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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 45736
)	
v.)	MADISON COUNTY NO. CR 2015-114
)	
TYSON D. CLEMENTS,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

When he was nineteen years old, Tyson D. Clements pleaded guilty to felony sexual abuse of a child under the age of sixteen (16) years. The district court imposed a unified sentence of fifteen years, with two years fixed, and retained jurisdiction. After Mr. Clements participated in a "rider," the district court suspended the sentence and placed him on probation for a period of ten years. Mr. Clements later admitted to violating his probation, and the district court revoked his probation and executed his underlying sentence. On appeal, Mr. Clements asserts the district court, when it revoked his probation, abused its discretion by executing his underlying sentence rather than retaining jurisdiction.

Statement of the Facts & Course of Proceedings

Mr. Clements reportedly touched the privates of a twelve-year-old female on multiple occasions. (*See* Presentence Report (*hereinafter*, PSI), p.3.)¹ In an interview with a Madison County Sheriff's Office deputy, Mr. Clements eventually admitted to touching the alleged victim. (*See* PSI, p.3.)

The State charged Mr. Clements with one count of lewd conduct with a child under the age of sixteen (16) years, felony, I.C. §§ 18-1508 and 18-112A. (R., pp.27-28.) He initially entered a not guilty plea. (R., p.32.) Pursuant to a plea agreement, Mr. Clements later pleaded guilty to an amended charge of one count of sexual abuse of a child under the age of sixteen (16) years felony, I.C. §§ 18-1506 and 18-112A. (R., pp.38-41.) The district court imposed a unified sentence of fifteen years, with two years fixed, and retained jurisdiction. (R., pp.50-51.)

After Mr. Clements participated in a Sex Offender Assessment Group "rider," the rider program staff recommended he be placed on probation. (PSI, pp.267-74.) The district court then suspended Mr. Clements' sentence and placed him on probation for a period of ten years. (R., pp.63-67.)

About a year and one-half later, the State filed a Report of Probation Violation alleging Mr. Clements had violated the terms and conditions of his probation. (R., pp.79-82.) He entered denials to all the alleged violations. (R., p.87.) Mr. Clements subsequently admitted to violating his probation by consuming alcohol, using marijuana and hydrocodone, going out shooting with a rifle, being kicked out of his residences, viewing pornography and exchanging pornographic images, accessing social media accounts and using a smartphone without permission, having an unapproved friendship with a thirteen-year-old female, having unapproved sexual relationships

¹ All citations to the PSI refer to the 282-page PDF version of the Presentence Report and its attachments.

with women, and not taking a polygraph every six months and completing a polygraph that showed deceptive responses. (See Tr., p.5, L.3 – p.19, L.17.) The district court found Mr. Clements had “made a knowing, intelligent, and voluntary decision for which he’s established a factual basis for each of the admissions that were made.” (Tr., p.19, Ls.18-25.)

During the disposition hearing, Mr. Clements recommended the district court give him “another chance at probation after a rider, a rider that focuses on his substance abuse rather than the sex offense.” (Tr., p.65, L.23 – p.66, L.1.) Mr. Clements thought “that he could benefit from substance abuse treatment and counseling. So we’re asking the Court not to impose the sentence at this time but to retain jurisdiction and place him in the CAPP or the Cincinnati rider.” (Tr., p.66, Ls.2-6.)

The State recommended the district court execute Mr. Clements’ sentence. (Tr., p.66, Ls.12-14.) The district court revoked Mr. Clements’ probation and executed the sentence. (R., pp.92-93.)

Mr. Clements filed a Notice of Appeal timely from the district court’s “Judgment and Commitment on Conviction of a Probation Violation.”² (R., pp.95-97; see R., pp.105-08 (Amended Notice of Appeal).)

² At the same time he filed the Notice of Appeal, Mr. Clements filed a Motion for Reduction of Sentence, pursuant to Idaho Criminal Rule 35. (R., pp.102-03.) After a hearing, the district court denied the motion. (R., pp.110-11.) In light of the applicable legal standards, Mr. Clements does not challenge the district court’s denial of the Motion for Reduction of Sentence on appeal.

ISSUE

When the district court revoked Mr. Clements's probation, did the court abuse its discretion by executing his underlying sentence rather than retaining jurisdiction?

ARGUMENT

When The District Court Revoked Mr. Clements's Probation, The Court Abused Its Discretion By Executing His Underlying Sentence Rather Than Retaining Jurisdiction

Mr. Clements asserts the district court, when it revoked his probation, abused its discretion by executing his underlying sentence rather than retaining jurisdiction. The district court should have followed Mr. Clements' recommendation and retained jurisdiction so he could go on a rider to address his substance abuse problems.

A district court may revoke a defendant's probation under certain circumstances. I.C. §§ 19-2602, 19-2603 & 20-222. "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). In reviewing a district court's discretionary decision, appellate courts conduct an inquiry "to determine whether the court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with the applicable legal standards, and reached its decision by an exercise of reason." *Id.* at 105-06.

Appellate courts use a two-step analysis in reviewing a probation revocation proceeding. *Id.* at 105. First, the appellate court determines "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. Clements concedes he admitted to violating his probation. (*See* Tr., p.5, L.3 – p.19, L.17.) When a probationer admits to a direct violation of her 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 abused its discretion by executing Mr. Clements' underlying sentence rather than retaining jurisdiction.

Retained jurisdiction is designed "to allow the trial court additional time to evaluate the defendant's rehabilitation potential and suitability for probation." *State v. Chapel*, 107 Idaho 193, 194 (Ct. App. 1984). "Probation is the ultimate objective sought by a defendant who asks a court to retain jurisdiction." *Id.* (citing *State v. Toohill*, 103 Idaho 565, 567 (Ct. App. 1982)). Whether to place a defendant on probation is a choice "committed to the sound discretion of the trial court." *Id.* Because probation is at issue, the standard of review for a district court's decision on whether to retain jurisdiction is the "clear abuse of discretion" standard, with a focus on the criteria set forth in I.C. § 19-2521. *Id.* "Refusal to retain jurisdiction will not be deemed a 'clear abuse of discretion' if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate under I.C. § 19-2521." *Id.*

Ms. Clements asserts the district court abused its discretion by executing his underlying sentence rather than retaining jurisdiction. At the disposition hearing, when the district court asked Mr. Clements if he would have "stopped doing this stuff" if he had not been charged with a probation violation, he answered, "I would have, yes. I had started to straighten up there towards the very, very end." (Tr., p.71, Ls.3-9.) According to Mr. Clements, "I was starting to pay for my treatment. I was working on staying sober. I was about, I think, at least a week, week and a half sober before my arrest, and on the day of my arrest, actually, I had an interview at 4:30 that day at a restaurant." (Tr., p.71, Ls.8-12.) He "was trying to better myself. Even though I already had a job, I was seeking for more work." (Tr., p.71, Ls.12-14.)

Mr. Clements also explained that he needed substance abuse treatment, because “what I was focused on when I was out on probation was just spending time drinking whether in a bar or at a friend’s house or by myself.” (Tr., p.69, Ls.21-25.) When the district court asked why he thought he could use alcohol on probation and get away with it, he replied that his probation officer at the time “wasn’t UAing me as much as he should have been.” (Tr., p.70, Ls.4-8.)

Additionally, the district court questioned Mr. Clements about why it took him eighteen months to have a polygraph exam, when he was required to have regular polygraphs every six months. (See Tr., p.70, Ls.12-18.) Mr. Clements explained that his probation officer at the time “wasn’t really disciplining me on any of the probation rules, and he was just kind of—he was giving me enough slack to hang myself with, so to speak.” (Tr., p.70, Ls.19-22.) As long as the probation officer did not mention it, Mr. Clements “was just going to kind of sweep it under the rug and not worry about it.” (Tr., p.70, Ls.23-24.) When Mr. Clements was transferred to another probation officer, “that’s when everything became stricter, and that’s finally when I had that polygraph.” (See Tr., p.70, L.25 – p.71, L.2.)

In light of the above, Mr. Clements submits the district court, when it revoked his probation, abused its discretion by executing his underlying sentence rather than retaining jurisdiction. The district court should have followed Mr. Clements’ recommendation and retained jurisdiction so he could go on a rider to address his substance abuse problems.

CONCLUSION

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

DATED this 23rd day of July, 2018.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, electronically as follows:

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
Delivered via e-mail to: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BPM/eas