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### State v. Fisher Appellant's Brief Dckt. 46195

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

JENNY C. SWINFORD  
Deputy State Appellate Public Defender  
I.S.B. #9263  
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,	)	
	)	NOS. 46195-2018, 46196-2018
Plaintiff-Respondent,	)	
	)	ADA COUNTY NOS. CR-FE-2013-14688,
v.	)	CR-FE-2014-4050
	)	
DAVID M. FISHER,	)	APPELLANT’S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

In 2013, David M. Fisher, a forty-six-year-old man with no prior mental illness, had a psychotic breakdown and became completely delusional. He was diagnosed with schizophrenia and bipolar disorder. Due to his delusions, he engaged in criminal behavior and ultimately pled guilty to three counts of intimidation of a witness. The district court imposed an aggregate sentence of fifteen years, with five years fixed, and eventually placed Mr. Fisher on probation. After about twenty-one months of success on probation, Mr. Fisher’s medication dosage was lowered, he stopped taking his medication, and he became delusional again. He unfortunately committed additional criminal offenses and admitted to violating his probation. The district court

revoked his probation. Mr. Fisher then filed an Idaho Criminal Rule 35 motion for leniency. The district court denied his motion. Mr. Fisher appeals.

### Statement of Facts and Course of Proceedings

In October 2013, the State charged Mr. Fisher with lewd conduct, sexual abuse of a child, intimidation of a witness, misdemeanor possession of a controlled substance, possession of drug paraphernalia, and violation of a no contact order (CR-FE-2013-14688 or “the 2013 case”). (R., pp.43–45.) In a separate case, in April 2014, the State charged Mr. Fisher with two counts of intimidation of a witness (CR-FE-2014-4050 or “the 2014 case”). (R., pp.367–68.) The district court consolidated the cases. (R., pp.114, 383.) From April 2014 to July 2014, the district court committed Mr. Fisher for mental health treatment due to his inability to assist in the proceedings. (R., pp.116–17, 121, 385–86, 387.)

In January 2015, Mr. Fisher pled guilty to intimidation of a witness in the 2013 case. (R., pp.147–48.) In accordance with the plea agreement, the district court dismissed the other charges. (R., p.168.) Mr. Fisher also pled guilty to the first count of intimidation of a witness and entered an *Alford*<sup>1</sup> plea to the second count of intimidation of a witness in the 2014 case. (R., pp.419–20.)

In March 2015, the district court sentenced Mr. Fisher to five years fixed for intimidation of a witness in the 2013 case. (R., pp.167–70.) In the 2014 case, the district court sentenced him to five years indeterminate for each count of intimidation of a witness, to run consecutively. (R., pp.428–31.) The 2013 and 2014 sentences would also run consecutively to each other. (R., pp.168, 429.) As such, the district court imposed an aggregate sentence of fifteen years, with five years fixed. (*See* R., pp.473–74 (amended judgment).)The district court also retained

jurisdiction in both cases. (R., pp.168, 429.) In October 2015, the district court suspended the sentences and placed Mr. Fisher on probation. (R., pp.215–20.)

In July 2017, the State filed a motion for probation violation. (R., pp.277–78, 291–92 (amended motion), 532–33, 543–44 (amended motion.) The State alleged Mr. Fisher violated his probation by committing two counts of misdemeanor unlawful entry and failing to maintain full-time employment. (R., pp.292, 544.) Mr. Fisher admitted to the probation violations. (Tr., p.11, L.23–p.13, L.8.) The district court revoked his probation and executed imposition of his aggregate sentence of fifteen years, with five years fixed. (Tr., p.35, Ls.16–20.) In both cases, Mr. Fisher timely appealed from the district court’s revocation orders. (R., pp.298–300, 302–03, 549–51, 553–54.)

Mr. Fisher then filed an Idaho Criminal Rule 35 (“Rule 35”) motion requesting that the district court reduce his aggregate sentence to fifteen years, with three years fixed. (R., pp.305–08, 310–28, 556–59, 561–79.) The district court denied the motion. (R., pp.331–33, 582–84.)

## ISSUES

- I. Did the district court abuse its discretion by revoking Mr. Fisher’s probation?
- II. Did the district court abuse its discretion by denying Mr. Fisher’s Rule 35 motion?

## ARGUMENT

### I.

#### The District Court Abused Its Discretion By Revoking Mr. Fisher’s Probation

The district court is empowered by statute to revoke a defendant’s probation under certain circumstances. I.C. §§ 19-2602, -2603, 20-222. The Court uses a two-step analysis to

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<sup>1</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

review a probation revocation proceeding. *State v. Sanchez*, 149 Idaho 102, 105 (2009). First, the Court determines “whether the defendant violated the terms of his probation.” *Id.* Second, “[i]f it is determined that the defendant has in fact violated the terms of his probation,” the Court examines “what should be the consequences of that violation.” *Id.* The determination of a probation violation and the determination of the consequences, if any, are separate analyses. *Id.*

Here, Mr. Fisher does not challenge his admissions to violating his probation. (Tr., p.11, L.23–p.13, L.8.) “When a probationer admits to a direct violation of her probation agreement, no further inquiry into the question is required.” *State v. Peterson*, 123 Idaho 49, 50 (Ct. App. 1992). Rather, Mr. Fisher submits the district court abused its discretion by revoking his probation.

“After a probation violation has been proven, the decision to revoke probation and pronounce sentence lies within the sound discretion of the trial court.” *State v. Roy*, 113 Idaho 388, 392 (Ct. App. 1987). “A judge cannot revoke probation arbitrarily,” however. *State v. Lee*, 116 Idaho 38, 40 (Ct. App. 1989). “The purpose of probation is to give the defendant an opportunity to be rehabilitated under proper control and supervision.” *State v. Mummert*, 98 Idaho 452, 454 (1977). “In determining whether to revoke probation a court must consider whether probation is meeting the objective of rehabilitation while also providing adequate protection for society.” *State v. Upton*, 127 Idaho 274, 275 (Ct. App. 1995). The court may consider the defendant’s conduct before and during probation. *Roy*, 113 Idaho at 392.

In this case, Mr. Fisher submits the district court abused its discretion by revoking his probation because his probation was achieving its rehabilitative objective. At the time of the initial offenses in 2013 and 2014, Mr. Fisher had a complete psychotic breakdown. (*See*

Presentence Investigation Report (“PSI”),<sup>2</sup> pp.8, 14–15; *see generally* PSI, pp.52–100 (psychiatric evaluation.) Mr. Fisher believed God, aliens, and angels were sending him mental “downloads.” (PSI, pp.8, 14–15, 97–98.) He also believed the aliens would bring about a utopian world, arrest the Illuminati (who controlled all major social and financial institutions, including the courts and jails), and clear his charges. (PSI, pp.8, 97–98.) Mr. Fisher was diagnosed with schizoaffective disorder with symptoms of schizophrenia (including delusions and hallucinations) and bipolar disorder (including mania and grandiosity). (PSI, p.96.) His psychiatric evaluator opined that Mr. Fisher’s mental illness caused the delusions, he was under the influence of the delusions when he committed the offenses, and that he would not have committed the offenses if he was not suffering from a major mental illness. (PSI, pp.97–99.) Because his criminal behavior was solely attributable to his psychotic break, Mr. Fisher was considered “a low risk for danger of violence to himself or others” if he maintained his mental stability. (PSI, p.99.) In fact, prior to his psychotic episode, Mr. Fisher led a normal life. He earned an Associate’s Degree through ITT and worked for Micron as an engineer for about twenty-five years. (PSI, pp.13–14.) He had a good relationship with his family and two children. (PSI, pp.10–11, 12.) His children were the most important aspect of his life, and he enjoyed spending time with them and playing sports. (PSI, pp.11, 17.) At sentencing, Mr. Fisher received letters of support from family and friends. (PSI, pp.44–46.) In sum, Mr. Fisher was a contributing, productive member of society but for his recent mental health crisis.

Once Mr. Fisher obtained the proper treatment and medication, he regained control of his mental health. From October 2015 to July 2017, Mr. Fisher succeeded on probation. (*See R.*, pp.224, 225, 226–27, 230, 231, 236, 237, 239, 249, 251, 257–59, 260, 261, 264, 268, 269.)

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<sup>2</sup> Citations to the PSI refer to the 895-page electronic document with the confidential exhibits.

The district court held regular review hearings, and Mr. Fisher continued to improve. The minutes from these hearings indicate Mr. Fisher obtained employment at a call center, repeatedly tested negative for drugs and alcohol, regularly took his medication, attended counseling, enrolled in online classes, and engaged in positive activities. (*See R.*, pp.224, 225, 226–27, 230, 231, 236, 237, 239, 249, 251, 257–59, 260, 261, 264, 268, 269.) In short, probation met the objectives of rehabilitating Mr. Fisher while also providing adequate protection for society.

After about twenty-one months of success on probation, Mr. Fisher unfortunately had another psychotic episode, leading to the probation violations at issue here. This mental health setback, however, was caused by Mr. Fisher’s physician lowering his medication dosage from a 10-milligram injectable to a 5-milligram pill. (PSI, p.429.) After this lower dosage, Mr. Fisher’s mental health symptoms returned, and he believed he did not need the medication. (PSI, p.429.) He started to have delusions again. (PSI, p.429; Tr., p.25, L.7–p.29, L.5.) Once Mr. Fisher was back in custody, he restarted his medication and drastically improved. (*See Tr.*, p.27, L.22–p.28, L.10.) He stated at the disposition hearing, “There are two different sides to me. There’s the side that is manic, I do have a manic bipolar side, and I have a normal side, and right now I feel very normal and ashamed and stupid for not being as faithful to my meds as I should have.” (Tr., p.32, Ls.13–17.) By the time of the disposition hearing, Mr. Fisher had been in custody for almost one year. (Tr., p.29, Ls.13–14.) Mr. Fisher’s mother set aside money to pay for the injectable medication, and a physician was “happy to resume care” for Mr. Fisher. (Tr., p.30, Ls.2–6; PSI, p.440.)

In light of this information of Mr. Fisher’s mental health, the district court abused its discretion by revoking Mr. Fisher’s probation. Mr. Fisher’s mental illness was the single cause of his probation violations, and he was otherwise successful on probation. The district court

therefore failed to exercise reason and should have reinstated Mr. Fisher's probation with additional conditions to ensure the proper medication and treatment for his mental illness. Mr. Fisher maintains that revocation was an abuse of discretion.

## II.

### The District Court Abused Its Discretion By Denying Mr. Fisher's Rule 35 Motion

"A Rule 35 motion for reduction of sentence is essentially a plea for leniency, addressed to the sound discretion of the court." *State v. Carter*, 157 Idaho 900, 903 (Ct. App. 2014). In reviewing the grant or denial of a Rule 35 motion, the Court must "consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence." *Id.* The Court "conduct[s] an independent review of the record, having regard for the nature of the offense, the character of the offender and the protection of the public interest." *State v. Burdett*, 134 Idaho 271, 276 (Ct. App. 2000). "Where an appeal is taken from an order refusing to reduce a sentence under Rule 35," the Court's scope of review "includes all information submitted at the original sentencing hearing and at the subsequent hearing held on the motion to reduce." *State v. Araiza*, 109 Idaho 188, 189 (Ct. App. 1985). "When presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." *State v. Huffman*, 144 Idaho 201, 203 (2007).

Here, Mr. Fisher presented new and additional information that demonstrates his sentence was excessive. He reiterated to the district court that he suffered "from an acute mental illness that requires intensive medication management." (R., pp.306, 557.) He argued:

The court is aware that when taking his medication the defendant functioned very well and was not a threat to society. While in prison, there will be no requirement that the defendant be medicated. Based on his prior history in the

Ada County Jail, there is no reason to expect he will misbehave while incarcerated thereby spurring IDOC to medicate him for behavior management. If the defendant spends another two years incarcerated without required medication, society is not being protected. His symptoms will arguably worsen as his release approaches.

(R., pp.306–07, 557–58.) In addition, Mr. Fisher’s mother wrote a letter to the district court describing Mr. Fisher’s past success on probation. (R., pp.310, 561.) She stated that Mr. Fisher spent time fishing with his children and watching football with his parents. (R., pp.310, 561.) She further explained that he was careful with his money and sold his car to help with expenses. (R., pp.310, 561.) She believed that Mr. Fisher stopped taking the pill medication because of the side effects. (R., pp.310, 561.) She hoped that, because a physician would give Mr. Fisher the injectable medication again, that he would be reinstated on probation. (R., pp.310, 561.) Additionally, a friend wrote a letter of support stating that Mr. Fisher was a kind, gentle, positive, and loving person. (R., pp.311, 562.) She stated that his children meant “everything to him.” (R., pp.311, 562.) She also recognized that Mr. Fisher’s bipolar diagnosis was “a horrible struggle for him.” (R., pp.311, 562.) Along with these letters of support, Mr. Fisher included his C-Notes from Ada County Jail and while on probation. These notes showed that Mr. Fisher generally did very well on probation until he stopped taking his medication. (R., pp.314–23; 565–74.) Finally, Mr. Fisher wrote a letter to the district court explained that he “fully” understood that he had to take his medication. (R., pp.327, 578.) He explained that he was remorseful for his actions. (R., pp.327, 578.) Prior to his mental illness, he volunteered and spent time with his family. (R., pp.327–28, 578–79.) If reinstated on probation, he would be committed to taking his medication and relying on his mother for support. (R., pp.328, 579.) In light of this new and additional information, Mr. Fisher argues the district court failed to exercise reason and thus abused its discretion by denying his Rule 35 motion. The district court should have reduced

Mr. Fisher's aggregate sentence from fifteen years, with five years fixed, to fifteen years, with three years fixed. (R., pp.305, 556.)

CONCLUSION

Mr. Fisher respectfully requests that this Court vacate the district court's orders revoking his probation and remand his cases for a new disposition hearing. Alternatively, he respectfully requests that this Court reduce his sentence as it deems appropriate or vacate the district court's orders denying his Rule 35 motions and remand his cases for further proceedings.

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

/s/ Jenny C. Swinford  
JENNY C. SWINFORD  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26<sup>th</sup> day of November, 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

JCS/eas