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### State v. Cecil Appellant's Brief Dckt. 45848

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45848
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR01-16-31426
v.	)	
	)	
NATHAN DEAN CECIL,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to Mr. Cecil's guilty pleas to two counts of video voyeurism, the district court sentenced Mr. Cecil to a five-year term, with two years determinate, followed by a three-year term, with zero years determinate, and suspended execution of the sentence. Mr. Cecil was placed on probation and ordered to serve local jail time as a condition of his probation. Mr. Cecil violated his probation, and the district court revoked the same, imposing his sentence. Mr. Cecil thereafter filed a motion for reconsideration pursuant to Idaho Criminal Rule 35 ("Rule

35”), which the district court denied. Mr. Cecil appeals the district court’s revocation of his probation on the basis that the court failed to fully consider mitigating factors.<sup>1</sup>

#### Statement of the Facts & Course of Proceedings

Sometime between 2013 and 2016, Mr. Cecil posted photographs of several woman on an internet site called “Tumblr” or “Tumblr porn,” without the females’ consent. (Presentence Investigation (“PSI”) dated July 11, 2017, p.3) One victim, M.H., reported to police that she dated Mr. Cecil between August and December of 2015. In November 2015, she took photos of her genitals on her cell phone, and she believed Mr. Cecil somehow got the photos and posted them on the internet in April and July of 2016. (PSI, pp.32-33, 68.) M.H. showed the investigating officer a Tumblr site that contained photos of her in a bathing suit and another photo of her genitals. (PSI, p.68.) Another victim, R.S., Mr. Cecil’s ex-wife, also made a report, indicating that Mr. Cecil had problems with pornography throughout their marriage, started an internet porn site, and had posted photos on the internet of her in lingerie and one of her genital area. (PSI, p.69.) R.S. also took the photos of herself but did not send them to Mr. Cecil; she believes he sent them to himself while they were separated. (PSI, p.70.) The images ultimately made their way to other pornography sites, often with sexually graphic and enticing comments, which the victims believed Mr. Cecil posted. (PSI, pp.3-4.) After the victims discovered these images were posted, they contacted law enforcement who investigated. Mr. Cecil was ultimately indicted for three counts of video voyeurism. (R., pp.37-39.)

Mr. Cecil pled guilty to two counts of video voyeurism and was sentenced to five years, with two years determinate, on one count, plus a consecutive three years, with zero years

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<sup>1</sup> Mindful of *State v. Huffman*, 144 Idaho 201 (2006), Mr. Cecil does not challenge the district court’s denial of his Rule 35 motion.

determinate time, on the second count, execution of sentence suspended. He was placed on probation for eight years. (R. pp.101-104.)<sup>2</sup>

After Mr. Cecil's sentencing but prior to his release from serving jail time imposed as a condition of his probation, the State filed a Motion for Probation Violation, alleging Mr. Cecil had violated a protection order between November 22 and December 4, 2017; violated a no-contact order on November 26, 2017; and violated a no-contact order between November 7 and November 26, 2017. (R., p.167.) Mr. Cecil admitted two of the alleged violations - violating a no-contact order and a protection order. (R., p.181.) Subsequent to a disposition hearing where the two named victims and the subject of the no-contact orders, Mrs. Cecil, made statements, the district court revoked Mr. Cecil's probation and executed his previously-imposed sentence. (R., pp.182-185.) Mr. Cecil subsequently filed a Rule 35 motion to reduce his sentence, which the court denied. (R., pp.192-193.) Mr. Cecil filed a timely appeal. (R., pp.187, 207.)

### ISSUE

Did the district court abuse its discretion when it revoked Mr. Cecil's probation and executed his underlying sentence?

### ARGUMENT

#### The District Court Abused Its Discretion When It Revoked Mr. Cecil's Probation And Executed His Underlying Sentence

Mr. Cecil asserts that the district court abused its discretion when it revoked his probation and executed his original sentence without full consideration of the mitigating circumstances.

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<sup>2</sup>Mr. Cecil has filed numerous motions for early release and sent numerous letters directly to the court, requesting a modification to his probation. However, Mr. Cecil does not challenge those matters on appeal.

The standards of this Court's review for such claims on appeal are set forth in the Idaho Court of Appeals' Opinion in *State v. Beckett*:

Idaho Code § 20-222 prescribes that revocation of probation is within the discretion of the court and may occur at any time during the probation, if the probationer violates any of the terms of the probation. In making its decision, the court examines whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society. *State v. Hass*, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct.App.1988). The court may, after a probation violation has been proven, order the suspended sentence to be executed or, in the alternative, the court is authorized under I.C.R. 35 to reduce the sentence. *State v. Marks*, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct.App.1989). On review, the appellate court must determine whether the district court acted within the boundaries of its discretion, consistent with any legal standards applicable to its specific choices, and whether the district court reached its decision by an exercise of reason. *State v. Hass, supra*.

*State v. Beckett*, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992). Factors at sentencing and probation disposition may include, but are not limited to “the defendant’s good character, status as a first-time offender, sincere expressions of remorse and amenability to treatment, and support of family.” *State v. Knighton*, 143 Idaho 318, 320 (2006); I.C. § 19-2521. In Mr. Cecil’s case, several mitigating factors were present demonstrating the goals of sentencing were being met – his early acceptance of responsibility, his amenability to treatment and stellar progress with programs offered through the county jail, the lack of severity of offending conduct as compared with other probation offenders, and his community support. All told, these factors compelled a continued probation sentence.

First, Mr. Cecil took responsibility very early by admitting the probation violation approximately five weeks after being arraigned. (R., pp.176, 181.) Mr. Cecil is remorseful for not only his more recent activities, but also committing his original crimes. This early acceptance of responsibility is mitigating. *See State v. Shideler*, 103 Idaho 593, 594 (1982). Moreover, acknowledgment of guilt and acceptance of responsibility by the defendant are critical

first steps toward rehabilitation. *See State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010). Mr. Cecil should be afforded credit for this early resolution.

Mr. Cecil has an excellent network of community support. He had a very stable childhood and is very close to his parents, who live in town. (PSI, p.7.) He is also connected with his siblings. (PSI, p.8.) Mr. Cecil graduated from high school, but it is noteworthy that he was placed on an Individualized Education Plan in seventh grade due to a slight learning disability, and Mr. Cecil has at least on one occasion been diagnosed with impulse control disorder and Attention Deficit Disorder, Inattentive Type. (PSI, pp.11, 36.) This may shed insight into why Mr. Cecil was seemingly unable to stop himself from contacting his wife despite no contact orders, given his emotional attachment to her and his son. At the time of his initial sentencing, Mr. Cecil was embarking upon his own auto-detailing business, which, although waylaid due to his incarceration, speaks to Mr. Cecil's efforts to be productive and self-supportive. (PSI, pp.13, 15.) A defendant's reliability and dedication as a working member of society is a factor which a district court should consider as part of the defendant's character. *State v. Baiz*, 120 Idaho 292, 293 (Ct. App. 1991); *see also State v. Hagerdorn*, 129 Idaho 155, 161 (Ct. App. 1996).

Upon release from custody, Mr. Cecil also explained he would have support from a Celebrate Recovery program through church, and he expressed plans to pursue counseling and indicated the ability to pay for the same with insurance. (Tr., p.26, Ls.6-25.) Mr. Cecil performed great in other areas of his life, as corroborated by the Ada County Sheriff's Department. On December 6, 2017, the Ada County Sheriff's Office wrote the court, requesting approval to release Mr. Cecil thirty days early due to his completion of the Inmate Worker Program, Active Behavior Change/Moral Reconciliation, and Workforce Readiness. (R., p.164.)

As part of the original PSI process, Mr. Cecil also underwent a substance abuse assessment. No present diagnoses were noted, substantiating the absence of concern over alcohol or drug abuse. (PSI, p.18.) His LSI score as noted on the PSI, which is often relied upon as a predictor of risk, fell within the low category. (PSI, p.15.) Several prosocial factors were noted, including employment, support system, sobriety, and pro-social outlook. (PSI, p.14.) Mr. Cecil underwent a psychosexual evaluation, where Dr. Johnston, an expert, administered multiple tests/assessments. (PSI, p.29.) Dr. Johnston concluded Mr. Cecil only presented “at the lower-end of the moderate risk to re-offend,” and could further reduce his risk through serious engagement in treatment, and more rapidly than others. (PSI, pp.13-14, 27.) There was no evidence before the court at disposition indicating his risk of committing another sexually-related offense such as video voyeurism had increased.

Lastly, beyond Mr. Cecil’s personal factors in mitigation, a court must take into account the conduct underlying the probation violation, and Mr. Cecil’s minimal prior history. Mr. Cecil’s criminal record prior to the video voyeurism included only one conviction for petit theft and one for inattentive driving. (PSI, pp.5-6.) The conduct underlying the probation violations was not severe and contrary to the victims’ statements or the prosecutor’s statement that the victims were in fear for their safety, Mr. Cecil’s conduct was not physical nor violent. Bearing in mind that Mr. Cecil was before the court for violations of contact orders occurring in November 2017 and December of 2017, a closer look at the actual communication reveals mitigating factors.

According to the police report investigating the contact from Mr. Cecil to his wife, M.C., Mr. Cecil’s December 4, 2017, message to M.C. was, “we need to discuss our divorce, and what we both want out of it, we have been court ordered to mediation so let’s get this show on the

road so we can move on and be happy for Chance.” (PSI, p.230.) An earlier message was, “how is my son doing?” (PSI, p.231.) Mr. Cecil’s explanation for the conduct was, despite being aware of the order, he was attempting to proceed pro se in the handling of his divorce. (PSI, p.231.) A summary of his other contacts to her were included. They suggest major emotional attachment and inability to detach, but did not include threats to M.C. or threats to take her children away. (PSI, p.84.) The last documented contact was in February 2018, when Mr. Cecil sent a letter his infant son. (PSI, p.257.) This is not alleged as a probation violation, but given it was brought to the court’s attention, the lack of physical threat is mitigating.

Moreover, although the victims describe significant emotional distress, there is no factual support or evidence to suggest threats to their safety or that Mr. Cecil threatened any violence; some of the victims’ statements intimate that more serious conduct occurred than actually did. For instance, R.S.’s statement focused on describing Mr. Cecil’s contact with the court and other people, and she construed his contacts in a way that might be consider out of the ordinary. While Mr. Cecil had admittedly written to the court on many occasions and requested an early release, R.S. described that as harassment to the judge. (Tr., p.16, Ls.14-16.) R.S. also relayed Mr. Cecil violated a no-contact order when he purportedly requested her fiancé in September 2016, to read and explain to him the protective order, but there is no evidence Mr. Cecil was ordered not to communicate with the fiancé. (Tr., p.15, Ls.13-16.) The contact that she did describe that bears on Mr. Cecil’s conduct since being placed on probation, and *as it related to her*, was his attempt to get into contact with her through Telemate twice in November 2017. (Tr., p.15, L.25 – p.16, L.3.) But there was no evidence to indicate that November communication was of a threatening or harassing nature.



Another victim, M.H., relayed that Mr. Cecil had tried to contact her through Telmate, but she did not accept the invitation. When Mr. Cecil was questioned by police, he relayed that he had contacted M.H. to apologize to her and admit his wrongdoing and fault. (PSI, p.210.) There is no evidence of a threat in the attempted communication. As such, the only new information for the court's consideration at disposition included several written contacts discussing divorce, Mr. Cecil's son, and his love for M.S., and interrupted attempts to contact other parties. (R, pp.85, 124.) Lastly, the named victim of the protection/no-contact order violations, M.C., relayed that she obtained the orders due to his continuous phone calls and "harassing me through phone calls and text messages," yet it bears nothing that Mr. Cecil was married to her at that time, and Mr. Cecil had meanwhile recently advised the court that same wife was experiencing a high-risk pregnancy of their child. (R., pp.122, 124.)

In sum, as argued by Mr. Cecil's counsel, the contacts that he made, although unwanted, were not threatening, menacing, or wishing ill over those individuals. Given that Mr. Cecil had performed so well in many aspects of rehabilitation and was coming to terms with termination of his marriage with M.C., who had just recently given birth to their son, where no or few avenues remained at that time for Mr. Cecil to communicate with M.C. about their divorce or child, the court should have given full consideration to Mr. Cecil's character, circumstances, and community support, such as to reinstate his probation. The court abused its discretion by failing to fully take these factors into consideration at his disposition hearing.

CONCLUSION

Mr. Cecil respectfully requests that this Court vacate the order revoking his probation and reinstate his probation on the previously imposed terms, with an appropriate sanction. Alternatively, he requests that his case be remanded to the district court for a new disposition hearing.

DATED this 26<sup>th</sup> day of July, 2018.

/s/ Lara E. Anderson  
LARA E. ANDERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26<sup>th</sup> 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

LEA/eas