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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45813
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-FE-2015-4684
)	
KENNETH ALAN QUEEN,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Queen failed to establish that the district court abused its discretion by revoking his probation and executing his underlying, unified sentence of 10 years, with two years fixed, for felony injury to a child?

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

Queen pled guilty to felony injury to a child (amended from two counts of lewd conduct with a minor under sixteen) and, in September of 2015, the district court imposed an underlying, unified sentence of 10 years, with two years fixed, and retained jurisdiction. (43566 R., pp.5-6,

66-67, 72-74.¹) Following a period of retained jurisdiction, the district court suspended the sentence and placed Queen on probation for a period of 10 years. (R., pp.15-20.)

In December of 2017, the state filed a motion for probation violation, alleging that Queen had violated the conditions of his probation by failing to attend and/or complete sex offender treatment, failing to maintain employment, using marijuana and methamphetamine, failing to obtain permission from his supervising officer before changing residences, failing to pay the cost of supervision, and failing to pay fines, fees, funds, surcharges and/or costs as ordered by the Court. (R., pp.33-43.) Queen subsequently admitted that he had violated the conditions of his probation by failing to attend sex offender treatment, and the district court revoked his probation and executed the underlying sentence. (R., pp.45, 47-49.) Queen filed a notice of appeal timely from the order revoking his probation. (R., pp.50-52.)

Queen asserts that the district court abused its discretion by revoking his probation in light of his financial difficulties, attempts to resume treatment, and his attempts to find housing and employment. (Appellant's brief, pp.4-7.) Queen 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 whether to revoke a defendant's probation for a violation is within the discretion of the district court. State v. Garner, 161 Idaho 708, 710, 390 P.3d 434, 436 (2017) (quoting State v. Knutsen, 138 Idaho 918, 923, 71 P.3d 1065, 1070 (Ct. App. 2003)). The goal of probation is to foster the probationer's rehabilitation while protecting public safety. State v. Cheatham, 159 Idaho 856, ___, 367 P.3d 251, 253 (Ct. App. 2016) (citations omitted). In determining whether

¹ The Idaho Supreme Court ordered the record in this appeal to be augmented with Queen's prior appeal record and transcripts from Supreme Court Docket No. 43566.

to revoke probation, a court must examine whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society. State v. Cornelison, 154 Idaho 793, 797, 302 P.3d 1066, 1070 (Ct. App. 2013) (citations omitted). A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. Id. at 798, 302 P.3d at 1071 (citing State v. Beckett, 122 Idaho 324, 326, 834 P.2d 326, 328 (Ct. App. 1992)).

Queen is not a viable candidate for probation in light of his refusal to abide by the conditions of community supervision and his failure to rehabilitate while in the community. Queen's conviction in this case stemmed from allegations that he sexually abused a 13-year-old child on multiple occasion. (43566 R., pp.5-7; 2/12/18 Tr., p.10, Ls.4-9.) Following a period of retained jurisdiction, the district court apparently had reservations about placing Queen on probation but ultimately did so, imposing as a fundamental condition that Queen participate in and complete an intensive sex offender treatment program. (2/12/18 Tr., p.10, Ls.10-22; R., pp.14-20.) Queen enrolled in sex offender treatment with H&H Treatment Programs, LLC, in June 2016. (R., p.42.) In February 2017 he "cancelled" an appointment and "did not reschedule appropriately." (R., p.36.) By "Summer 2017 Mr. Queen began struggling with attendance and financial issues." (R., p.42; see also R., pp.36-37.) His treatment provider gave him multiple opportunities to "be compliant and attend to [his] financial issues," but, ultimately, Queen "stopped attending sessions all together." (R., p.42; see also R., pp.36-37.) Queen's failure to even attempt to continue participating in treatment with H&H, despite having been given multiple accommodations and opportunities to do so, supports the district court's determination that probation was neither consistent with the protection of society nor achieving its rehabilitative purpose.

Queen argues otherwise, claiming he only stopped attending sex offender treatment “because of his financial difficulties.” (Appellant’s brief, p.5.) Queen, however, admitted to the district court that his failure to attend treatment “over a period of time from February 2017 through November 30th 2017” was both “willful and intentional.” (1/22/18 Tr., p.4, Ls.3-20.) Moreover, whatever Queen’s financial difficulties were, they appear to have been of his own making. In addition to alleging that Queen failed to complete sex offender treatment, Queen’s probation officer also alleged as bases for his report of violation that Queen admitted to having used marijuana and methamphetamine and failed to maintain employment. (R., pp.37-38, 41.) Although not admitted by Queen, the district court was entitled to consider these allegations in deciding the appropriate disposition and, more particularly, in evaluating Queen’s assertions that he was unable to comply with the most fundamental condition of his probation due to a financial hardship. See, e.g., State v. Coffin, 104 Idaho 543, 548–49, 661 P.2d 328, 333–34 (1983) (citing State v. Ott, 102 Idaho 169, 627 P.2d 798 (1981)) (“[C]onsideration of charges which are pending or have been previously dismissed in arriving at a sentencing decision is within the sentencing authority of the court.”); State v. Heffern, 130 Idaho 946, 949–50, 950 P.2d 1285, 1288–89 (Ct. App. 1997) (quoting State v. Wickel, 126 Idaho 578, 887 P.2d 1085, 1087 (Ct. App. 1994)) (A trial judge may consider a broad spectrum of information in imposing a sentence, including a defendant's past criminal history and, with due caution, “the existence of [a] defendant's alleged criminal activity for which no charges have been filed, or where charges have been dismissed.”). The district court did so and appropriately concluded Queen’s purported financial difficulties did not justify his failure to attend and complete sex offender treatment, reasoning:

... [Y]ou are not doing treatment because you say you don’t have money, but you are testing positive for pot and methamphetamine. So your money is

going somewhere, and it's not going somewhere useful. It's going towards committing additional crimes.

And, then, you behaved badly to one employer and lost that job. And then another employer, in December, fires you because you were stealing because they found the tools that you were using at that job in a pawn job [sic]. So I don't see this as forward progress. I don't see this as acceptable. And this was too serious a case, too serious a need for you to buckle down and start working on the sex offender issues and that some other child wouldn't be put in a bad spot.

(2/12/18 Tr., p.11, L.10 – p.12, L.1.)

At the disposition hearing, the district court articulated its reasons for revoking Queen's probation, including his poor performance while on probation. (2/12/18 Tr., p.10, L.4 – p.12, L.9.) The district court concluded, "[Y]ou are, frankly, a serious risk to children. And you have not proven yourself personally to do what it takes to reduce that risk." (2/12/18 Tr., p.12, Ls.6-9.) The state submits that Queen has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the disposition hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm the district court's order revoking Queen's probation and executing his underlying sentence.

DATED this 10th day of August, 2018.

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

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of August, 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:

BEN P. MCGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

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

APPENDIX A

<p style="text-align: center;">7</p> <p>03:53PM 1 out in the community and to keep the community 03:53PM 2 safe. And so, Your Honor, for that reason, I 03:53PM 3 would ask that you impose sentence. 03:53PM 4 THE COURT: All right. Please proceed. 03:53PM 5 MR. MARX: Thank you, Your Honor. 03:53PM 6 We are going to ask that the Court 03:53PM 7 reinstate Mr. Queen on a period of supervised 03:53PM 8 probation. One of the concerns that he had was 03:53PM 9 the treatment, and that's an understandable 03:53PM 10 concern given the circumstances that bring 03:53PM 11 Mr. Queen to court today. 03:53PM 12 He indicates that he was struggling to 03:53PM 13 pay numerous expenses, and he got behind on what 03:53PM 14 he owed the H&H facility. He determined or found 03:54PM 15 out he could take his treatment through SANE, and 03:54PM 16 Medicaid would pay for it. However, H&H wouldn't 03:54PM 17 release his records without paying his balance due 03:54PM 18 on that. 03:54PM 19 He indicates he owes \$97 to them. If 03:54PM 20 he is able to successfully pay that, then he'll be 03:54PM 21 able to transfer his treatment to SANE where it's 03:54PM 22 funded, and he won't have continued issues that 03:54PM 23 he's having at this point. He has spoken to the 03:54PM 24 probation officer assigned to the jail, 03:54PM 25 discussed the steps that he needs to go through to</p>	<p style="text-align: center;">9</p> <p>03:55PM 1 Court would see that as a violation. So he is 03:55PM 2 asking for guidance from the Court and how 03:55PM 3 Your Honor intended that no-contact order when it 03:55PM 4 was entered. 03:55PM 5 I think the state and myself took it as 03:55PM 6 not having any intentional, direct contact. But 03:55PM 7 if you are working at a work and a minor child 03:55PM 8 walks by with parents, I don't think that that's 03:55PM 9 what the Court intended, but Mr. Queen is asking 03:55PM 10 for some clarification for that as well. 03:56PM 11 THE COURT: Well, what do you have to say, 03:56PM 12 Mr. Queen? 03:56PM 13 THE DEFENDANT: I was doing really good. I 03:56PM 14 was going to treatment. I was paying my bills. I 03:56PM 15 had a house. I had a full-time job, supervisor -- 03:56PM 16 yeah. I didn't go to grocery stores or nothing 03:56PM 17 like that because it says on the bottom page, 03:56PM 18 "Within a hundred feet." And, you know, I didn't 03:56PM 19 want to get in trouble. 03:56PM 20 I'm going to SANE solutions, getting 03:56PM 21 transitional funding again. I'm going to succeed. 03:56PM 22 Never absconded, always was there when my PO 03:56PM 23 called me, so just give me another chance and I'll 03:57PM 24 prove it to you so. 03:57PM 25 THE COURT: Is there legal cause why we</p>
<p style="text-align: center;">8</p> <p>03:54PM 1 get transitional funding for housing. 03:54PM 2 He had some employment along the way, 03:54PM 3 and, really, his struggles seem to appear -- he 03:54PM 4 had some work issues. He was struggling with 03:54PM 5 getting treatment transferred, and he got defeated 03:54PM 6 and used. 03:54PM 7 And, understandably, the Court has some 03:54PM 8 concerns with that. He seems to have a plan ahead 03:54PM 9 at this point. He is an inmate worker again in 03:54PM 10 the jail and moving forward. So we are asking the 03:54PM 11 Court to place him on a period of probation again. 03:54PM 12 Mr. Queen has a housekeeping request 03:55PM 13 from the Court in terms of his job prospects are 03:55PM 14 tight and things of that nature. The Court 03:55PM 15 entered a no-contact order prohibiting him to be 03:55PM 16 within a certain feet of minor children. He took 03:55PM 17 a very strict reading. In speaking with Mr. 03:55PM 18 Dinger, it wasn't his understanding that the Court 03:55PM 19 interpreted that. Mr. Queen feels like he is not 03:55PM 20 able to go to the grocery store, things of that 03:55PM 21 nature. So he is asking the Court for some 03:55PM 22 clarification there. 03:55PM 23 That also is part of his job prospects. 03:55PM 24 He has some automotive skills, but he is concerned 03:55PM 25 that if he has some incidental contact, that the</p>	<p style="text-align: center;">10</p> <p>03:57PM 1 should not proceed? 03:57PM 2 MR. MARX: No, Your Honor. 03:57PM 3 MR. DINGER: No, Your Honor. 03:57PM 4 THE COURT: Well, this case is a situation 03:57PM 5 where it started out with charges for having 03:57PM 6 sexual intercourse multiple times with a 03:57PM 7 13-year-old. It ended up with injury to a child 03:57PM 8 for that child instead of the excessive physical 03:57PM 9 abuse that that child also suffered from. 03:57PM 10 I sent you on a rider to see if you 03:57PM 11 would settle in and work on things. 03:58PM 12 When you came back from the rider, even 03:58PM 13 though there were some things about it that caused 03:58PM 14 me concern, but I thought, well, I'll give you a 03:58PM 15 chance to do sex offender treatment in the 03:58PM 16 community as long as there was no contact with all 03:58PM 17 children because I did not think you should be 03:58PM 18 around children. I didn't think you'd fully 03:58PM 19 addressed your issues. I think you present a risk 03:58PM 20 to them to both physical and sexual abuse. 03:58PM 21 And I wanted you to participate in the 03:58PM 22 SANE program or its equivalent. 03:58PM 23 You have admitted to failing to attend 03:58PM 24 or successfully complete sex offender treatment. 03:58PM 25 You cancelled your appointments initially in</p>

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03:58PM 1 February of last year. Did not reschedule. Then
 03:58PM 2 you failed to report for appointments.
 03:58PM 3 Probation officer, obviously, worked
 03:58PM 4 with you for quiet awhile saying you need to get
 03:58PM 5 into treatment. You need to do the treatment.
 03:58PM 6 You have changes you need to make. The probation
 03:58PM 7 officer told you to re-engage in treatment, and
 03:58PM 8 then the probation officer imposed some
 03:58PM 9 discretionary jail time trying to accomplish that.
 03:58PM 10 Then, you are not doing treatment
 03:58PM 11 because you say you don't have money, but you are
 03:58PM 12 testing positive for pot and methamphetamine. So
 03:58PM 13 your money is going somewhere, and it's not going
 03:58PM 14 somewhere useful. It's going towards committing
 03:58PM 15 additional crimes.
 03:58PM 16 And, then, you behaved badly to one
 03:58PM 17 employer and lost that job. And then another
 03:58PM 18 employer, in December, fires you because you were
 03:58PM 19 stealing because they found the tools that you
 03:58PM 20 were using at that job in a pawn job.
 03:58PM 21 So I don't see this as forward
 04:00PM 22 progress. I don't see this as acceptable. And
 04:00PM 23 this was too serious a case, too serious a need
 04:00PM 24 for you to buckle down and start working on the
 04:00PM 25 sex offender issues and that some other child

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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 25th of April, 2018.
 20
 21
 22 *Roxanne K. Patchell, RPR, CSR*
 23 Roxanne K. Patchell, RPR, CSR
 24 Idaho CSR Number 733
 25 California CSR Number 12057

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04:00PM 1 wouldn't be put in a bad spot.
 04:00PM 2 I'm revoking probation and imposing
 04:00PM 3 sentence. You got a chance; you didn't use it.
 04:00PM 4 You do have 42 days in which to appeal, and we'll
 04:00PM 5 calculate your credit for time served.
 04:00PM 6 But you are, frankly, a serious risk to
 04:00PM 7 children. And you have not proven yourself
 04:00PM 8 personally to do what it takes to reduce that
 04:00PM 9 risk.
 10 (Proceedings concluded at 4:01 p.m.)
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