

Uldaho Law

Digital Commons @ Uldaho Law

Not Reported

Idaho Supreme Court Records & Briefs

4-23-2019

State v. Howell Respondent's Brief Dckt. 45927

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Howell Respondent's Brief Dckt. 45927" (2019). *Not Reported*. 5075.
https://digitalcommons.law.uidaho.edu/not_reported/5075

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

LORI A. FLEMING
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	Nos. 45927-2018 & 45928-2018
Plaintiff-Respondent,)	
)	Kootenai County Case Nos.
v.)	CR-2013-13847 & CR-2017-21467
)	
KERRY ALLEN HOWELL,)	
)	RESPONDENT’S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Howell failed to establish that the district court abused its discretion, either by revoking his probation in case number 45927, or by imposing a unified sentence of five years, with two years fixed, upon his guilty plea to unlawful possession of a firearm in case number 45928?

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

In case number 45927, Howell pled guilty to burglary and the district court imposed a unified sentence of 10 years, with five years fixed, and retained jurisdiction. (45927 R., pp.180-81.) Following the period of retained jurisdiction, the district court suspended Howell’s sentence

and placed him on supervised probation for three years. (45927 R., pp.202-05.) Howell later violated his probation by testing positive for methamphetamine on eight separate occasions, and the district court reinstated him on probation and extended his term of probation “to October 1, 2018.” (45927 R., pp.260-61, 299-300.)

Howell’s probation officer subsequently filed a report of violation alleging that Howell had violated his probation a second time by committing the new crime of unlawful possession of a firearm, for which he was charged in case number 45928. (45927 R., pp.304-05; 45928 R., pp.45-46.) Pursuant to a Rule 11 plea agreement, Howell admitted the allegation in case number 45927 and pled guilty to unlawful possession of a firearm in case number 45928, and the state agreed to not file a persistent violator enhancement and to recommend a concurrent unified sentence of five years, with two years fixed, for unlawful possession of a firearm, and that the court retain jurisdiction in both cases. (45927 R., pp.310-11; 45928 R., pp.48, 50-51; Tr., p.5, Ls.21-22.) At the combined sentencing and disposition hearing, Howell’s counsel “concur[red] with the Rule 11.” (Tr., p.18, Ls.4-5.) The district court followed the plea agreement and revoked Howell’s probation and executed the underlying sentence in case number 45927; imposed a concurrent unified sentence of five years, with two years fixed, for unlawful possession of a firearm in case number 45928; and retained jurisdiction in both cases. (45927 R., pp.313-14; 45928 R., pp.52-53.) Following the period of retained jurisdiction, the district court suspended Howell’s sentences and placed him on supervised probation for two years. (Supp. R., pp.123-24, 126-29.) Howell filed a notice of appeal in each case, timely from the district court’s order revoking probation in case number 45927, and timely from the judgment of conviction in case number 45928. (45927 R., pp.316-20; 45928 R., pp.55-59.)

“Mindful of the fact that he admitted violating his probation, and that the district court has since suspended his sentence and placed him back on probation,” Howell nevertheless asserts that the district court abused its discretion by revoking his probation in case number 45927. (Appellant’s brief, pp.3-4.) Howell also “challenges as excessive his underlying sentence of five years, with two years fixed,” in case number 45928, “mindful of the fact that this is the sentence he agreed to pursuant to the plea agreement.” (Appellant’s brief, pp.1, 4-5.) Howell offers no argument in support of his claims.

“When issues on appeal are not supported by proposition of law, authority, or argument, they will not be considered.” State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (citing I.A.R. 35; Langlely v. State Indus. Special Indem. Fund, 126 Idaho 781, 784, 890 P.2d 732, 735 (1995)). A party waives an issue on appeal if either authority or argument is lacking, not just if both are lacking. Id. Because Howell has not presented, on appeal, any argument to support either his claim that the district court abused its discretion by revoking his probation in case number 45927, or his claim that his sentence is excessive in case number 45928, he has waived both issues on appeal and this Court should decline to consider them.

Even if Howell’s appellate claims have not been waived, the claims still fail because his claim that the district court abused its discretion by revoking his probation in case number 45927 is moot, and his claim that his sentence is excessive in case number 45928 is barred by the doctrine of invited error.

It is well established that an appellate court does not decide moot issues. “An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief.” State v. Barclay, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010) (quotations and citations omitted). Although the district court revoked Howell’s probation and

retained jurisdiction upon finding a violation in case number 45927, the court subsequently placed Howell back on probation at the conclusion of the retained jurisdiction program. (Supp. R., pp.126-29.) Thus, even if this Court were to determine that the district court erred by not immediately reinstating Howell's probation upon finding a violation, such a determination would have no practical effect upon the outcome of the case because the district court has already granted Howell the very relief to which he claims he was entitled – probation. Howell's claim that the district court abused its discretion by revoking his probation is, therefore, moot and this Court must decline to consider it.

With respect to Howell's claim that his sentence in case number 45928 is excessive, Howell acknowledges, on appeal, that "his underlying sentence of five years, with two years fixed, is the sentence he agreed to under the terms of [the] plea agreement." (Appellant's brief, p.5.) Furthermore, at sentencing, Howell's counsel told the district court, "We certainly concur with the Rule 11 [plea agreement]." (Tr., p.18, Ls.4-5.) A party is estopped, under the doctrine of invited error, from complaining that a ruling or action of the trial court that the party invited, consented to or acquiesced in was error. State v. Castrejon, 163 Idaho 19, 21, 407 P.3d 606, 608 (Ct. App. 2017) (review denied Jan. 4, 2018) (citations omitted). This doctrine applies to sentencing decisions as well as to rulings during trial. Id. The purpose of the invited error doctrine is to prevent a party who caused or played an important role in prompting a trial court to take a certain action from later challenging that action on appeal. Id. at 22, 407 P.3d at 609 (citing State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999)). Because Howell received the sentence to which he agreed, he cannot claim on appeal that the sentence is excessive. Therefore, Howell's claim of an abuse of sentencing discretion is barred by the doctrine of invited error and Howell's sentence should be affirmed.

Conclusion

The state respectfully requests this Court to affirm the district court's order revoking Howell's probation in case number 45927 and Howell's conviction and sentence in case number 45928.

DATED this 23rd day of April, 2019.

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

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of April, 2019, served a true and correct copy of the attached RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

KIMBERLY A. COSTER
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

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