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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	Nos. 46195 & 46196
Plaintiff-Respondent,	)	
	)	Ada County Case Nos.
v.	)	CR-FE-2013-14688 &
	)	CR-FE-2014-4050
DAVID M. FISHER,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Fisher failed to establish that the district court abused its discretion by revoking his probation and denying his Rule 35 motions to reduce the sentences imposed upon his guilty pleas to three counts of intimidating a witness?

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

In 2015, Fisher pled guilty to one count of intimidating a witness in case CR-FE-2013-14688 (“the 2013 case”), and two counts of intimidating a witness in case CR-FE-2014-4050 (“the 2014 case”), and the district court imposed a sentence of five years fixed in the 2013 case, and sentences of five years indeterminate for each count in the 2014 case, ran all three sentences

consecutively, and retained jurisdiction in both cases. (R., pp.167-71, 428-32.<sup>1</sup>) After a period of retained jurisdiction, the district court suspended the sentences and placed Fisher on probation in both cases for an aggregate period of 15 years. (R., pp.215-222.)

In July 2017, the state filed a motions for probation violation alleging that Fisher had violated the conditions of his probation by committing the new crimes of burglary and grand theft, failing to maintain full-time employment, and failing to pay his court ordered financial obligations. (R., pp.277-79, 532-33.) Fisher admitted to having violated the conditions of probation by committing two counts of misdemeanor unlawful entry and by failing to maintain employment. (Tr., p.11, L.23 – p.12, L.25.) The district court revoked Fisher’s probation in both cases and executed all three sentences. (R., pp.298-301, 549-52.) Fisher timely appealed. (R., pp.302-04, 553-55.) Fisher also filed Rule 35 motions for reduction of his sentences, which the district court denied. (R., pp.305-09, 556-60; 331-34, 582-85.)

Fisher asserts that the district court abused its discretion by revoking probation in both cases, contending, “[His] mental illness was the single cause of his probation violations, and he was otherwise successful on probation. (Appellant’s brief, pp.3-7.) Fisher 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

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<sup>1</sup> Citations to the page numbers of the Clerk’s Record correspond with the page numbers of the electronic file “Fisher 46195 & 46196 cr.pdf”

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)).

Fisher is not an appropriate candidate for probation, as demonstrated by his unwillingness to abide by the terms of community supervision and the risk he presents to the community. The state acknowledges Fisher's mental health issues; however, his failure to continue taking medication for his mental health issues is itself a violation of the conditions of his probation and places the community at risk. (See R., pp.217, 332-33, 583-84; PSI, p.429.<sup>2</sup>) In his own version of events for his probation violation, Fisher admitted, "I decided I didn't need meds," and after discontinuing his use of medication he entered the house of his ex-wife and took her motorcycles. (PSI, p.429.) Fisher was also fired from his job after he "got into an argument w/my boss." (PSI, p.429.) In the underlying cases, Fisher threatened his ex-wife, his daughter, the victim in a lewd conduct case that was eventually dismissed, and the detective working on the case. (PSI, p.3.) Fisher minimized his conduct in both his underlying case and in his probation violation proceedings, stating, "The whole thing was a mental health glitch," and "I never would have done either of tase [these] things if I had stayed on my meds." (PSI, pp.17, 429.) Clearly, probation was not "achieving its rehabilitative objective," as Fisher admitted that he purposely stopped taking his medication, despite the fact that doing so was a condition of his probation (R., p.217), and thereby put the community at risk with his dangerous actions (Appellant's brief, p.4; PSI, p.429).

At the disposition hearing for Fisher’s probation violations, the district court articulated its reasons for revoking Fisher’s probation and executing the underlying sentence. (5/21/18 Tr., p.33, L.11 – p.37, L.2.) The state submits that Fisher has failed to establish an abuse of discretion for reasons more fully set forth in the attached excerpt of the disposition hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Fisher next asserts that the district court abused its discretion by denying his motions for a reduction of his sentences in light of letters of support from his mother and a friend, and his “letter to the district court explained[ing] that he ‘fully’ understood that he had to take his medication.” (Appellant’s brief, pp.7-9.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Fisher 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.” Id. Fisher has failed to satisfy his burden.

Fisher provided no new information in support of his motions for reduction of his sentences. Information with respect to Fisher’s friend and family support and his plan to maintain medication for his mental health was before the district court both at sentencing and at the disposition hearing. (PSI, pp.17, 43-46, 429, 434.) In denying Fisher’s motions for leniency, the district court concluded:

This Court did not reinstate Defendant’s sentence simply for going off his medications. Rather, Defendant made the decision to go off his medication – despite knowing the negative effects it could have – and committed very serious crimes, besides violating several critical conditions of probation. The risk to society is simply too great should Defendant make the same mistake again. In

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<sup>2</sup> PSI page numbers correspond with the page numbers of the electronic file “Fisher 46195 & 46196 psi.pdf.”

initially crafting Defendant's sentence, the Court carefully considered and weighed the applicable sentencing factors previously discussed. If anything, Defendant's gross deviation from his conditions of probation further convince this Court that the sentence imposed then remains appropriate now.

(R., pp.333, 584.) Because Fisher presented no new evidence in support of his motions for reduction of sentence, he failed to demonstrate in the motions that his sentences are excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court's order denying his motions.

#### Conclusion

The state respectfully requests this Court to affirm the district court's orders revoking Fisher's probation and denying his Rule 35 motions for reduction of sentence.

DATED this 23rd day of January, 2019.

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

ALICIA HYMAS  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd 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:

JENNY C. SWINFORD  
DEPUTY STATE APPELLATE PUBLIC DEFENDER  
[documents@sapd.state.id.us](mailto:documents@sapd.state.id.us).

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

## APPENDIX A

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1 graduation is coming up on the 2nd of June.  
2 But just so you know, your Honor, I am not  
3 any of those things that Mr. Dinger accused me of. I do  
4 have a bipolar/manic issue, and I can -- it's -- this is  
5 just -- it snuck up on me. I thought I was feeling  
6 good. I don't know if you notice but I rock a lot, my  
7 lips are dry when I'm on these meds, but it's -- it's  
8 nothing that I can't learn to live with, especially  
9 after screwing up like this as bad as I did.  
10 THE COURT: Thank you.  
11 Mr. Fisher, on your admissions, I do find  
12 that you violated your probation and that the violation  
13 was willful. In an exercise of my discretion in  
14 disposition, I've considered the Toohill factors,  
15 including the nature of the offense and the character of  
16 the offender and the information in mitigation and  
17 aggravation. I've also considered the objectives of  
18 sentencing and disposition, to include, first and  
19 foremost, protection of the public, the need for  
20 deterrence, potential for rehabilitation and the need  
21 for punishment or retribution.  
22 I've reviewed and re-reviewed and  
23 re-re-re-reviewed, the PSI materials, psychological  
24 evaluations, considered the arguments and  
25 recommendations of counsel, and the statement that you

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1 someone like Mr. Fisher is the Department of  
2 Corrections. But it is what it is.  
3 The truth and reality is that Mr. Fisher,  
4 because of his mental illness, is dangerous. I gave  
5 this an opportunity to work, and it didn't, and I'm  
6 grateful that nobody was ultimately physically harmed in  
7 this. I'm sure his ex-wife was quite scared, and I  
8 understand that.  
9 At this point I'm going to revoke your  
10 probation and I'm going to impose the underlying  
11 sentences. I recognize that longterm that this may not  
12 be the most longterm save thing, in terms of when you  
13 get out I don't know that you're going to be in a better  
14 position than you would be now, but I just can't take  
15 that risk again.  
16 So I am going to impose the underlying  
17 sentences, I'm going to remand to you the custody of the  
18 sheriff of the county to be delivered to the proper  
19 agent of the State Board of Corrections in execution of  
20 the sentence. Credit will be given for the days served  
21 prior to entry of judgment, which is a lot of credit,  
22 it's not five years worth, but it's a lot of credit. I  
23 do encourage Mr. Fisher to take your meds and to work  
24 hard to be able to be safe and to parole out and then  
25 keep taking your meds.

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1 have given today.  
2 This is a difficult case, obviously.  
3 Mr. Fisher, when he does not take his medications, is a  
4 dangerous person. He sexually assaulted a young girl  
5 and then he harassed and terrorized others, including a  
6 detective, that led to these convictions. He, when  
7 medicated, seems to be fairly harmless.  
8 When this case first came around, my  
9 inclination was to impose the sentences, but because of  
10 this dichotomy after it seemed like a year and a half in  
11 the hospital and in jail and on the Rider and off the  
12 Rider, it seemed like I could give Mr. Fisher a chance  
13 to keep the demons at bay by taking his meds and by  
14 being ever vigilant about starting down that slippery  
15 slope of allowing himself to get in the position where  
16 he can't make good decisions, because when that happens,  
17 he becomes a danger again, as is evidenced by what he  
18 did in this case this time when he stopped taking his  
19 meds.  
20 When I last saw him, he seemed to be doing  
21 well, and then all of a sudden this. So there's some  
22 degree of unpredictability involved as well. It's  
23 regretful there's not a secure psychiatric facility that  
24 could be a place to treat someone like Mr. Fisher  
25 longterm, and it's regretful that our last refuge for

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1 You have the right to appeal. If you cannot  
2 afford an attorney, you can request to have one  
3 appointed at public expense. Any appeal must be filed  
4 within 42 days the date of this order revoking your  
5 probation and imposing the underlying sentence.  
6 MR. LOSCHI: What was the overall underlying  
7 sentence?  
8 THE COURT: When you combine it together,  
9 it's a five plus ten, but because those things run  
10 together, it's probably less than that.  
11 MR. LOSCHI: I'd always understood the  
12 sentence to be five plus ten, but when you arraigned him  
13 and I went back and looked at the paperwork, the  
14 paperwork might say ten plus five so...  
15 THE COURT: I think it's five plus ten.  
16 MR. LOSCHI: You may be right. I'll look  
17 back at it because I did think if it was ten plus five,  
18 it was incorrect.  
19 THE COURT: I looked at the judgments of  
20 conviction this weekend as I was preparing, and my math  
21 was five plus ten. And, again, because he gets credit  
22 on each case while he was serving, the five is five, but  
23 those are going to bleed down.  
24 Mr. Fisher, I do wish you good luck. I think  
25 when you're medicated, you're a nice guy. I just,



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1 unfortunately, can't take the risk, and I wish you the  
2 best of luck.  
3 (Proceedings concluded.)  
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1 REPORTER'S CERTIFICATE  
2 STATE OF IDAHO )  
3 COUNTY OF ADA )  
4  
5 I, CHRISTIE VALCICH, Certified Court Reporter  
6 of the County of Ada, State of Idaho, hereby certify:  
7 That I am the reporter who transcribed the  
8 proceedings had in the above-entitled action in machine  
9 shorthand and thereafter the same was reduced into  
10 typewriting under my direct supervision; and that the  
11 foregoing transcript contains a full, true, and accurate  
12 record of the proceedings had in the above and foregoing  
13 cause, which was heard at Boise, Idaho.  
14 IN WITNESS WHEREOF, I have hereunto set my  
15 hand this 12th day of September, 2018.  
16  
17 *christie valcich*  
18  
19 \_\_\_\_\_  
20 CHRISTIE VALCICH, CSR-RPR  
21 Ada County Courthouse  
22 200 West Front Street  
23 Boise, Idaho  
24  
25