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### State v. Barber Appellant's Brief Dckt. 45478

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45478
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR01-16-30823
v.	)	
	)	
DAMIAN MAXWELL BARBER,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Damian Barber appeals from the district court's Order Relinquishing Jurisdiction, asserting the district court abused its discretion by failing to fully consider mitigating factors and relinquishing jurisdiction after successful completion of a rider.

Statement of the Facts & Course of Proceedings

On September 15, 2016, twenty year old Damian Barber became exceedingly jealous and upset after his former girlfriend and child's mother, Savannah Hunter, refused to communicate with him once they began discussions of getting back together. (Presentence Investigation

(“PSI”), pp.183-184.) Instead, she went off-roading with her friends and asked Elston Herzog and his roommates to watch David, Ms. Hunter and Mr. Barber’s infant son. (PSI, p.98.) When inquiring about Savannah and his son’s whereabouts, Mr. Barber sent numerous messages to Savannah’s friends, including Layla Schnepel, a/k/a Layla Kelsey. Apparently, the parties engaged in back-and-forth text messages of a disparaging nature, which Ms. Schnepel described as a lot of “shit-talking, name calling and drama.” (PSI, p.126.) The verbal dispute escalated when Mr. Barber complained that he did not want his son babysat by “dope heads,” and he called Ms. Schnepel a horrible mother, since she, along with her husband, Cory Schnepel, had previously given up their son for adoption. (PSI, pp.125, 131.) Ms. Schnepel then called her brother, Elston Herzog, for help. (PSI, p.125.)

Mr. Barber and Ms. Hunter’s friend or friends agreed to fight, or in the words, of Cody Schnepel, “scrap it out,” because everyone was enraged. (PSI, pp.98-100, 132.) Some say that it was Mr. Barber who challenged them to a fight. (PSI, p.99.) Savannah Hunter, Keola Keliikuli, Cameron Gamel, Cody Schnepel, Kayla Schnepel, Elston Herzog, and Elston’s blonde female friend, all traveled to Mr. Barber’s house to confront him. (PSI, pp.99-101.) Ms. Hunter warned them not to go onto the property because Mr. Barber’s grandma, Melody Williams, was known to have firearms around the house and “would have a reason to shoot them.” (PSI, p.98.) When they arrived in the vicinity of Mr. Barber’s house, they had trouble finding Mr. Barber’s house, so Mr. Herzog called Mr. Barber to get his exact location, and also shone a rifle sight with a bright green laser pointer outside to find Mr. Barber. (PSI, p.99.)

When they located Mr. Barber, they noticed he was outside, holding a .22 rifle pointed towards the sky. (PSI, pp.99-101.) Mr. Barber fired into the sky, and then, the rifle was at Mr. Barber’s hip level. Mr. Herzog thought he was aiming at his sister, Layla, and he took off

after Mr. Barber, grabbing the gun, and then jumping on Mr. Barber's back. Mr. Barber fired several rounds, but it did not seem that he was aiming at anything. (PSI, p.130.) A witness described them "grappling over the gun" before it went off; another explained that Mr. Herzog was trying to get the gun away from Mr. Barber or "get him to the ground." (PSI, pp.100, 126.) Layla Schnapel stated, "it was kind of Elston instigating it," (meaning the agreement to fight) whereas others blame Mr. Barber. (PSI, pp.99-102, 126.) Upon police questioning, Mr. Barber admitted shooting Mr. Herzog; he admitted first firing a warning shot, whereupon Mr. Herzog began striking Mr. Barber with his fists. Mr. Barber raised the then, downward-pointed rifle to push Mr. Herzog away, but when it was at waist level, he shot Mr. Herzog three times. (PSI, pp.95, 183-184.) Mr. Barber also made statements suggesting self-defense. (PSI, pp.183-184.) Police responded to the scene and Mr. Herzog obtained emergency medical treatment for two non-life threatening gunshot wounds, and was released two days later with instructions for wound care. (PSI, pp.267-270.)

Mr. Barber was arrested and charged with aggravated assault, aggravated battery and use of a firearm or deadly weapon in the commission of a crime. (R., pp.43, 46-47.) Pursuant to an agreement with the State, Mr. Barber pled guilty to aggravated battery and agreed to pay restitution in exchange for the State's agreement not to file a complaint in an unrelated matter. (R., pp.62-63.) At the initial sentencing hearing, the district court sentenced Mr. Barber to a fifteen year term, with three years fixed, and retained jurisdiction for "evaluative" purposes to assess Mr. Barber's ability to rehabilitate and consider the propriety of reducing his sentence. (Transcript, 12/19/2016 ("Tr. 1"), p.30, Ls.13-22.)

Mr. Barber was thereafter placed in the Change at Corrected Alternative Placement Program ("CAPP") and participated in treatment. (R., p.69.) At his rider review hearing, he

requested to be placed on probation, or in the alternative, to complete additional programming on retained jurisdiction. (Transcript, 10/02/2017 (“Tr. 2”), p.9, Ls.3-8.) Despite reports of Mr. Barber’s progress and a recommendation from the Department of Correction that Mr. Barber be placed on probation, the district court relinquished jurisdiction and imposed his fifteen year sentence. (R., pp.71-73; Tr. 2, p.15. L.12.) Mr. Barber filed a timely Notice of Appeal. (R., p.74.)

### ISSUE

Did the district court abuse its discretion by failing to place Mr. Barber on probation after he successfully completed his rider in light of the mitigating factors?

### ARGUMENT

#### The District Court Abused Its Discretion By Failing To Place Mr. Barber On Probation After Successful Participation In A Rider

Mr. Barber asserts that, given any view of the facts, the district court abused its discretion by failing to place him on probation at the rider review hearing. The primary goal of the retained jurisdiction statute, I.C. § 2601(4), is to permit the trial court additional time to assess a particular defendant’s rehabilitative potential and suitability for probation. *State v. Chapel*, 107 Idaho 193, 687 P.2d 583 (Ct. App. 1984). The ultimate goal of a defendant agreeable to retained jurisdiction is a grant of probation. *State v. Toohill*, 103 Idaho 565, 567, 650 P.2d 707, 709 (Ct. App. 1982). The decision whether to place a defendant on probation after participation in the retained jurisdiction program is left to the sound discretion of the district court, and will not be disturbed on appeal absent an abuse of discretion. *Chapel*, 107 Idaho at 194. Here, the court abused its discretion because it denied Mr. Barber probation despite evidence he was amenable and responsive to rehabilitative treatment programs and community supervision.

The first example of Mr. Barber's rehabilitative progress is his acceptance of responsibility and insight into his own actions. At the outset of the investigation, Mr. Barber provided a detailed and honest statement to the police, and remained at his house, anticipating police, even after shooting and hurting Mr. Herzog. (PSI, pp.183-185.) Cooperation with the police and prosecution can be mitigating. *See State v. James*, 112 Idaho 239, 243 (Ct. App. 1986.) At the rider review hearing, he expressed acknowledgement of his role and even appreciation for the judicial process:

Well, first off, I want to thank you for sending me on this rider. I see so much change in me, in my maturity level. I know it's not the full maturity and with all of these writes up that I've had, they were very immature that I was doing, such as, talking during count, not being up for the count time procedures that they had given to us. And I took full accountability of that. You know, I didn't fight against it. I took it, and I said, "You know what, sir, sorry. I apologize, and it will not happen again." I believe that, you know, the program was hard. It was tough. You know, at one point I said, "You know what, I don't want to do this." But I really dug down deep inside of myself and really pulled my head out of, you know, my back end. . . .

(Tr. 2, p.9, L.25 – p. 10, L.17.) He also stated:

While I was in my classes -- my ART class, that was a big thing because *I do have a very short fuse, ma'am. I really dug deep into it on my anger with by social skills that I have that was given from my teacher, from my instructor, and he was very surprised. He really didn't think I would be able to pull through it. And I really -- I really pat myself on the back for that for being able to come all this way from being a total, you know, total nothing and from not learning anything and just doing wrong to coming out and being able to control my anger, be able to not fight back, and be able to know who I am inside, and to be positive and keep my emotions up. . . . I had asked a lot of questions on how to do the work and how to do the assignments, and I got that help. And I've never been able to ask for help. . . .* With everything that was happening with my baby momma, with my ex, ma'am, and my son, it enraged me quite a bit, but I didn't show it. I simply talked about it in group. I talked about it with my case manager, and they were able to help me know what to do. I don't have no contact with her anymore nor do I want one because of what she said. I do keep in contact with her father, and I do keep in contact with her mother to know how my boy is doing. But other than that, I do want to thank you for giving me this chance to, at least, show you - - show the courts that, yeah, it was rocky. This was a rocky rider. I can't speak for you, ma'am, but I do have to say I do want to give you a thank you and a God

bless to giving me this rider and having me come closer to who I am as myself and who I can truly be on the outs. . . .

(Tr. 2, p.10, L.24 – p.3, L.16.) These remarks to the court are very instructive.

Mr. Barber, as an immature 20 year old man, found himself originally before the court for inability to control his jealousy and anger towards his ex-girlfriend and son's mother. He participated in escalation of a seemingly minor incident which cumulated with a mutual combat situation where he shot Mr. Herzog. Many months later however, after participation in CAPP, Mr. Barber demonstrated he was able to reflect on his behavior, learn techniques to control his emotions, and make self-supporting decisions. (PSI, pp.291-293.) Mr. Barber's acceptance of responsibility is mitigating, as well as his desire to actively change his behavior. *See State v. Shideler*, 103 Idaho 593, 594 (1982). His full acknowledgement is noteworthy because Savannah Hunter, Cody Schnapel, Eldon Herzog, and their associates, encouraged and induced and facilitated the crime, by voluntarily driving together as a formidable group to Mr. Barber's house, where Mr. Herzog willingly and physically confronted Mr. Barber despite recognition that he was angry and had a gun. (PSI, pp.99-102, 126-128.) *See State v. Nice*, 103 Idaho 89, 91 (1982) (reducing defendant's sentence, in part, based on "the circumstances surrounding the case," which included the 14-year old victim in a lewd conduct case actively pursuing the defendant and, ultimately, removing her clothing and telling the defendant she wished to have sex.) Mr. Barber's progress is corroborated through Idaho Department of Corrections records.

The facilitator's comments reveal Mr. Barber's programming was effective. During substance abuse treatment, he was described as open-minded and willing; he fully participated and identified high risk situations. (PSI, p.291.) Mr. Barber also completed ten aggression replacement training sessions, and was a good student who followed direction and grasped the material. He identified highly effective skills to assist him in recognizing his own triggers. (PSI,

p.293.) During the Thinking for a Change course, Mr. Barber initially struggled to find motivation given that his mother had died during his incarceration and, due to a lie propounded by Ms. Hunter, he believed she had killed his son. (PSI, pp.291-292; Tr. 2, p.6, Ls.14-22.) But Mr. Barber turned his attitude and participation around:

His facilitator also reported that Mr. Barber has come to understand that he cannot continue to hold on to the belief that he is the cause for his ex-girlfriend using hard drugs, which caused her to drop their infant son, ultimately resulting in head trauma and death. He replaced that belief with the belief that she made the choice to use drugs and she could have made the choice not to use drugs. This was a major obstacle for him to overcome during this class, and his facilitator observed that this may continue to be a struggle for him in the future. Mr. Barber chose to work with the issues he faces his ex-girlfriend as his high risk situation during the Problem Solving portion of the program. He put in a lot of effort to understand how to take a moment to stop and think before responding once he realizes he is in a problem situation. His facilitator also reported that overall, Mr. Barber did very well in group, he was a positive member who participated in group discussions and activities, he was receptive to feedback, and he rose to challenges presented to him by the counselor and other group members.

(PSI, pp.291-292.) A stark example of Mr. Barber's maturity is his ability to process his emotions after being told his son was killed, and then discovering the true facts (that his son had been in Ms. Hunter's parents' custody for an extended period of time). He did this without major emotional or physical outburst to his or anyone else's detriment. (Tr. 2, p.6, Ls.14-22.) Mr. Barber dealt with this trauma and learned from the experience and assured the court at the rider review that he had extricated himself from Ms. Hunter and planned to stay away. (Tr. 2, p.12, L.24 – p.13, L.3.) This speaks to his ability to make self-supporting decisions. Not only did Mr. Barber improve his behavior and learn crucial life skills, but he transformed from an unmotivated young man to an excited and eager one, voicing his gratitude for the opportunity to show what he had accomplished and give back to the community. (PSI, p.294.)

Albeit the rider review notes indicate that at some point during CAPP, his progress and work product declined. However, after counseling, he revealed his conduct was largely

motivated by fear of getting out of custody, and when given another opportunity, he succeeded. (PSI, p.291.) Moreover, Mr. Barber's criminal history prior to the current event was not severe; his offenses related to substance abuse, misdemeanor battery and runaway. (PSI, pp.7-8.) Some of that behavior may be attributable to his unstable and tumultuous childhood, and this can be mitigating. *See State v. Gonzales*, 123 Idaho 92, 93-94 (Ct. App. 1993) (mitigating facts included defendant's young age, lack of high school completion, abusive childhood having lived in "numerous broken homes," and "was introduced to drugs and alcohol at a very young age and admit[ted] to being chemically dependent."). Mr. Barber's father was a drug addict and heavy drinker who beat him and his family. Eventually, his father left the home. (PSI, pp.8-9.) Given Mr. Barber's childhood, it is understandable that it had a negative effect on his juvenile behavior.

Mr. Barber also suffers from some mental illness and substance abuse. In 2016, he was hospitalized for drinking excessively and being suicidal. He did take prescription medication for a time but was unable to continue them after release. (PSI, p.11.) A Global Appraisal of Individual Needs ("GAIN") was completed as part of the sentencing process, revealing Mr. Barber had diagnoses of alcohol and cannabis use disorder and "rule out- determine mental health diagnosis associated with current medication." (PSI, pp.20-21.) A recommendation was made to coordinate mental health treatment with his legal system involvement. (PSI, p.27.) Despite this acknowledgement of mental health needs, it does not appear a full assessment/diagnosis or plan was implemented to address Mr. Barber's psychological needs during CAPP. Therefore, any deficiencies in programming can be addressed in the future to help Mr. Barber further improve his functioning and compliance.

As a whole, Mr. Barber's time during CAPP allowed him to actually experience meaningful rehabilitation and demonstrate ability to comply on community supervision.

Although the district court is not bound to follow a recommendation of probation from the Department of Correction, the district court in this case abused its discretion by failing to fully consider his positive progress. The trial court did not appear to be impressed by the emotional fall-out to Mr. Barber regarding Ms. Hunter's lie about their son's death, nor his ability to maturely handle the experience; in fact, it did not even comment. (Tr. 2, pp.13-15.) Instead, the court improperly placed undue weight on the non-serious written warnings issued to Mr. Barber during his CAPP placement.

Mr. Barber was recommended for probation despite these warnings, ostensibly because they did not concern serious abuses. (PSI, p.294.) He was cited for talking during count, not following Standing ID Count procedures, "manipulation of staff," sharing commissary, being out of his bunk during count, being out of his area, talking during count, using an indigent envelope when not considered indigent. (PSI, p.306.) Interestingly, he did not commit the same violation more than once, and it did not significantly affect the facilitators' views. Mr. Barber concedes that subsequent to CAPP probation recommendation, he was disciplined for writing a letter to a security staff expressing feelings for her, which he shared with another staff member but asked staff not to disclose it. As a result of that, the CAPP Lead Case Manager wrote, "[h]is continued disrespect to staff, poor attitude, and rule violations indicate that he may not perform any better while on community supervision." (PSI, p.306.) The district court took this to heart, without fleshing out the actual severity of the conduct or questioning the stark difference between the CAPP recommendation and this newest letter. Rather, the district court called his performance on the rider as "poor," indicating it did not think Mr. Barber "internalized anything." (Tr. 2, p.14, Ls.2-3, 11-12.) The CAPP records include only two contacts between Mr. Barber and this lead manager, back in spring, during orientation. (PSI, p.305.) There is an obvious disconnect

between attitudes and staff at CAPP, wherein one appears to consider his progress noteworthy, whereas another blatantly disagrees. The district court failed to consider this even though Mr. Barber's counsel aptly addressed the lack of seriousness of the "offense."

The most recent write-up, starting from there back that we received today, he indicated that he had written on a piece of paper that he found one of the staff members attractive and that was found out. Obviously, in a normal world, that does not give anybody any problems for doing such a thing, but when you are in custody in an institution, they take those things a little bit more seriously. He had an opportunity to destroy that document. He indicates he made the correct decision when confronted about it and called for and asked to produce the note and did so.

(Tr. 2, p.5, L.24 – p.6, L.11.) Given that the documentation from CAPP bespoke of significant progress from the time of Mr. Barber's offense, the trial court should have engaged in a meaningful analysis of his renewed rehabilitation and supervision potential. It did not do this, and instead, relied solely on the report of the violations. Thus, the trial court abused its discretion in relinquishing jurisdiction.

#### CONCLUSION

Mr. Barber respectfully requests that this Court vacate the Order Relinquishing Jurisdiction and remand the case back to the district court with instructions to place Mr. Barber on probation.

DATED this 16<sup>th</sup> day of March, 2018.

\_\_\_\_\_/s/\_\_\_\_\_  
LARA E. ANDERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16<sup>th</sup> day of March, 2018, 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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\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

LEA/eas