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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45774
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-FE-2015-2349
)	
MICHAEL CHRISTIAN RICH,)	
)	RESPONDENT’S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Rich failed to establish that the district court abused its discretion, either by declining to retain jurisdiction a second time upon revoking his probation, or by denying his Rule 35 motion for a reduction of sentence?

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

Rich pled guilty to felony DUI and, in May 2015, the district court imposed a unified sentence of 10 years, with three years fixed, and retained jurisdiction. (R., pp.73-75.) Following the period of retained jurisdiction, the district court suspended Rich’s sentence and placed him

on supervised probation for 10 years. (R., pp.79-84.) Rich subsequently violated his probation, and the district court revoked his probation and executed the underlying sentence. (R., pp.135-37.) Rich filed a notice of appeal timely from the district court's order revoking probation. (R., pp.140-42.) He also filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.143-44, 148-49.)

Mindful that "he did not deserve a second chance at probation," Rich nevertheless asserts that the district court abused its discretion by declining to retain jurisdiction upon revoking his probation, in light of the purported "progress" he made while on probation and his claim that his probation violations "stem from his interrelated struggles with depression, anxiety, and substance abuse." (Appellant's brief, pp.4-6.) Rich has failed to establish an abuse of discretion.

The decision whether to retain jurisdiction is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). The primary purpose of a district court retaining jurisdiction is to enable the court to obtain additional information regarding whether the defendant has sufficient rehabilitative potential and is suitable for probation. State v. Jones, 141 Idaho 673, 677, 115 P.3d 764, 768 (Ct. App. 2005). Probation is the ultimate goal of retained jurisdiction. Id. There can be no abuse of discretion if the district court has sufficient evidence before it to conclude that the defendant is not a suitable candidate for probation. Id.

On appeal, Rich acknowledges that, at the disposition hearing, both he and defense counsel recognized that his "missteps" while on probation "were severe enough that he did not deserve a second chance at probation." (Appellant's brief, p.6.) Rich nevertheless contends that the district court should have retained jurisdiction because his probation violations "stem from

his interrelated struggles with depression, anxiety, and substance abuse.” (Appellant’s brief, p.6.) Because Rich acknowledged, at the disposition hearing, that he “did not deserve a second chance at probation,” the district court had sufficient information to conclude that Rich was no longer a suitable candidate for probation. (Appellant’s brief, p.6 (citing Tr., p.10, L.12 – p.12, L.8).) Therefore, there can be no abuse of discretion in the district court’s refusal to retain jurisdiction upon revoking Rich’s probation. Jones, 141 Idaho at 677, 115 P.3d at 768.

Furthermore, Rich is not a suitable candidate for probation or for a second period of retained jurisdiction in light of his ongoing criminal offending and disregard for the terms of community supervision, which has continued despite the fact that he has previously had opportunities to address his substance abuse and “interrelated” mental health issues. Rich reported that he was “first arrested at age 15 for ‘Vehicle Prowling,’” for which he was “placed on juvenile supervision, but later violated the terms of his supervision and was subsequently incarcerated in a juvenile detention center.” (PSI, p.11.¹) He subsequently incurred juvenile adjudications for DUI, reckless driving, and driving with a suspended license. (PSI, p.11.) Just a few days before he turned 18, Rich committed the crimes of robbery and assault, for which he was “charged as an adult” and later placed on probation; however, he violated his probation by testing positive for marijuana and “accruing new misdemeanor charges in December 2005.” (PSI, pp.2, 7, 10.) Thereafter, Rich racked up criminal convictions for possession of stolen property, a second robbery conviction, three convictions for minor in possession of alcohol, possession of drug paraphernalia, reckless driving, ignition interlock violation, three convictions for driving with a suspended license, and at least five convictions for DUI (one of which Rich

¹ PSI page numbers correspond with the page numbers of the electronic file “Rich 45774 psi.pdf.”

claims was dismissed after he was incarcerated in jail/prison for approximately three years), as well as a violation of parole. (PSI, pp.6-10, 53.)

Rich has previously had opportunities to address his substance abuse and mental health issues; however, he has repeatedly failed to follow through with treatment recommendations and has continued to abuse substances. In 2011, he participated in an intensive inpatient substance abuse treatment program at the James Oldham Treatment Center, during which he completed substance abuse treatment in conjunction with treatment that addressed his depression and anxiety. (PSI, pp.241-42.) At the time of his discharge from the program, it was recommended that he participate in intensive outpatient substance abuse treatment and a 12-step program, along with “exercises designed to develop skills in coping with feelings,” “additional depression and guilt reduction exercise[s],” and “further education on internal and external relapse triggers, specifically depression and anxiety.” (PSI, pp.242-43.) The treatment center even scheduled an appointment for Rich at an outpatient facility to ensure he received continued services; however, Rich did not follow through with the recommended outpatient treatment. (PSI, pp.19, 243.)

Rich claimed that he was “sober since 2010” and only resumed his use of marijuana and alcohol shortly before he committed the instant offense, after he decided to stop using opiates. (PSI, p.19.) In the instant offense – which he blames on his “relapse” on alcohol – Rich used marijuana and consumed liquor and beer; took his employer’s truck without permission; drove it “through a fence” and through a homeowner’s backyard, causing “extensive damage to her fence, grass, and deck”; fled the scene and “sideswiped two vehicles”; nearly hit a pedestrian; continued to flee after officers with “activated police patrol vehicle lights” caught up with him; and, upon turning onto a dead end road, exited his vehicle, disregarded officers’ commands, and “attempted to flee the scene on foot.” (PSI, pp.4-6, 19, 51.) Officers quickly apprehended Rich,

as he was “unable to make a hasty retreat” due to his “level of intoxication.” (PSI, p.4.) Rich had “a sandwich baggie containing suspected marijuana, and an Altoids tin containing a black metal pipe with burnt marijuana residue inside.” (PSI, p.4.) His “blood alcohol content, per blood draw results, was .233.” (PSI, p.4.)

The presentence investigator recommended the retained jurisdiction program, noting that “a cognitive component in substance use counseling would appear to benefit [Rich],” and that Rich “should also address his self-reported symptoms of anxiety and stress, and determine how they may correlate negatively with his cognitive distortions regarding substance use.” (PSI, p.24.) The mental health evaluator likewise recommended substance abuse treatment and mental health treatment “that included individual psychotherapy, group therapy and referral for pharmacological assessment and intervention.” (PSI, p.257.) The district court placed Rich in the retained jurisdiction program, where Rich completed the “Extended Rider,” with programs including the Therapeutic Community, Cognitive Self-Change, Anger Management, “A New Direction” Relapse Prevention Group, and Pre-release. (R., pp.73-75; PSI, pp.274-75.) On February 8, 2016, the district court placed Rich on supervised probation and set periodic review hearings to monitor his progress. (R., pp.79-85, 89, 92-98, 100-02, 105, 109-10.)

Despite having received extensive treatment and programming, Rich continued to violate the conditions of his probation and again failed to follow through with his treatment recommendations. He failed to appear for his review hearings on July 20, 2016; November 9, 2016; February 8, 2017; and April 5, 2017. (R., pp.94, 96, 98, 101.) On May 12, 2017, his probation officer submitted a Special Progress Report, indicating that Rich had been sanctioned with increased drug testing and increased reporting to his probation officer, and advising that Rich “needs to contact the Terry Reilly clinic, as directed by his probation officer in February

2017, and follow through with their recommendations for mental health treatment. He also needs to begin attending sober-based support groups as directed by his probation officer.” (R., pp.103-04.) Rich failed to appear at his subsequent review hearing on June 21, 2017, and the district court issued a warrant for his arrest. (R., pp.105-06.) Rich was arrested on the warrant one week later and immediately posted bond. (R., pp.106-07.) Three days later, he tested positive for THC and admitted, to his probation officer, that he had been smoking marijuana regularly “to help with [the] stress of his relationships and losing [his] job”; Rich “was sanctioned with a 9pm curfew and increased reporting” to the probation office. (R., p.114.) He subsequently missed his appointments with his probation officer “on July 8th, July 14th and July 15th.” (R., p.114.) Rich did, however, appear for his “FTA/Re-Set Review” hearing on July 24, 2017, at which time his bond was exonerated and the district court set his next review hearing for August 2, 2017. (R., pp.12, 109.) On July 26, 2017, Rich reported to the probation office and admitted to continued marijuana use, for which he was sanctioned with two days of discretionary jail time; however, he failed to “collect his paperwork to check himself into the Ada County Jail” as instructed. (R., p.114.)

At his August 2, 2017 review hearing, Rich admitted that he tested positive for marijuana. (R., p.110.) On August 29, 2017, Rich’s probation officer conducted a residence check and discovered Rich “on the porch with a large can of Mike's Hard Lemonade and [two] mini bottles of liquor.” (R., p.114.) Rich was “patted down for officers [sic] safety after a knife was viewed clipped to the inside of his pocket,” and officers found “several more small knives in his pockets and a racket socket that he admitted was used for smoking Marijuana.” (R., p.114.) Rich also admitted to “losing another job last week” and claimed that “being stressed out” led to his use of alcohol and marijuana. (R., p.114.) Officers also found “a small glass pipe that

appeared to be used for smoking Methamphetamine,” and Rich “admitted to smoking the Methamphetamine.” (R., p.114.) Due to Rich’s use of drugs and alcohol in a home where children were present, Rich’s probation officer instructed him “to reside at the River of Life until further notice and to report to the [probation] office on September 1, 2017”; however, Rich failed to report to the River of Life and, on September 1, 2017, he was again sanctioned with two days of discretionary jail time. (R., pp.111, 114.) On September 8, 2017, Rich failed to report to the probation office as instructed and, when he reported on September 12, 2017, he smelled of alcohol and tested positive for THC and alcohol. (R., p.114.)

The state finally filed a motion for probation violation on October 11, 2017, and Rich later admitted that he violated the conditions of his probation by consuming alcohol, using marijuana and methamphetamine, possessing drug paraphernalia, possessing weapons, and failing to report to his supervising officer on four separate occasions. (R., pp.116-18, 133.) At the January 22, 2018 disposition hearing for Rich’s probation violation, the state noted that Rich had also committed a new DUI offense in November 2017, which was pending in the State of Oregon and had a hearing “set for a February date.” (Tr., p.7, L.19 – p.8, L.5; p.9, Ls.21-22.)

Rich is correct in recognizing that his “missteps were severe enough that he did not deserve a second chance at probation.” (Appellant’s brief, p.6.) Probation was clearly not achieving the goals of rehabilitation or protecting the community in this case, as evinced by the fact that Rich committed yet another DUI while on probation for what is approximately his sixth DUI offense. (PSI, pp.6-11.) Furthermore, he has continued to consume alcohol and use illegal drugs while on probation – despite having participated in substance abuse treatment, and despite having been directed to participate in mental health treatment since at least February 2017 – demonstrating his failure to rehabilitate in the community. (R., pp.104, 114; Tr., p.12, Ls.11-12.)

At the disposition hearing for Rich's probation violation, the state addressed Rich's ongoing substance abuse, his poor performance on his rider, and his continued disregard for the law and the terms of community supervision. (Tr., p.7, L.10 – p.10, L.8 (Appendix A).) The district court subsequently articulated its reasons for revoking probation and executing Rich's sentence. (Tr., p.15, L.10 – p.17, L.6 (Appendix B).) The state submits that Rich has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts of the disposition hearing transcript, which the state adopts as its argument on appeal. (Appendices A and B.)

Rich next asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence, in light of his performance on his rider in 2015 and his claim that he "made progress while on probation." (Appellant's brief, pp.6-8.) 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, Rich 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. Rich has failed to satisfy his burden.

On appeal, Rich acknowledges that he "did not specifically reference new or additional information in his Rule 35 motion." (Appellant's brief, p.7.) Indeed, Rich provided no new information in support of his Rule 35 request, and the only argument he made in his brief supporting the Rule 35 motion was that the objectives of sentencing "may still be accomplished by reducing the sentence in this case." (R., pp.143-47.) Although Rich now asserts that "the record between the judgment of conviction in 2015 and the order revoking his probation included

new information not considered when the underlying sentence was originally imposed” (Appellant’s brief, p.7), he did not refer to that information in his Rule 35 motion or in the supporting brief (R., pp.143-47). Moreover, that information was available to the district court at the time of the probation violation disposition hearing, and, although the district court had the authority to reduce Rich’s sentence at that time, it chose not to do so. I.C.R. 35; State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 7 (Ct. App. 2009) (“Upon revoking a defendant’s probation, a court may order the original sentence executed or reduce the sentence as authorized by Idaho Criminal Rule 35.”). Because information with respect to Rich’s performance on his 2015 rider and while on probation was before the district court at the time that it revoked Rich’s probation and executed his underlying sentence, it was not “new or additional information *subsequently* provided to the district court in support of the Rule 35 motion.” Huffman, 144 Idaho at 203, 159 P.3d at 840 (emphasis added). Rich presented no new evidence in support of his Rule 35 motion; therefore, he failed to demonstrate in the motion that his sentence was excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court’s order denying his Rule 35 motion.

Conclusion

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

DATED this 10th day of July, 2018.

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

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of July, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

MAYA P. WALDRON
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

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

APPENDIX A

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<p>1 COURTROOM OF THE DISTRICT COURT 2 FOURTH JUDICIAL DISTRICT 3 ADA COUNTY COURTHOUSE 4 ADA COUNTY, BOISE, IDAHO 5 MONDAY, JANUARY 22, 2018, 4:28 P.M. 6 ***** 7 THE COURT: State versus Michael Rich. 8 All right. Counsel for the state, what 9 is your recommendation? 10 MR. BLEAZARD: Your Honor, the state is 11 recommending the Court impose the sentence in this 12 case -- revoke probation and impose the underlying 13 sentence. The defendant has demonstrated a 14 history of poor probation. He's demonstrated a 15 history of alcoholism, general refusal to stay 16 away from alcohol, and most concerning is his 17 continued use of alcohol and the DUI he picked up 18 in Oregon. 19 He is currently charged with a DUI. 20 What alerted me to it is the very last note in the 21 probation officer's notes that he confirmed the 22 defendant was charged with a DUI in Oregon. I 23 have looked it up on the Oregon repository and 24 confirmed the fact that is actually pending. In 25 fact, there is a note on the last hearing that had</p>	<p>1 during the course of the rider. 2 The state recommended at the rider 3 review -- well, I don't believe the state made a 4 recommendation, a specific recommendation, but 5 noted the concerns with how the defendant 6 performed. On review with this Court, the 7 defendant struggled. He did very poorly. 8 He struggled to maintain employment 9 throughout. He would get a job and lose a job. 10 He would complain about work a lot. He had issues 11 maintaining a sponsor and being consistent with 12 his AA attendance. He would routinely not bring 13 green cards. 14 And, really, everything seemed to fall 15 apart in June when he failed to appear for a 16 review hearing. Shortly after that, he didn't 17 have a pay stub for the Court. He admitted 18 marijuana use. 19 He failed to appear again in October, 20 and then that's when a warrant went out for a 21 probation violation. And then the DUI was picked 22 up in November 2017. 23 The defendant's -- the allegations in 24 the motion for probation violation outline really 25 all the problems that was going on with the</p>
8	10
<p>1 a question mark. The defendant -- says, "The 2 defendant is in IDOC?" So I'm not sure if he 3 didn't appear for something over there. 4 Regardless, it's set for a February 5 date. I assume defendant will be transported over 6 there at some point. 7 The defendant was originally sentenced 8 back in May 2015. The state recommended a 9 retained jurisdiction, and the Court at that time 10 made note that the sentence recommendation and a 11 sentence of a rider was a generous thing for the 12 defendant. That he -- based on his history, which 13 is substantial, includes a prior felony level DUI 14 that was reduced after an appeal. But it also 15 includes a grand theft in 2006, robbery in 2008, 16 as well as an assault. 17 In light of that history, the 18 opportunity to prove himself in a rider was a good 19 one. 20 The Court also noted that it would 21 relinquish jurisdiction if he didn't do more 22 substantial treatment through the rider. He did 23 get that substantial treatment, but the rider was 24 very poor. He didn't take it very seriously. He 25 demonstrated serious problems with authority</p>	<p>1 defendant. He has really demonstrated that he is 2 not a good candidate for probation at all. 3 I don't know what defense is going to 4 recommend to the Court. I would certainly -- I'm 5 recommending imposition. I think that any idea of 6 probation or rider or anything like that just 7 simply is not a possibility or for a feasible 8 opportunity for the defendant at this point. 9 Thank you, Your Honor. 10 THE COURT: Please proceed. 11 MR. MARX: Thank you, Your Honor. 12 I'm going to ask the Court to retain 13 jurisdiction and give Mr. Rich another opportunity 14 for a rider. Mr. Rich indicates when he did his 15 previous period of jurisdiction, it was in the 16 middle of transitioning out of the end of the 17 TC program into the issues. So along that way, he 18 feels that the current program as it's structured 19 may be more beneficial to him, give him an 20 opportunity to be successful. 21 I think that the state's identification 22 that things really started to slide down hill the 23 last few months is accurate. I think where things 24 started to get out of control, they really spun 25 significantly out of control for Mr. Rich.</p>

APPENDIX B

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1 just don't want to continue doing it. I'm almost
 2 31 years old, and the idea of growing old in
 3 prison is not something that I look forward to.
 4 And I want the opportunity to do the right thing.
 5 So I appreciate your time, Your Honor.
 6 THE COURT: Is there legal cause why we
 7 should not proceed?
 8 MR. MARX: No, Your Honor.
 9 MR. BLEAZARD: No, Your Honor.
 10 THE COURT: Well, the time you came before
 11 the Court, you had -- you were in a spot where
 12 that was your fifth felony conviction. And you
 13 had DUI charges in October 2005, October 2006,
 14 December 2006, August 2008, December 2008,
 15 November 2010.
 16 And then you came before the Court with
 17 a DUI in February 2015 in which you also hit a
 18 fence near a house, drove through a backyard, hit
 19 two sheds, and almost hit a pedestrian at a time
 20 where your BAC level was .233. So that was a
 21 pretty serious picture.
 22 And as I said at the time, I thought
 23 the state's recommendation of a rider for a person
 24 with your prior record was very generous. You got
 25 an extended rider, and it wasn't -- then, after

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1 your extended rider you were given a chance at
 2 probation.
 3 You did -- we did have problems with
 4 you not showing up for some of your reviews and
 5 forgetting your green cards.
 6 And then the probation violation in
 7 this case is where you were using marijuana, using
 8 methamphetamine. You were in possession of
 9 alcohol in direct violation of the terms and
 10 conditions of your probation, which specifically
 11 requires that you not purchase, possess, or
 12 consume any alcohol.
 13 You failed to report four different
 14 times. And, of course, I'm concerned about the
 15 fact that there is a DUI arrest in November 2017.
 16 That doesn't appear to be resolved, so that is the
 17 place that it's at. It's not resolved. But what
 18 I see is a person who not only is continuing with
 19 the same problems he had before, but he is adding
 20 to them. And I don't think that this is feasible.
 21 I'm going to revoke probation and
 22 impose sentence. I don't see how -- I don't see
 23 how these issues can be successfully addressed.
 24 And, frankly, I think there needs to be
 25 consequences for this. You were given quite a

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1 significant break with getting a rider in the
 2 first place. It was a very extended rider.
 3 And I'm not seeing a level of
 4 commitment to change that would make me feel more
 5 confident, so I think this is an appropriate case
 6 for imposition, unfortunately.
 7 You do have 42 days in which to appeal.
 8 (Proceedings concluded at 4:40 p.m.)
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1 REPORTER'S CERTIFICATE

2

3 STATE OF IDAHO)
 4 COUNTY OF ADA) SS

5

6 I, ROXANNE K. PATCHELL, Official Court
 7 Reporter, Ada County, State of Idaho hereby
 8 certify:

9 That I am the reporter who took the
 10 proceedings had in the above-entitled action in
 11 machine shorthand and thereafter the same was
 12 reduced into typewriting under my direct
 13 supervision; and

14 That the foregoing reporter's transcript
 15 contains a full, true, and accurate record of the
 16 proceedings had in the above and foregoing cause,
 17 which was heard in Boise, Idaho

18 IN WITNESS WHEREOF, I have hereunto set my
 19 hand this 21st of May, 2018.

20

21 *Roxanne K. Patchell, RPR, CSR*
 22 _____

23 Roxanne K. Patchell, RPR, CSR
 24 Idaho CSR Number 733
 25 California CSR Number 12057