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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46035
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-FE-2015-15971
)	
JAMES EDWARD WHITMORE,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Whitmore failed to establish that the district court abused its discretion by revoking his probation and executing his underlying unified sentence of five years, with one year fixed, imposed following his guilty plea to manufacturing a controlled substance?

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

In November 2015, the state charged Whitmore with manufacturing a controlled substance (marijuana), possession of marijuana, and possession of drug paraphernalia. (R., pp.24-25.) Pursuant to a plea agreement, Whitmore pled guilty to manufacturing a controlled

substance and the state dismissed the remaining charges and agreed to recommend a unified sentence of five years, with two years fixed, and that the district court retain jurisdiction. (R., pp.29, 38-39.) The district court imposed a unified sentence of five years, with one year fixed, and retained jurisdiction. (R., pp.48-52.) Following the period of retained jurisdiction, the district court suspended Whitmore's sentence and placed him on supervised probation for five years. (R., pp.60-68, 82-90.) In its order placing Whitmore on probation, as one of the conditions of probation, the district court gave Whitmore notice that this opportunity on probation was his "last chance," stating:

Defendant has had two riders and prior opportunities for probation. Defendant is advised that this is his last chance and final opportunity at probation. Any violation of any of the terms and conditions of probation will likely result in imposition of the full underlying sentence.

(R., pp.65, 87.)

Approximately 14 months later, the state filed a motion for probation violation alleging that Whitmore had violated the conditions of his probation by smoking heroin, marijuana, and "his prescription medication Norco" "for approximately three to four months" "with his wife"; falsifying his urinalysis testing by submitting "someone else's urine"; failing to complete detox treatment at the Allumbaugh House; failing to attend any relapse prevention classes as instructed; failing to attend domestic violence treatment as required; changing residences without permission on several occasions; residing with his wife after he was told he "could not live with his wife"; failing to move into a transition house as instructed; failing to report for supervision as directed on three separate occasions; failing to maintain full-time employment; and failing to pay restitution and his other court-ordered costs. (R., pp.104-09 (parenthetical notations omitted).) Whitmore admitted that he violated the conditions of his probation by smoking heroin for approximately three to four months, falsifying his urinalysis testing, failing to attend domestic

violence treatment, changing residences without permission on several occasions, residing with his wife after he was told he could not live with her, and failing to move into a transition house as instructed. (R., pp.112-13.) The district court revoked Whitmore's probation and executed his underlying sentence. (R., pp.115-17.) Whitmore filed a notice of appeal timely from the district court's order revoking probation. (R., pp.121-23.)

Whitmore asserts that the district court abused its discretion by revoking his probation in light of his substance abuse issues, completion of the rider aftercare program, support from his wife and from his former employer, and claim that he "did not attend the court-ordered domestic violence classes because he was struggling financially, and he was working and trying to take care of a new baby." (Appellant's brief, pp.3-5.) Whitmore 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)). 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)).

Whitmore is not an appropriate candidate for probation in light of his ongoing substance abuse and criminal behavior, his unwillingness to abide by the conditions of community

supervision, and his failure to make adequate rehabilitative progress and/or to follow through with rehabilitative treatment in the community as instructed. On appeal, Whitmore claims that he failed to attend his required domestic violence classes “because he was struggling financially, and he was working and trying to take care of a new baby.” (Appellant’s brief, p.4.) However, Whitmore was employed through July 25, 2017, and his “new baby” was not born until October 2017, yet his domestic violence treatment provider reported, *on August 2, 2017*, that Whitmore had only ever attended two groups and he “was about to be discharged.” (R., pp.106-08.) Furthermore, Whitmore told his probation officer that he “does not need the classes because he did not commit the crime of domestic violence.” (R., p.106.)

Whitmore also contends that the district court abused its discretion by revoking his probation because “his probation was achieving its rehabilitative objective while providing protection for society.” (Appellant’s brief, p.4.) To the contrary, Whitmore told his probation officer that he relapsed in May or June of 2017, and admitted that he smoked heroin, marijuana, and Norco with his *pregnant* wife “for approximately three to four months.” (R., pp.104, 107.) Whitmore’s probation officer subsequently “intervened and attempted to get [Whitmore] stabilized,” instructing him to “seek help and detox.” (R., p.108.) Although Whitmore admitted himself to a detox program as instructed, he “stayed only three days and left the facility before he completed detox.” (R., p.105.) His probation officer then instructed him to attend relapse prevention classes, but Whitmore “never showed up for class” and was eventually “discharged for excessive absences.” (R., p.105.) Thereafter, Whitmore’s probation officer “encouraged him on multiple occasions to be honest ... and to seek help if he was still struggling with addiction[,] to no avail.” (R., p.108.) On January 4, 2018, Whitmore was caught tampering with his

urinalysis testing, as he “provided someone else’s urine from [an] apparatus under his shirt.”
(R., p.105.)

Whitmore’s probation officer recommended that the district court revoke Whitmore’s probation and execute his underlying sentence, stating:

The defendant has completed two rider programs and has three prior felony convictions for Possession of a Controlled Substance, Eluding an Officer and Domestic battery which has included him serving time at the prison and on parole. Throughout the years the defendant has been in and out of prison and in and out of treatment. He has completed multiple programs and he has been given multiple opportunities to address his extensive drug addiction and traumatic life events and has failed to implement that treatment into his day to day living. His addiction has left him homeless, separated from his family, unemployed and in and out of jail without the desired effect of him choosing to get sober and it is apparent without these protective factors he is not amenable to community supervision.

(R., p.108.)

At the disposition hearing for Whitmore’s probation violation, the state addressed Whitmore’s history of criminal conduct, his refusal to abide by terms of probation, and the risk he presents to the community. (3/22/18 Tr., p.31, L.8 – p.34, L.4.) The district court subsequently articulated the correct legal standards applicable to its decision and also set forth its reasons for revoking probation and executing Whitmore’s underlying sentence. (3/22/18 Tr., p.36, L.19 – p.39, L.8.) The state submits that Whitmore has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts 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 Whitmore's probation and executing his underlying sentence.

DATED this 2nd day of January, 2019.

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

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 2nd day of January, 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:

REED P. ANDERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

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

APPENDIX A

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1 materials?

2 MS. DAVIS: Yes, judge.

3 THE COURT: And any errors or corrections

4 other than the ones I pointed out?

05:04 5 MS. DAVIS: Yes, judge. There is an error

6 on -- it's not really -- it's page two of the file review.

7 The second paragraph under the supplemental information.

8 It starts out: In November 2016. It's that second

9 sentence. She reported Mr. Whitmore was using heroin and

05:04 10 physically abusing Samantha.

11 In the P.O.'s notes it has the E-mail from

12 the sister and it doesn't say anything about him using

13 heroin. It just says physically abusing Samantha. So

14 that got stuck in there somehow using heroin.

05:05 15 THE COURT: I kind of remember reading that.

16 MS. DAVIS: And that is on page 11 of a 35

17 -- or bait stamp PV 18. The November 13th P.O. notes --

18 or November 30th P.O. notes.

19 THE COURT: What's the bait stamp PV?

05:05 20 MS. DAVIS: 18. But there is no mention of

21 my client using heroin.

22 THE COURT: All right. Well, it says that

23 her sister was using heroin.

24 MS. DAVIS: Right, but not Mr. Whitmore.

05:05 25 THE COURT: Well, are you saying that he

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1 review those in a few minutes. I don't know that we have

2 any other issues to deal with except arguments and

3 recommendations, do we?

4 MS. DAVIS: No, judge.

05:07 5 MR. WHITE: No, judge.

6 THE COURT: All right. Mr. White, let's

7 hear your comments and recommendations.

8 MR. WHITE: Thank you, Your Honor. Your

9 Honor, in this case I'm going to ask that you impose the

05:08 10 previously suspended sentence giving Mr. Whitmore credit

11 for any time that he's served to today's date.

12 Obviously one of the fundamental problems

13 that we've been dealing with with Mr. Whitmore is domestic

14 violence issues. That's not a new thing, frankly. He's

05:08 15 got previous domestic violence convictions, domestic in

16 2005, attempted strangulation reduced to down to domestic

17 battery in 2007.

18 The domestic here we're talking about

19 including the one that this court noted was later reduced

05:08 20 to a misdemeanor.

21 In the State's view one of the most

22 important things for Mr. Whitmore to be doing during his

23 probation was that domestic violence treatment because we

24 would generally like for people to stop beating up their

05:08 25 spouses. Mr. Whitmore's response to that was he went to

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1 wasn't? Or are you just saying she just didn't say he

2 was?

3 MS. DAVIS: I'm saying he wasn't, and I'm

4 saying that she didn't say he was.

05:05 5 THE COURT: All right.

6 MS. DAVIS: That is the only correction.

7 THE COURT: All right. Mr. White, you've

8 read and reviewed the materials?

9 MR. WHITE: I have, Your Honor.

05:06 10 THE COURT: Did you see any errors or

11 corrections?

12 MR. WHITE: No, Your Honor.

13 MS. DAVIS: Judge, I'm sorry. Did you

14 receive those letters I E-mailed madame clerk this

05:06 15 morning?

16 THE COURT: No. No. I know I didn't read

17 anything.

18 MS. DAVIS: There are two letters that I

19 received.

05:06 20 THE CLERK: I'm sorry. They came through

21 and -- hold on.

22 MS. DAVIS: Mr. White, you did receive

23 those?

24 MR. WHITE: I did, and I reviewed both.

05:07 25 THE COURT: She's printing those. We'll

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1 two weeks of classes and then he said: Well, I want to

2 transfer to somewhere else. And then he just flat out

3 refused to go. And according to the defendant, he had no

4 need for it because he didn't commit the crime; so there

05:09 5 was no point in him getting any sort of domestic violence

6 treatment.

7 You can see from the probation officer's

8 notes from the various mentions throughout here there's

9 ongoing issues with he and his wife, Samantha. Multiple

05:09 10 times IDOC has tried to do something to intervene to try

11 to keep that toxic relationship from going forward.

12 I understand certainly the point Ms. Davis

13 made regarding the actual E-mail sent in November of 2016.

14 What exactly it said. But at the same time, it's not as

05:09 15 though his wife is somebody who is completely innocent in

16 drug use and they haven't been using together. That's, in

17 fact, one of the specific allegations it's referenced on

18 page two of the PSI that he did, in fact, admit to his

19 probation officer that both he and his wife were using

05:10 20 heroin and marijuana. He claimed at that time that he had

21 started using drugs again in June of 2016 and was up to

22 using heroin and marijuana almost daily.

23 One of the biggest problems that we have in

24 terms of substance abuse and trying to monitor it is that

05:10 25 we try to put people on UAs. They have to conduct tests.

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1 They have to periodically submit samples. And despite
 2 admissions that he's using during this time, he's testing
 3 clean. We found out in January of 2018 why that is, and
 4 that's because they finally busted him when they arrested
 05:10 5 him on an agent's warrant that he had strapped an
 6 apparatus himself to allow him to basically provide
 7 someone else's clean urine in a urinalysis test to make it
 8 look like his own.
 9 You can't monitor people when they refuse to
 05:11 10 be monitored. They move around to different houses;
 11 particularly going outside the district. When they refuse
 12 to comply with your orders to not associate with people
 13 with whom they have toxic relationships that are abusive
 14 and with whom they use.
 05:11 15 We can't keep the community safe. We can't
 16 keep you off of drugs. We can't protect the victim of
 17 your constant domestic violence. And when you refuse to
 18 actually comply with urinalysis testing, then we can't
 19 truly monitor what's going on in your probation and what
 05:11 20 needs to be done.
 21 State's view that this is a significant
 22 violation of probation. This is a significant failure of
 23 probation. This court warned him that this would be, in
 24 fact, his last chance on probation and the violations
 05:11 25 likely would result in imposition.
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1 He does still have his job with JRS Homes
 2 Solutions and CF Beef Packers and we do have -- one of
 3 those letters is from one of his bosses saying that he
 4 does still have his job.
 05:13 5 He was -- part of the 90 in 90 that he was
 6 doing, he was going to the 12-step meetings with his boss
 7 from JRS Homes until July of last year. That's when he
 8 got injured on the job and got the prescription medication
 9 and basically fell off the wagon, and he would really like
 05:13 10 to start going back to the meetings with his boss from JRS
 11 because he was doing well when he was doing that.
 12 No, he did not do his domestic violence
 13 classes. He did tell me he was struggling at the time
 14 financially. His P.O. and him had had conversation about
 05:14 15 the domestic violence classes. Then later on obviously
 16 his son was born, which then he was trying to work as well
 17 as raise his son at the time and unfortunately he put the
 18 domestic violence classes on the back burner.
 19 As the court may remember, my client's
 05:14 20 father is dying. I don't know if the court remembers me
 21 talking about that extensively in the motion for bond
 22 reduction. My client would like to be out and help him.
 23 We don't know how long he has to live. And so James wants
 24 to be able to get out on probation, be able to help his
 05:15 25 father with whatever he needs and just be there for the
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1 Given the significant violations here, we do
 2 believe that imposition of previously suspended sentence
 3 is appropriate. So I'd ask the court to impose at this
 4 time.
 05:12 5 THE COURT: Thank you, Mr. White.
 6 Ms. Davis.
 7 MS. DAVIS: Judge, first I'd like to let the
 8 court know that my client's family is here in the
 9 courtroom today. If you could raise your hand. They're
 05:12 10 here to support him. I also received --
 11 THE COURT: Thank you all for coming.
 12 MS. DAVIS: I also received another letter,
 13 if I could give that to the court.
 14 THE COURT: Thank you.
 05:12 15 MS. DAVIS: Judge, today we're asking that
 16 you go ahead and reinstate my client on probation. Just
 17 so the court is aware -- and the court is already aware,
 18 but I would like to point out some of the good things that
 19 my client did on probation.
 05:12 20 He did complete the rider aftercare program.
 21 Obviously he needs to continue on with some more
 22 treatment. He did complete a 90 in 90. He does want to
 23 do another 90 in 90. He never did start working the steps
 24 with his sponsor, but he wants to start doing that now and
 05:13 25 knows that is an integral part of his sobriety.
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1 remainder of the time he has left.
 2 My client is willing to go ahead and take
 3 the SAP and A B.C. classes in custody. He does have the
 4 money to pay for them.
 05:15 5 So what he's hoping that the court will
 6 place him on probation, have him take those classes and
 7 then have early release upon completion.
 8 My client is not proud of the fact that he
 9 relapsed. My client is not proud of the fact that he did
 05:15 10 not complete the classes that this court ordered him to
 11 do, but he believes in himself. His family needs him
 12 right now, and for those reasons, we're asking that you
 13 reinstate him on probation.
 14 Thank you.
 05:16 15 THE COURT: Mr. Whitmore, you have the right
 16 to address the court. Is there anything you would like to
 17 say?
 18 THE DEFENDANT: No, Your Honor.
 19 THE COURT: All right then. Mr. Whitmore,
 05:16 20 based upon your admissions to violating your probation as
 21 alleged in items 1, 4, 6 and 7, the court does find that
 22 you willfully violated your probation as charged in those
 23 four counts and I will dismiss the remaining charges
 24 pursuant to the plea bargain deal.
 05:16 25 You've done this before, Mr. Whitmore. So
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1 you understand how it works. I have to use my own best
 2 judgment and the appropriate discretion that's required by
 3 law to achieve those four main objectives in sentencing.
 4 Protection of society, deterrence, rehabilitation and
 05:17 5 punishment. And to do that, I look at all the facts and
 6 circumstances and review all the paperwork and sort out
 7 all the aggravating and mitigating factors and review your
 8 character, condition and attitude and listen to the
 9 arguments and recommendations of the attorneys. But in
 05:17 10 the end, I have to make up my own mind.
 11 Therefore, it is the judgment of this court
 12 that the following disposition will be imposed.
 13 First of all, the court will revoke the
 14 prior order suspending sentence and order of probation
 05:17 15 and impose the original underlying sentence of five years
 16 imprisonment with one year fixed followed by four years
 17 indeterminant. And note for the record that the defendant
 18 has accrued 406 days credit for time served to this date.
 19 Thus, the defendant has not -- well, he's already served
 05:18 20 more than the one year fixed time that was previously
 21 imposed.
 22 So what I'm going to do, Mr. Whitmore, I'm
 23 not going to suspend that sentence and I'm not going to
 24 retain any jurisdiction. I'm going to go ahead and impose
 05:18 25 the sentence. You will be immediately eligible for
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1 could to try to keep the defendant out of prison and on
 2 probation, but it requires that the defendant engage and
 3 participate in that process and he doesn't seem or hasn't
 4 seemed to be ready, willing and able to do so.
 05:20 5 So for all of those reasons, the court does
 6 believe that this disposition is reasonable, fair and just
 7 given all the unique facts and circumstances of this case
 8 and the objective of sentencing as required by law.
 9 Mr. Whitmore, I know you're not surprised by
 05:20 10 all of this, but if you're unhappy and disappointed, you
 11 still have the right to appeal to the Idaho Supreme Court.
 12 I want to remind you if you want to do that, a written
 13 notice of appeal would have to be filed in 42 days.
 14 That's six weeks.
 05:21 15 Otherwise, counsel should return their PSI
 16 materials and delete or destroy any electronic versions.
 17 Defendant will be remanded back to the
 18 custody of the Ada County Sheriff for delivery to the
 19 Idaho Department of Corrections for further execution of
 05:21 20 the sentence in this case.
 21 Anything more for Mr. Whitmore?
 22 MR. WHITE: Not from the State, Your Honor.
 23 Thank you.
 24 MS. DAVIS: Defense counsel has returned
 05:21 25 their copy of the PSI.
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1 parole.
 2 Now, based upon your history, whether you
 3 get parole immediately is not my choice, but up to the
 4 Department of Corrections.
 05:18 5 I want to note for the record that the
 6 defendant has already had two riders, multiple
 7 opportunities at probation and he's clearly not amenable
 8 to probation. He has a history of violent behavior and a
 9 severe substance abuse disorder and refuses to attend or
 05:18 10 to complete both substance abuse treatment classes as well
 11 as his batterer's course -- classes. At the time other
 12 violations were that he wasn't working, hadn't paid off
 13 his fines, fees and costs. Continued reports of domestic
 14 violence regarding his wife, Samantha, and they were using
 05:19 15 heroin together.
 16 Suggestions through the records that he's
 17 affiliated with the SVC gang, but he's had multiple DOR's
 18 in jail and prison and in rider. Previously absconding
 19 from parole and was imposed upon in his previous sentences
 05:19 20 for eluding domestic violence and possessing
 21 methamphetamine back in the early party of the century.
 22 All in all, the defendant does have serious
 23 substance abuse disorder issues. He has significant
 24 mental health issues. He has significant violent issues.
 05:20 25 This court feels like it really has done everything it
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1 THE COURT: Thank you.
 2 (That completes the proceedings for this
 3 date.)
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