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State v. Howell Respondent's Brief Dckt. 44995

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. KRISTOPHER ERIK HOWELL, Defendant-Appellant.	)	NO. 44995 & 45068 Ada County Case No. CR-2015-8772 & 2015-5699 RESPONDENT'S BRIEF

Issue

Has Howell failed to establish that the district court abused its discretion, either by revoking his probation, or by denying his Rule 35 motion for reduction of his aggregate, unified sentence of seven years, with three years fixed, imposed following his guilty pleas to possession of methamphetamine and grand theft by possession of stolen property?

Howell Has Failed To Establish That The District Court Abused Its Sentencing Discretion

In April of 2015, Howell was arrested for grand theft by possession and two counts of criminal possession of a financial transaction card in case 45068. (R., pp.149-51.) Pursuant to a plea agreement Howell pled guilty to grand theft by possession. (R., pp.183-87.) In June of

2015, Howell was arrested for possession of methamphetamine and possession of drug paraphernalia in case 44995. (R., pp.40-41.) Pursuant to a plea agreement Howell pled guilty to possession of methamphetamine. (R., pp.85-92.) The district court held a joint sentencing hearing and imposed a sentence of seven years, with three years fixed, for the grand theft case, and seven years, with two years fixed, for the possession of methamphetamine case, and retained jurisdiction in both cases. (R., pp.93-95,198-200.) Following a period of retained jurisdiction the district court placed Howell on probation for seven years. (R., pp.103-07, 207-11.)

Approximately four months later, in September 2016, Howell's probation officer filed a motion for bench warrant alleging Howell had violated the terms of his probation by: using drugs, changing residences without permission, absconding supervision, and failing to pay fines, fees, and restitution as ordered by the Court. (R., pp.108-14, 212-18.) The district court issued a warrant for Howell's arrest, but Howell was not arrested until several months later, in January of 2017. (R., pp.115-17, 219-21.) Howell thereafter admitted to having violated the terms of his probation and the district court revoked his probation and executed his underlying sentences in both cases. (R., pp.127-29, 232-34.) Howell filed notices of appeal timely from the district court's orders revoking probation. (R., pp.131-33, 236-38.) Howell also filed a Rule 35 motion in case 44995, but the district court denied the motion. (R., p.130; Aug, pp.15-16.)

Howell asserts that the district court abused its discretion by revoking his probation in light of his claims that the district court erroneously believed he had two prior felony convictions and that his violations did not justify revoking probation. (Appellant's brief, pp.4-7.) Howell has failed to establish an abuse of discretion.

"Probation is a matter left to the sound discretion of the court." I.C. § 19-2601(4). The decision to revoke probation lies within the sound discretion of the district court. State v. Roy,

113 Idaho 388, 392, 744 P.2d, 116, 120 (Ct. App. 1987); State v. Drennen, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992). When deciding whether to revoke probation, the district court must consider "whether the probation [was] achieving the goal of rehabilitation and [was] consistent with the protection of society." Drennen, 122 Idaho at 1022, 842 P.2d at 701.

Howell has clearly demonstrated that he is not an appropriate candidate for probation, particularly in light of his criminal history, his refusal to make himself available for supervision and his ongoing use of controlled substances. Howell was arrested for grand theft by possession in case 45068 in April of 2015; just two months later he was arrested for possession of methamphetamine in case 44995; and the very next month was arrested for petit theft. (PSI, p.8.) Howell also has a criminal record dating back to 1991. (PSI, pp.5-7.) Although the district court believed at the time of the disposition hearing that Howell had at least two prior felony convictions (see 3/27/17 Tr., p.9, Ls.3-20), this belief was supported by the PSI, which on its face indicates that Howell had been charged with and convicted of (or received withheld judgments for) three felony offenses in the State of Florida (see PSI, pp.5-6). While Howell did advise the presentence investigator that *one* of the cases had been amended to a misdemeanor, the presentence investigator was unable to verify that claim (see PSI, p.7), and Howell apparently provided no substantiation of his claim at that time or at any time before the district court revoked his probation. In any event, even if the district court's belief that Howell had a juvenile record and two prior felony convictions was erroneous, its ultimate conclusion – that Howell had "been racking up offenses for a significant period of time" and that "[h]is record is quite substantial with numerous theft issues tied with what looks to be a pretty serious drug habit" (3/27/17 Tr., p.9, Ls.13-16) – is supported by the record (PSI, pp.5-8) and, along with other factors, supports the court's decision to revoke Howell's probation.

In addition to his criminal history, Howell also has a history of non-compliance with community supervision, and he admitted that, while on probation for grand theft in Florida, he violated the terms of his probation multiple times and eventually served out his sentence in jail. (PSI, p.7.) Furthermore, Howell's claim that his probation violations in this case did not justify revoking probation is illogical, as Howell's probation officer was never even able to supervise Howell because he absconded within days of being released following the period of retained jurisdiction. (R., pp.111-14, 215-18.) In no way can probation meet the goals of protecting the community and rehabilitation if the probationer chooses to remove himself from probation supervision. See State v. Sandoval, 92 Idaho 853, 860, 452 P.2d 350, 357 (1969) (citing State v. Oyler, 92 Idaho 43, 436 P.2d 706 (1968)) (emphasis added) (purpose of probation is to give the offender "an opportunity to be rehabilitated *under proper control and supervision*"). Howell was fully aware that failing to report for supervision was a violation of the conditions of his probation, and he was not deterred by the knowledge that his entire sentence could be executed.

At the disposition hearing, the district court stated, "But, frankly, your case started with failures to appear. You absconded almost as soon as you were put on probation. I was already pretty much on the line about it, but I gave you a chance and now I just feel like – based on your performance and what this record shows I don't have confidence that you would stick around." (3/27/17 Tr., p.10, Ls.12-18). The district court considered all of the relevant information and appropriately determined that Howell was no longer a viable candidate for community supervision. Given any reasonable view of the facts, Howell has failed to establish that the district court abused its discretion by revoking his probation.

Howell next asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence in case 44995 in light of the district court's erroneous

assumptions of his criminal record.[1] (Appellant's brief, pp.7-8.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Howell must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id. Howell has failed to satisfy his burden.

In support of his Rule 35 motion, Howell provided and addendum that included information clarifying the extent of his criminal history. (Aug., pp.1-14) The district court clearly considered this information (see Aug., p.15 (noting "defense submitted additional material" in support of Rule 35 motion)) but determined, in its discretion, that the information did not "warrant[] changing the sentence." (Aug., p.16.) In light of Howell's absconding behavior, his extensive history of being charged with (even if not convicted of) drug and theft-related felonies, and his demonstrated inability or unwillingness to be supervised, Howell has failed to show the court abused its discretion.

The district court considered all of the relevant information and reasonably determined that a reduction of Howell's sentence was not appropriate. Howell has not shown that he was entitled to a reduction of sentence, particularly in light of his absconding behavior and criminal

[1] Howell filed an Addendum to Motion for Reconsideration of Sentence in case 45068; however, it was not filed until August 1, 2017, which is 124 days after the Order Revoking Probation was entered, and was therefore untimely. (Aug., pp.17-30.)

history. Given any reasonable view of the facts, Howell has failed to establish that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence.

Conclusion

The state respectfully requests this Court to affirm the district court's orders revoking probation and denying Howell' Rule 35 motion for a reduction of sentence.

DATED this 13th day of December, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of December, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
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