixed. (R., pp.103-05). Under Idaho Code § 19-2603, when the court pronounces a sentence before placing a defendant on probation, and then probation is later revoked, the court may only execute the original sentence; the court is not allowed to pronounce and execute a greater sentence. Moreover, while the Idaho Criminal Rules allow the district court to reduce the underlying sentence following revocation of probation or relinquishment of jurisdiction, see Rule 35(b), there is no rule allowing it to enhance that sentence.

In stark contrast with Van Komen, the district court in this case did not violate Le Veque's right against self-incrimination because Le Veque had no such right: Le Veque never invoked the right, and any attempt by Le Veque to invoke such a right would be unavailing because there was no possibility of self-incrimination in this case. Le Veque has failed to show error by the district court.

C. Because This Issue Was Not Raised To The District Court, Le Veque Is Required To Show Fundamental Error, Which He Has Failed To Do

Furthermore, the issue Le Veque attempts to present on appeal, a violation of his (uninvoked and nonexistent) Fifth Amendment right against self-incrimination, was never presented to nor decided by the district court. The issue is therefore unpreserved

and should not be considered except under the fundamental error standard. See State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). To show fundamental error,

> the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

Id. at 228, 245 P.3d at 980. Applying this legal standard to the facts of this case demonstrates that Le Veque has failed to show fundamental error entitling him to review of this unpreserved issue.

First, Le Veque has not shown that any of his constitutional rights were violated by the district court when it relinquished jurisdiction. As shown above, the only right arguably at issue—the privilege against compelled self-incrimination—is not a right Le Veque had, both because he failed to expressly invoke the right and because there was no possibility of self-incrimination in relation to his already resolved case from South Dakota. Second, it is not clear on the record that Le Veque ever invoked his (nonexistent) right against self-incrimination; rather, he actively sought to take another polygraph examination. Nor is it clear that the district court relied on Le Veque's (non)invocation of his (nonexistent) right against self-incrimination when it relinquished jurisdiction. Le Veque has failed to show any error, much less fundamental error entitling him to review of this unpreserved issue.

As the Idaho Supreme Court explained in Van Komen, "the district court … could have elected to relinquish jurisdiction based upon the Defendant's prior history" and violations while on probation. Id., 160 Idaho at 540, 376 P.3d at 744. That is what

happened in this case: At Le Veque's probation revocation hearing, after finding that Le Veque had violated his probation in several ways, the district court revoked his probation because his "history in this case [was] abysmal." (Tr., p.115, L.4 – p.116, L.3.) The district court explained that it did not "feel that there is any hope for [Le Veque] to be successful on probation, and that includes even after a retained [jurisdiction]." (Tr., p.116, Ls.14-16.) Nevertheless, it offered Le Veque a chance, during a period of retained jurisdiction, to prove otherwise. (Tr., p.116, Ls.16-19.) But, as the district court explained at the subsequent hearing, Le Veque failed to do so, and the district court relinquished jurisdiction. (Supp. Tr., p.8, L.2 – p.9, L.24.) That was a proper exercise of the district court's discretion, and the court should be affirmed.

II.
Le Veque Has Failed To Show That The District Court Abused Its Discretion When It Revoked His Probation

A. Introduction

After determining that Le Veque had violated his probation, the district court revoked that probation. (Tr., p.111, Ls.3-6; p.115, L.4 – p.117, L.17.) On appeal, Le Veque asserts that the district court abused its sentencing discretion when it revoked his probation. (Appellant's brief, pp.12-14.) Application of the correct legal standards to the facts before the court, however, shows that Le Veque has failed to establish an abuse of the district court's discretion.

B. Standard Of Review

"Sentencing decisions are reviewed for an abuse of discretion." State v. Moore, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)).

C. The District Court Did Not Abuse Its Sentencing Discretion By Revoking Le Veque's Probation And Executing His Underlying Sentence

Finding that "all of the allegations have been proven and all of the defenses raised by [Le Veque] are without any merit at all," the district court revoked Le Veque's probation. (Tr., p.115, Ls.4-18.) "Probation is a matter left to the sound discretion of the court." I.C. § 19-2601(4). The decision to revoke probation is also within the court's discretion. State v. Sanchez, 149 Idaho 102, 105, 233 P.3d 33, 36 (2009) (citing State v. Lafferty, 125 Idaho 378, 381, 870 P.2d 1337, 1340 (Ct. App. 1994)). In reviewing a district court's decision to revoke probation, this Court employs a two-step analysis. Sanchez, 149 Idaho at 105, 233 P.3d at 36 (citation omitted). First, the Court considers whether the defendant actually violated 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. A district court's decision to revoke probation is a discretionary one that will not be overturned on appeal absent an abuse of that discretion. Id.

The district court properly exercised its discretion when it revoked Le Veque's probation. The second condition of Le Veque's probation required him to "comply with all of the rules, regulations and requirements of the Idaho Department of Correction[]." (R., p.123.) After an evidentiary hearing, the district court found that Le Veque violated

that condition several times when he engaged in an unapproved sexual relationship, was terminated from his treatment program, and was deceptive on multiple polygraph evaluations. (Tr., p.111, L.3 – p.112, L.2; see also R., pp.215-19.) And these were not Le Veque's only violations during probation; he had also twice tested positive for alcohol consumption and once for Kratom. (R., pp.127, 137). The district court recognized these prior violations, too. (See R., p.143; Tr., p.116, L.20 – p.117, L.5.)

After finding that Le Veque had willfully violated conditions of his probation, the district court next determined the proper resolution of Le Veque's probation violations. The district court noted that Le Veque's "history in this case [was] abysmal." (Tr., p.115, L.19.) He had whined and acted spoiled and entitled, he had not cooperated with probation, and he even lied in the middle of his allocution to the court as it considered disposition of his violations. (Tr., p.115, L.19 – p.117, L.5.) The district court had no confidence that Le Veque had any hope of being successful on probation. (Tr., p.116, Ls.14-19.) The district court therefore, in a proper exercise of its discretion, revoked Le Veque's probation. (Tr., p.115, Ls.4-18.)

On appeal, Le Veque asserts that the district court abused its sentencing discretion by revoking his probation without considering Le Veque's challenge to the various sex offender terms and conditions of his probation. (Appellant's brief, pp.12-14.) In fact, three times the district court considered Le Veque's challenges, and three times it rejected those challenges—including once during the revocation proceedings. (See Tr., p.110, Ls.9-19; see also R., pp.134-36, 141-43, 281-91.)

After learning that Le Veque had been charged with second degree rape in South Dakota, and convicted of a lesser sex crime pursuant to a plea agreement, the

Department of Correction, in accordance with its standard procedures, decided to supervise Le Veque on sex offender probation. (Tr., p.37, Ls.3-14; p.70, L.19 – p.74, L.5; see also R., pp.257-74.) In South Dakota, second degree rape is a Class 1 felony and is defined as the act of sexual penetration accomplished "[t]hrough the use of force, coercion, or threats of immediate and great bodily harm…." S.D.C. § 22-22-1. Class 1 felonies are serious offenses in South Dakota, punishable by up to 50 years imprisonment and a $50,000 fine. S.D.C. § 22-6-1. Le Veque's crime was resolved pursuant to a plea agreement, under which he was convicted of sexual contact without consent with [a] person capable of consenting (PSI, p.8), a Class 1 misdemeanor, see S.D.C. § 22-22-7-4. Of the two classes of misdemeanors in South Dakota, Class 1 misdemeanors are the more serious. S.D.C. § 22-6-2.

The district court recognized the limits on its authority to tell the Department of Correction how to classify and supervise probationers. (R., pp.142-43.) And, after reviewing the case reports and other attachments from South Dakota (see R., pp.257-74), the district court also recognized the propriety of those terms and conditions, noting its "substantial concerns about protection of the public, future criminal behavior, potential sexual behavior" (Tr., p.13, Ls.15-22). The district court thus properly exercised its discretion in denying Le Veque's several motions to dismiss the conditions of his probation.

Considering Le Veque's repeated failures to honestly participate in treatment and to follow the rules and requirements of the Department of Correction, his probation was not meeting the goals of rehabilitation or protecting society. The district court's sentence "accomplish[es] the primary objective of protecting society." State v. Toohill,

103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Le Veque has failed to show any abuse of the district court's sentencing discretion. The court properly exercised its discretion when it revoked Le Veque's probation and executed his underlying sentence.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order relinquishing jurisdiction and order revoking probation.

DATED this 21st day of March, 2017.

_/s/ Russell J. Spencer_____
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of March, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

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_/s/ Russell J. Spencer_____
RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd