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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45816
Plaintiff-Respondent,	)	
	)	Bannock County Case No.
v.	)	CR-2015-17463
	)	
COLTON KELLY BISCHOFF,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Bischoff failed to establish that the district court abused its discretion by revoking his probation and executing his concurrent underlying sentences of 10 years, with three years fixed, for felony injury to a child, and five years, with three years fixed, for felony intimidating a witness?

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

Bischoff pled guilty to felony injury to a child and felony intimidating a witness, and in September of 2016, the district court imposed concurrent, unified sentences of 10 years, with three years fixed, for injury to a child, and five years, with three years fixed, for felony

intimidating a witness, and retained jurisdiction. (R., pp.91-96.) Following a period of retained jurisdiction, the district court suspended the sentence and placed Bischoff on probation for a period of eight years. (R., pp.104-07.) Four months later, Bischoff's probation officer filed a report of probation alleging that Bischoff had violated the conditions of his probation by purchasing two pornographic DVD's, having physical contact with three minors with no trained chaperone present, using the internet without permission for the purpose of viewing pornography and contacting two prostitutes for sex, hiring two prostitutes for sex and paying them money for sexual intercourse, traveling both outside his district (multiple times) and outside the state of Idaho (once) without permission, having sexual intercourse with two separate prostitutes on multiple occasions, violating his curfew on multiple occasions, being involved in the sale of narcotic drugs, consuming alcohol, and using methamphetamine, heroin, marijuana, hydrocodone, tramadol, methadone, and oxycodone. (R., pp.113-15.) Bischoff subsequently admitted that he had violated the conditions of his probation, and the district court revoked his probation and executed the underlying sentences. (R., pp.128-31.) Bischoff filed a Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.138-39, 143-44.) Bischoff filed a notice of appeal timely from both the order revoking his probation and the order denying his Rule 35 motion. (R., pp.145-48.)

Bischoff asserts that the district court abused its discretion by revoking his probation in light of his need for treatment and because "the district court could only conclude from his conduct that probation was achieving its rehabilitative purpose." (Appellant's brief, pp.4-6.) Bischoff 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 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)).

Bischoff 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. Bischoff's conduct while on probation was abysmal. Bischoff was only on probation for four months, but violated the conditions of probation multiple times and in multiple ways, including by purchasing pornographic DVD's, having physical contact with minors with no trained chaperone present, using the internet without permission for the purpose of contacting two prostitutes for sex, hiring two prostitutes for sex and paying them money for sexual intercourse, traveling outside his district two times and traveling outside of Idaho once, having sexual intercourse with two separate prostitutes on multiple occasions, violating his curfew two times, being involved in the sale of narcotic drugs, consuming alcohol, and using methamphetamine, heroin, marijuana, hydrocodone, tramadol, methadone, oxycodone. (R., pp.113-15.) Furthermore, Bischoff was violating the terms of his probation all while participating in sex offender treatment, thus demonstrating, contrary to Bischoff's appellate claim, that probation

was clearly *not* achieving its rehabilitative purposes. (R., p.115; 1/8/18 Tr., p.13, Ls.20-24., p.14, Ls.4-8.)

At the disposition hearing, the district court articulated its reasons for revoking Bischoff's probation, including his abysmal performance while on probation. (1/8/18 Tr., p.15, L.18 – p.18, L.4.) The district court concluded,

This is serious behavior, and it demonstrates a total unwillingness to comply with the requirements you are required to comply with to even be on probation, whether you're engaging in treatment or not, apparently it wasn't doing any good.

(1/8/18 Tr., p.17, Ls.21-25.) The state submits that Bischoff 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 Bischoff's probation and executing his underlying sentences.

DATED this 18th day of July, 2018.

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

ALICIA HYMAS  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th 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:

BEN P. MCGREEVY  
DEPUTY STATE APPELLATE PUBLIC DEFENDER  
[documents@sapd.state.id.us](mailto:documents@sapd.state.id.us).

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

# APPENDIX A

1 unless he has changed his mind.

2 THE COURT: All right. Go ahead, Mr. Bischoff.

3 Well, he can sit down. I can hear him better  
4 if he sits close to the mic. Go ahead.

5 THE DEFENDANT: Your Honor, I know I made a lot  
6 of terrible choices on probation. But I need help, Your  
7 Honor, with drug treatment. And as Mr. Kent --  
8 Mr. Reynolds said, I was scared to tell the PO about  
9 this. I was scared to bring this up in treatment for  
10 fear of being sent to prison.

11 I feel like prison won't work -- would only  
12 lead to more harm for me. I feel like I would probably  
13 end up dead in prison. I feel like treatment on the  
14 outside would be better for me, to deal with more of  
15 life's situations, Your Honor.

16 THE COURT: Okay. Anything else?

17 THE DEFENDANT: No, Your Honor.

18 THE COURT: All right. Mr. Bischoff, this is a  
19 serious situation. The facts of the underlying case are  
20 serious. There a two -- well, there's two charges, two  
21 counts in the same case: The sexual relationship that  
22 you had maintained with this sixteen year old girl, and  
23 then the threatening texts thereafter were very  
24 troubling.

25 At the time of the sex offender evaluation that

1 occurred, psychosexual evaluation, even then, even that  
2 evaluation was concerning. At that point in time they  
3 identified you as a moderate to high risk to violate.

4           You had -- you said maybe I'll do treatment,  
5 but I don't think I really need it because I don't think  
6 this is a sex offense. You had -- this isn't the first  
7 time you've engaged with escorts. There was even a  
8 recommendation -- even a statement at the time that  
9 there was a concern that you might even offend against  
10 the same victim or other under-aged females. I don't  
11 think engaging with prostitutes is a good substitute for  
12 that.

13           So you've had a lot of warnings in your life.  
14 You had a lot of warnings on the PSI. Your rider review  
15 report was a little bit troubling. And I was hopeful  
16 that maybe you had enough of a contact at the rider and  
17 enough treatment that maybe you would do this on  
18 probation.

19           But what's compelling here above anything else  
20 is that you were released from probation -- or at least  
21 released to probation after the rider review on  
22 August 7th. Now this polygraph where you made all these  
23 admissions was November 28th, but all this conduct  
24 occurred before then. This is conduct that's ongoing  
25 from August 7th to no later than November 28th when all



1 these admissions occurred.

2           And I've said this before, but I'll say it to  
3 you because I don't want you to think that I'm totally  
4 unconcerned about your personal circumstances, but  
5 that's one factor. What can I do best for you is one  
6 factor, and it's not the most important factor.

7           Mr. Herzog mentioned the most important factor,  
8 and that is what do I need to do to make sure that the  
9 community is safe: From drug use, from prostitution,  
10 from pornography. What do I need to do to make sure the  
11 community is safe? That's the number one factor that I  
12 have to take into account.

13           Yes, I take into account your situation. But I  
14 have to take the other situation and give it greater  
15 weight, actually.

16           So I'm not pleased. Your behavior has not been  
17 good. Yes, you made a whole wrath of very bad choices.  
18 But it's a pile of bad choices. How many times do I get  
19 a PV where I've gotten things I have to deal with?  
20 Almost never happens. Usually three or four.

21           This is serious behavior, and it demonstrates a  
22 total unwillingness to comply with the requirements you  
23 are required to comply with to even be on probation,  
24 whether you're engaging in treatment or not, apparently  
25 it wasn't doing any good. Because you were --

1 pornography and DVD and prostitutes and so forth. It  
2 wasn't accomplishing its intended purpose.

3           So it's distressing to me, and I have to think  
4 about the community over anything else.

5           Having said that, I'm revoking your probation.  
6 I'm imposing the sentence. It's three and seven in one  
7 case, and three and two -- in the one count, and three  
8 and two in the other. I'm remanding you to the custody  
9 of the Department of Corrections for imposition of  
10 sentence.

11           MR. REYNOLDS: Would the court consider can  
12 second retained?

13           THE COURT: You can file a Rule 35, but that's  
14 my decision today.

15           MR. REYNOLDS: Okay.

16           THE COURT: You have 42 days to appeal this  
17 sentence. If you wish to appeal it and can't afford it,  
18 you can apply for an attorney and the costs of the  
19 appeal.

20           (End of proceedings this date.)  
21  
22  
23  
24  
25