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

SALLY J. COOLEY
Deputy State Appellate Public Defender
I.S.B. #7353
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,)	NOS. 46283-2018, 46284-2018,
)	& 46285-2018
)	
v.)	TWIN FALLS COUNTY
)	NOS. CR-2013-11394, CR42-18-6140,
)	& CR42-18-2230
)	
ERIC RODRIGUEZ-GONZALEZ,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Eric Rodriguez-Gonzalez pled guilty to possession of a controlled substance, Oxycodone. He received a unified sentence of five years, with two years fixed, and the court retained jurisdiction and then placed him on probation. He violated the terms of his probation by (and had his probation revoked for) committing new crimes in two separate cases: possession of a controlled substance, heroin, and criminal possession of a financial transaction card; and grand theft by acquiring lost property and criminal possession of a financial transaction card. On the new crimes the district court sentenced Mr. Rodriguez-

Gonzalez to an aggregate unified sentence of seven years, with three years fixed, to be served concurrently to his 2013 probation violation case.

On appeal, Mr. Rodriguez-Gonzalez asserts that the district court abused its discretion by revoking his probation on the oxycodone case and by imposing excessive sentences on the new crimes.

Statement of the Facts & Course of Proceedings

Supreme Court Docket No. 46283-2018 (Twin Falls County district court case number CR-2013-11394), (*hereinafter*, the Oxycodone case), and Supreme Court Docket No. 46284-2018 (Twin Falls County district court case number CR42-18-6140), (*hereinafter*, the lost card case)), as well as Supreme Court Docket No. 46285 (Twin Falls County district court case number CR42-18-2230 (*hereinafter*, the heroin residue case)), have been consolidated for appellate purposes. (R., p.231.)

On October 12, 2013, the car Eric Rodriguez-Gonzalez was riding in was stopped by law enforcement. (PSI, p.4.) The officer believed Mr. Rodriguez-Gonzalez smelled like marijuana and searched him. (PSI, p.4.) The officer located a substance that tested presumptively positive for marijuana, a pipe with residue, and a baggie containing two pills identified as Oxycodone and Hydrocodone. (PSI, p.4.) Based on these facts, an Information alleged that, on October 12, 2013, Eric Rodriguez-Gonzalez possessed Oxycodone. (R., pp.41-43.)

Mr. Rodriguez-Gonzalez pled guilty to possession of a controlled substance, and was sentenced to five years, with two years fixed, but the district court retained jurisdiction for up to 365 days. (R., pp.119, 122-129.) After a period of retained jurisdiction, the district court placed Mr. Rodriguez-Gonzalez on probation for three years or until his financial obligations were paid, whichever is longer. (R., pp.135-141.)

In 2016, a report of probation violation was filed which alleged that Mr. Rodriguez-Gonzalez violated the terms and conditions of his probation by: using controlled substances, failing to submit to UA testing, failing to report to his probation officer on several dates, being discharged from aftercare for failing to attend, failing to complete a new GAIN assessment, and failing to enroll in IOP treatment. (R., pp.145-172.)

After, Mr. Rodriguez-Gonzalez admitted to violating the terms and conditions of his probation, his probation was revoked and reimposed for a period of three years, or until all court costs, fines, and restitution are paid, whichever is longer. (R., pp.175-183.)

In 2018, the State filed another report of probation violation. (R., pp.184-199.) The report alleged that Mr. Rodriguez-Gonzalez violated the terms and conditions of his probation by: failing to prove that he had completed his community service, by failing to submit to UA testing two times per month, by failing to make payments toward his fines, fees, and restitution, by committing new crimes—possession of a controlled substance and criminal possession of a financial transaction card in Twin Falls County case number CR42-18-2230 (the heroin residue case). (R., pp.184-199.)

Mr. Rodriguez-Gonzalez admitted to violating some of the terms and conditions of his probation. (4/10/18 Tr., p.6, Ls.3-18.) Mr. Rodriguez-Gonzalez was referred to drug court and deemed eligible. (R., pp.205-212, 216-217.) At Mr. Rodriguez-Gonzalez's disposition hearing, the district court revoked his probation; however, the district court did *not* suspend Mr. Rodriguez-Gonzalez's sentence and/or order him to complete drug court. (8/14/18 Tr., p.20, Ls.17-22; p.21, L.25 – p.22, L.2; R., pp.219-221.) Mr. Rodriguez-Gonzalez filed a timely notice of appeal. (R., pp.223-227, 232-237.)

In the heroin residue case, law enforcement was notified that a debit card was taken from the wallet located in a jacket pocket while the owner was working. (R., p.315.) The owner said someone had tried to use the card at a local grocery store. (R., p.315.) The owner identified Mr. Rodriguez-Gonzalez from a surveillance video. (R., p.315.) Records indicate that Mr. Rodriguez-Gonzalez attempted to use the card at several businesses. (R., p.256.) Mr. Rodriguez-Gonzalez was questioned about the use of the card, and then told he was under arrest. (R., p.315.) In a search incident to arrest, burnt residue testing presumptively positive for heroin was located in a plastic tube found in Mr. Rodriguez-Gonzalez's coat pocket. (R., p.315.)

Based on these facts, Mr. Rodriguez-Gonzalez was charged by Information with one count of possession of a controlled substance and one count of criminal possession of a financial transaction card. (R., pp.329-331.)

Mr. Rodriguez-Gonzalez pled guilty to possessing a controlled substance and criminal possession of a financial transaction card. (4/9/18 Tr., p.11, L.17 – p.12, L.17; R., pp.333-342.) Mr. Rodriguez-Gonzalez sought admission to drug court, and although his application was initially denied due to new felony charges, he was subsequently deemed eligible. (R., pp.350, 353-354.)

At sentencing, Mr. Rodriguez-Gonzalez's counsel asked the district court to sentence him to drug court, with an underlying sentence of seven years, with three years fixed, for possessing heroin and five years, with three years fixed, for possessing the financial transaction card. (8/14/18 Tr., p.9, Ls.8-11; p.15, Ls.4-14.) Mr. Rodriguez-Gonzalez was sentenced to seven years, with three years fixed, for possession of heroin and five years, with three years fixed, for criminally possessing a financial transaction card. (8/14/18 Tr., p.20, L.23 – p.21, L.4; R., pp.359-363.) The sentences were concurrent with each other, and with the probation

violation in the Oxycodone case.¹ (R., p.359.) Mr. Rodriguez-Gonzalez filed a timely notice of appeal. (R., pp.364-367, 371-376.)

In the lost card case, Mr. Rodriguez-Gonzalez was video-recorded finding a debit card in an ATM machine and leaving with the card. (R., p.256.) Records indicate that Mr. Rodriguez-Gonzalez attempted to use the card at several businesses. (R., p.256.) Mr. Rodriguez-Gonzalez had also used a financial transaction card belonging to a business. (R., p.257.) The business owner was contacted, and she told law enforcement that she had never given Mr. Rodriguez-Gonzalez permission to use the card. (R., p.257.)

Based on these facts, Mr. Rodriguez-Gonzalez was charged by Information with one count of grand theft of lost property, one count of grand theft by wrongfully obtaining a financial transaction card, and two counts of criminal possession of a financial transaction card. (R., pp.265-268.)

Pursuant to a plea agreement, Mr. Rodriguez-Gonzalez pled guilty to possessing a lost financial transaction card and wrongfully obtaining a financial transaction card. (R., pp.270-280.) As part of the plea agreement, the State agreed to recommend a sentence of seven years, with three years fixed, to be served concurrently with the heroin residue case.² (R., p.280.)

¹ Although the Judgment of Conviction reflects that Mr. Rodriguez-Gonzalez's sentence in the heroin residue case was consecutive to the probation violation in the Oxycodone case, the district court orally pronounced Mr. Rodriguez-Gonzalez's sentences as all being concurrent to each other and to his 2013 case. (8/14/18 Tr., p.22, Ls.3-8.) To the extent the judgments in any of his cases indicate otherwise, the oral pronouncement controls and Mr. Rodriguez-Gonzalez reserves the right to seek a clerical correction pursuant to I.C.R. 36. *See State v. Wallace*, 116 Idaho 930, 932 (Ct. App. 1989) (holding that should an order of commitment not accurately represent the court's oral sentence pronouncement, it is proper to correct the error under Rule 36 to make the written expression consistent with that judgment).

² The plea agreement also required Mr. Rodriguez-Gonzalez to waive his right to appeal his sentence; however, the district court did not go over this provision during its plea colloquy with Mr. Rodriguez-Gonzalez. (R., p.273.) Further, Mr. Rodriguez-Gonzalez did not sign the Offer--Plea Agreement, which had expired before his defense counsel signed it. (R., p.280.)

At sentencing, Mr. Rodriguez-Gonzalez's counsel asked the court to sentence him to drug court, with an underlying sentence of seven years, with three years fixed, for grand theft by acquiring the lost card and five years, with three years fixed, for criminally possessing the financial transaction card. (8/14/18 Tr., p.8, L.23 – p.9, L.7; p.15, Ls.4-14.) In his allocution, Mr. Rodriguez-Gonzalez asked the district court to sentence him to drug court. (8/14/18 Tr., p.18, Ls.11-25.) Mr. Rodriguez-Gonzalez was sentenced to seven years, with three years fixed, for grand theft by acquiring lost property and five years, with three years fixed, for criminally possessing a financial transaction card. (8/14/18 Tr., p.21, Ls.10-21; R., pp.288-292.) All of the sentences were ordered to be served concurrently with the sentences in his heroin residue case and his oxycodone probation violation case. (8/14/18 Tr., p.22, Ls.3-8; Aug., pp.9-13.) Mr. Rodriguez-Gonzalez filed a timely notice of appeal. (R., pp.293-296, 300-305.)

On appeal, Mr. Rodriguez-Gonzalez contends that the district court abused its discretion by revoking his probation in the oxycodone case instead of suspending the sentence and ordering him to complete drug court. Mr. Rodriguez-Gonzalez contends that the district court abused its discretion in sentencing him excessively in the lost card case and the heroin residue case.

ISSUES

- I. Did the district court abuse its discretion when it sentenced Mr. Rodriguez-Gonzalez to an aggregate unified sentence of seven years, with three years fixed, following his plea of guilty to one counts of grand theft by possession of stolen property, two count of criminal possession of a financial transaction card, and one count of possession of heroin?
- II. Did the district court abuse its discretion when it revoked Mr. Rodriguez-Gonzalez's probation?

ARGUMENT

I.

The District Court Abused Its Discretion When It Sentenced Mr. Rodriguez-Gonzalez To An Aggregate Unified Sentence Of Seven Years, With Three Years Fixed, Following His Plea Of Guilty To One Count Of Grand Theft By Possession Of Stolen Property, Two Counts Of Criminal Possession Of A Financial Transaction Card, And One Count Of Possession Of Heroin

Mr. Rodriguez-Gonzalez asserts that, given any view of the facts, his aggregate unified sentence of seven years, with three years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, “[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.” *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Rodriguez-Gonzalez does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Rodriguez-Gonzalez must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

In light of Mr. Rodriguez-Gonzalez’s rehabilitative potential, the district court abused its discretion in sentencing him excessively. The district court failed to consider the fact that Mr. Rodriguez-Gonzalez was aware of his opiate addiction, was interested in seeking treatment

for his addiction and counseling others to do the same, and that with programming, Mr. Rodriguez-Gonzalez could likely be successful in the community. (8/14/18 Tr., p.17, L.13 – p.18, L.25.) Notably, his PSI investigator recommended a retained jurisdiction for Mr. Rodriguez-Gonzalez. (PSI, p.14.) Further, Mr. Rodriguez-Gonzalez had been accepted into drug court. (R., pp.353-354.)

The Idaho Supreme Court has held that substance abuse should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982). In *Nice*, the Idaho Supreme Court reduced a sentence based on Nice's lack of prior record and the fact that "the trial court did not give proper consideration of the defendant's alcoholic problem, the part it played in causing the defendant to commit the crime and the suggested alternatives for treating the problem." *Id.* at 91. Additionally, the Idaho Supreme Court has ruled that ingestion of drugs and alcohol resulting in impaired capacity to appreciate criminality of conduct, could be a mitigating circumstance. *State v. Osborn*, 102 Idaho 405, 414 (1981). Mr. Rodriguez-Gonzalez realizes that he has an opiate addiction. (8/14/18 Tr., p.17, L.13.) However, Mr. Rodriguez-Gonzalez wants to stop using and have a better life, and his goal is to stay sober. (PSI, p.11.)

Mr. Rodriguez-Gonzalez has a supportive family to help him in his efforts to maintain his sobriety. His parents are a good source of support for him. (PSI, pp.6-7.) *See State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who had the support of his family and employer in his rehabilitation efforts).

Further, Mr. Rodriguez-Gonzalez expressed remorse for his acts. At sentencing, Mr. Rodriguez-Gonzalez wanted the court to know that he realized that he had an opiate addiction and that he needs help to remain sober. (8/14/18 Tr., p.17, L.13 – p.18, L.25.) Idaho

recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *State v. Shideler*, 103 Idaho 593, 595 (1982); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991). For example, in *Alberts*, the Idaho Court of Appeals noted that some leniency is required when the defendant has expressed “remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character.” *Alberts*, 121 Idaho at 209. In *Shideler*, Idaho Supreme Court ruled that the prospect of Shideler’s recovery from his poor mental and physical health, which included mood swings, violent outbursts, and drug abuse, coupled with his remorse for his actions, was so compelling that it outweighed the gravity of the crimes of armed robbery, assault with a deadly weapon, and possession of a firearm during the commission of a crime. *Shideler*, 103 Idaho at 594-95. Therefore, the court reduced Shideler’s sentence from an indeterminate term not to exceed twenty years to an indeterminate term not to exceed twelve years. *Id.* at 593. Mr. Rodriguez-Gonzalez’s circumstances are somewhat similar to the facts of both *Alberts* and *Shideler* in that he recognizes that he has an addiction to opiates, he wants treatment for his opiate abuse, and he showed considerable remorse for his actions.

Based upon the above mitigating factors, Mr. Rodriguez-Gonzalez asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his supportive family, substance abuse, and remorse, it would have imposed a less severe sentence by suspending his sentences and ordering him to complete drug court as a condition of his probation.

II.

The District Court Abused Its Discretion When It Revoked Mr. Rodriguez-Gonzalez's Probation

Mr. Rodriguez-Gonzalez asserts that the district court abused its discretion when it revoked his probation and executed his original sentence of five years, with two years fixed. He asserts that his probation violations did not justify revoking probation, especially in light of the goals of rehabilitation and the fact that the protection of society could be best served by his continued supervision under the probation department.

There are generally two questions that must be determined by the district court in addressing allegations of probation violations: first, the court must determine whether the defendant actually violated the terms and conditions of his probation; and second, if a violation of probation has been found, the trial court must then decide the appropriate remedy for the violation. *State v. Sanchez*, 149 Idaho 102, 105 (2009). “The determination of whether a probation violation has been established is separate from the decision of what consequence, if any, to impose for the violation.” *Id.* (quoting *State v. Thompson*, 140 Idaho 796, 799 (2004)). Once a probation violation has been found, the district court must determine whether it is of such seriousness as to warrant revoking probation. *State v. Chavez*, 134 Idaho 308, 312 (Ct. App. 2000). However, probation may not be revoked arbitrarily. *State v. Adams*, 115 Idaho 1053, 1055 (Ct. App. 1989). The district court must decide whether probation is achieving the goal of rehabilitation and whether probation is consistent with the protection of society. *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001). If a knowing and intentional probation violation has been proved, a district court’s decision to revoke probation will be reviewed for an abuse of discretion. I.C. § 20-222; *Leach*, 135 Idaho at 529.

In reviewing a trial court's decision for an abuse of discretion, the relevant inquiry regards four factors:

Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg v. My Fun Life, 163 Idaho 856, 863 (2018).

Only if the trial court determines that alternatives to imprisonment are not adequate in a particular situation to meet the state's legitimate interest in punishment, deterrence, or the protection of society, may the court imprison a probationer who has made sufficient, genuine efforts to obey the terms of the probation order. *State v. Lafferty*, 125 Idaho 378, 382 (Ct. App. 1994). Mr. Rodriguez-Gonzalez asserts that the district court abused its discretion by failing to reach its decision to revoke his probation by the exercise of reason.

Here, Mr. Rodriguez-Gonzalez showed good insight into his addiction issues and his criminal thinking—he wants to get better. Mr. Rodriguez-Gonzalez can be rehabilitated and be a productive member of society. As Mr. Rodriguez-Gonzalez told the court:

I've been incarcerated now for approximately six months, and I've utilized this time to think and ponder what's important to me in life as well as reflect on my past.

Like I stated in the PSI, I've made many mistakes, bad decisions, as failures in my past. I've stolen, cheated, manipulated, and lied, refusing to realize what I've done. And I hold myself accountable for the decisions I've made and the pain and heartache I've caused.

These terrible choices and decisions could have been avoided. I am a drug addict. Many, if not all, of my bad decisions were while under the influence of drugs. These crimes I've committed go against my morals and values; my sober, clear-minded, nondrug-induced morals and values. I normally hold myself to a higher standard and feel ashamed, remorseful, and regretful of the choices I have made while under the influence of opiates.

When I'm using drugs, I am no longer in control of my life. The addiction takes over. Although I regret throwing my responsibilities out of the window, going against my own morals by stealing and violating my values by harming others, I am guilty all the same, which is why I'm here today standing in this courtroom with my future balancing on the scales.

I may not be able to change what I've done in the past, but I can make impactful change, and I can make amends and repair damage I've caused and pay back what I've stolen. I have this desire, this passion to not only pay back the community by being a sober citizen, but also telling my story and helping those who are experiencing what I experienced in my past. I aspire to become the best version of myself and how I've changed.

(8/14/18 Tr., p.17, L.3 – p.18, L.10.)

Mr. Rodriguez-Gonzalez asserts that the district court abused its discretion in finding that his probation violations justified revocation in light of his rehabilitative potential and his insight into the issues that initially brought him before the district court. The district court failed to reach its decision not to place Mr. Rodriguez-Gonzalez on probation and order him to complete drug court by an exercise of reason where he had already been accepted into drug court, and it was clearly his addiction to opiates causing him to engage criminal conduct. (8/14/18 Tr., p.17, L.12 – p.18, L.25; R., pp.353-354.)

Mr. Rodriguez-Gonzalez is addicted to opiates. (8/14/18 Tr., p.17, L.13.) However, he realizes his addiction and the problems it has caused him. (8/14/18 Tr., p.17, Ls.13-21.) He is ready to be sober and to be a good citizen. (8/14/18 Tr., p.18, Ls.2-21.)

In light of all of the mitigating evidence that was presented to the district court that demonstrates Mr. Rodriguez-Gonzalez's significant rehabilitative potential, the district court abused its discretion when revoked his probation.

CONCLUSION

Mr. Rodriguez-Gonzalez respectfully requests that this Court reduce his sentences as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new probation violation hearing.

DATED this 26th day of March, 2019.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 2019, 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

SJC/eas