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State v. Larsen Appellant's Brief Dckt. 45849

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

MAYA P. WALDRON
Deputy State Appellate Public Defender
I.S.B. #9582
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. DAVID ANDREW LARSEN, Defendant-Appellant.	NO. 45849 KOOTENAI COUNTY NO. CR 2015-16339 APPELLANT'S BRIEF

STATEMENT OF THE CASE

Nature of the Case

David Andrew Larsen appeals from the district court's order relinquishing jurisdiction. Mindful that the district court did not have jurisdiction to place him on probation, Mr. Larsen contends that the district court abused its discretion by relinquishing jurisdiction.

Statement of Facts and Course of Proceedings

After Mr. Larsen pled guilty to injury to child for having sex with a seventeen-year-old (R.,[1] pp.55–57), the district court sentenced him to ten years fixed and retained jurisdiction

[1] Citations to "R." refer to the clerk's record created for Mr. Larsen's appeal in docket number 45064, and citations to "L.R." refer to the limited record created for this appeal.

(R., pp.69–71). As part of its sentence, the court recommended the sex offender curriculum and hand-wrote that "there needs to be a polygraph regarding whether the juvenile consented." (R., p.70.)

Mr. Larsen was diagnosed with autism for the first time while on his rider. (R., pp.75–76.) After getting that diagnosis and extending the period of retained jurisdiction under I.C. § 19-2601(4) so that Mr. Larsen could finish his rider, the court relinquished jurisdiction despite both defense counsel and the State recommending probation. (R., pp.78–79, 82–83, 85–86; *see generally* 3/16/2017 Tr.) The court explained

> I sent this person on a rider over a year ago, and in that document I required him to get a full disclosure polygraph about the events in question, whether the juvenile victim in this case consented to his having sex with her or not. I still don't really have that, and that's not what worries me at the present time.
>
> What worries me at the present time is that I'm dealing with a person, Mr. Larsen, who can't be supervised on probation mainly because he is incapable of being monitored on probation.

(3/16/2017 Tr., p.15, L.17–p.16, L.1.) The court compared Mr. Larsen's first polygraph, which disclosed three encounters with the victim in this case, to the most recent polygraph, which disclosed "a spreadsheet of victims." (3/16/2017 Tr., p.16, Ls.1–19.) Because Mr. Larsen passed both polygraphs, the court concluded that he could "pass a polygraph on virtually any subject in the world," and said that "frightens me to no end, and I—I am not seeing a set of circumstances that I could impose that would allow Mr. Larsen to be safely supervised in the community . . . ." (3/16/2017 Tr., p.16, Ls.19–24.) The court did, however, modify Mr. Larsen's sentence to a unified term of ten years, with two years fixed. (3/16/2017 Tr., p.20, Ls.20–24; R., pp.85–86.)

Defense counsel then filed an Idaho Criminal Rule 35 motion, which was based on two pieces of new information: Yet another polygraph Mr. Larsen completed in an effort to appease

the court's earlier concerns, and Mr. Larsen's testimony about his conduct since the court relinquished jurisdiction. (R., p.101; 7/31/17 Tr., p.5, L.12–p.11, L.5.) The court denied any request to further reduce Mr. Larsen's sentence, but offered to retain jurisdiction again so that Mr. Larsen could participate in a sex offender rider. (7/31/17 Tr., p.13, L.21–p.15, L.24; L.R., pp.22–23.) The court again told Mr. Larsen it was unhappy with the polygraphs he had completed, stating:

> I don't know how you—how it is you can pass a polygraph in May with one victim and pass one in March with a bunch more, so you're going to have to sort all that out for me before I consider placing you on probation. I need to know what the truth is about your past.

(7/31/17 Tr., p.16, Ls.16–21.) It added: "I guess that's what I'm clearly looking for is not only a polygraph at that time when he finishes that rider, but also a complete psychosexual evaluation giving me a risk evaluation where we're at at that time." (7/31/17 Tr., p.18, Ls.12–16; *see also* L.R., p.23 (ordering that Mr. Larsen "submit to a psychosexual evaluation and polygraph" before the next relinquishment hearing).)

At the next rider review hearing, the court began by discussing the psychosexual examination Mr. Larsen had competed and the polygraph it had ordered but that Mr. Larsen did not complete. (1/30/2018 Tr., p.4, Ls.6–18.) Defense counsel explained that the psychosexual evaluator did not need an additional polygraph and so she understood that the court did not require another one, but that Mr. Larsen would do another polygraph if the court wanted. (1/30/2018 Tr., p.2, L.23–p.3, L.4.) Defense counsel referred the court to a previous polygraph, which the court believed showed that Mr. Larsen had manipulated the victim into having sex with him. (1/30/2018 Tr., p.3, L.5–p.4, L.19.) The court added that the only new information it had was the psychosexual evaluation and an email from IDOC explaining why it had not placed Mr. Larsen in any additional programming. (1/30/2018 Tr., p.4, L.20–p.5, L.1; *see also* 45849

PSI, p.1; Aug., pp.1–2 (email from Ashley Dowell at IDOC explaining that it had concluded Mr. Larsen did not qualify for additional programming after the court granted his Rule 35 motion, and it had not performed a polygraph or psychosexual evaluation on Mr. Larsen[2]).)

Defense counsel asked the court to place Mr. Larsen on probation, citing the amount of time Mr. Larsen had already spent in custody, his cooperation with the court's requested polygraphs, his moderate risk of recidivism, and his amenability to treatment in the community. (1/30/2018 Tr., p.12, L.24–p.14, L.18.) And Mr. Larsen told the court:

> This has been quite the reality check. I get more terrified about going back than I am about anything else. And I want to say thank you for the opportunities to get to really know myself and give me the opportunity to be honest with myself and everybody around me to evaluate me and help me come to terms with myself instead of living a lie. And given the opportunity, I'll do my very best to succeed on probation . . . .

(1/30/2018 Tr., p.15, Ls.2–9.) The State declined to make any recommendation. (1/30/2018 Tr., p.12, Ls.20–21.)

The court decided to relinquish jurisdiction, explaining it did not believe it could adequately protect the public if it placed Mr. Larsen on probation:

> [B]ack when I initially imposed your prison sentence, I imposed a period of retained jurisdiction, I told you that you weren't forthcoming with the police about the lack of consent that you had from your underage victim, and told you what I needed when you came back. And that started kind of a long process. And in . . . May of last year, we got a polygraph that . . . dealt with the fact that you didn't have her consent . . . .
>
> Now we've got a psychosexual evaluation that assesses you at what I view as too much of a risk to be tolerated to be treated out in the community. . . .
>
> . . . .
>
> . . . I don't see where [the psychosexual evaluator] assesses you as being an acceptable risk to be treated in the community. . . .

[2] Handwritten on a copy of the emails is a note that appears to say the following: "Send him to prison no eval. Tom says he's a jerk @ jail." (Aug., p.1.)

(1/30/2018 Tr., p.15, L.22–p.17, L.2; L.R., pp.44–45.) Mr. Larsen timely appealed. (L.R., pp.46–48.)

ISSUE

Did the district court abuse its discretion by not placing Mr. Larsen on probation after his period of retained jurisdiction?

ARGUMENT

The District Court Abused Its Discretion By Not Placing Mr. Larsen On Probation After His Period Of Retained Jurisdiction

According to Idaho Criminal Rule 35(b), "[w]ithin 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction, a motion may be filed to correct or reduce a sentence and the court may correct or reduce the sentence. . . ." Further, Idaho Code § 19-2601(4) gives the district court discretion to,

> Suspend the execution of the judgment at any time during the first three hundred sixty-five (365) days of a sentence to the custody of the state board of correction. The court may retain jurisdiction over the prisoner for a period of up to the first three hundred sixty-five (365) days. . . . The prisoner will remain committed to the board of correction if not affirmatively placed on probation by the court. . . . The court in its discretion may sentence a defendant to more than one (1) period of retained jurisdiction after a defendant has been placed on probation in a case . . . .

The Idaho Supreme Court has held "[t]he plain language of section 19-2601(4) unconditionally requires an intervening period of probation prior to ordering an additional period of retained jurisdiction." *State v. Urrabazo*, 150 Idaho 158, 162 (2010).

Mindful that the district court did not have jurisdiction to place Mr. Larsen on his second period of retained jurisdiction and thus did not have jurisdiction to place him on probation at the end of that second period of retained jurisdiction, *see* I.C. § 19-2601(4); *Urrabazo*, 150 Idaho at 162, Mr. Larsen contends that the district court abused its discretion by not placing him on

probation. As explained by defense counsel at the rider review hearing, Mr. Larsen had already spent a lot of time in custody, he had cooperated with the court's requested polygraphs, he had a moderate risk of reoffending, and he was amenable to treatment in the community. (1/30/2018 Tr., p.12, L.25–p.14, L.18.) Further, after spending so much time in custody and in programming, Mr. Larsen had a high motivation to be successful on probation. (1/30/2018 Tr., p.15, Ls.2–9.) Therefore, the district court abused its discretion by not placing Mr. Larsen on probation at the end of his second period of retained jurisdiction.

CONCLUSION

Mr. Larsen respectfully requests that this Court order the district court to place him on probation.

DATED this 14th day of September, 2018.

/s/ Maya P. Waldron
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2018, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

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

MPW/eas