

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

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

KENNETH K. JORGENSEN  
Deputy Attorney General  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534  
Email: ecf@ag.idaho.gov

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 46411-2018
Plaintiff-Respondent,	)	
	)	Ada County Case No. CR01-2017-1995
v.	)	
	)	
GARO SHAHE ASIAN,	)	RESPONDENT’S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

Has Garo Shahe Asian failed to show that the district court abused its sentencing discretion when it relinquished jurisdiction?

ARGUMENT

Asian Has Failed Show That The District Court Abused Its Sentencing Discretion

A. Introduction

The state charged Asian with possession of a controlled substance and possession of drug paraphernalia, with a persistent violator enhancement. (R., pp. 41-42, 57-58, 76-77.) A jury found him guilty of the charged crimes and the court found him guilty of the enhancement after Asian requested a court trial. (R., pp. 134-35, 163-64.) The district court imposed a sentence of 10 years

with three and one-half years determinate and retained jurisdiction and, on the misdemeanor, imposed a concurrent sentence of 180 days. (R., pp. 204-07.) The district court subsequently relinquished jurisdiction and reduced the sentence to 10 years with two years determinate and ordered that the sentence be served concurrently with sentences in two other cases. (R., pp. 213-15.) Asian filed a timely notice of appeal. (R., pp. 217-18.)

On appeal Asian argues the district court abused its discretion because it believed Asian was not put on the correct program and did not believe the IDOC report adequate, and “held this against Mr. Asian.” (Appellant’s brief, pp. 5-7.)

B. Standard Of Review

“This Court reviews the district court’s decision to relinquish jurisdiction for an abuse of discretion.” State v. Le Veque, 164 Idaho 110, \_\_\_, 426 P.3d 461, 466 (2018). This includes an analysis of whether the district 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.” Id. at \_\_\_, 426 P.3d at 464.

C. Asian Has Shown No Abuse Of The District Court’s Discretion

A court's decision to relinquish jurisdiction will not be deemed an abuse if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate pursuant to I.C. § 19–2521. State v. Chapel, 107 Idaho 193, 194, 687 P.2d 583, 584 (Ct. App.1984). Good performance while on a retained jurisdiction program “does not alone create an abuse of discretion in the district judge's decision not to place the defendant on probation or reduce the sentence.” State v. Flores, 162 Idaho 298, 300, 396 P.3d 1180, 1182 (2017) (internal

quotation omitted). A court does not abuse its discretion in relinquishing jurisdiction if it “properly considered the information before it and determined that probation was not appropriate.” State v. Pelland, 159 Idaho 870, 367 P.3d 265, 269 (Ct. App. 2016).

In this case the district court properly considered the information before it and determined that probation was not appropriate. Asian’s record before this case included convictions for three prior felonies and eight prior misdemeanors. (PSI, pp. 5-10; see also 1/17/18 Tr., p. 51, L. 17 – p. 52, L. 11.) Asian bonded out in this case and committed two more felonies—a grand theft and another possession of a controlled substance. (PSI, p. 10; see also 1/17/18 Tr., p. 52, L. 22 – p. 53, L. 20.) His GAIN report diagnosed “Stimulant Use Disorder—Amphetamine Type, Severe” and Asian met the criteria for “Level II.1 Intensive Outpatient Treatment.” (PSI, pp. 22-32; see also 1/17/18 Tr., p. 55, Ls. 6-13.) The district court found that confidence Asian would do well on probation was “not backed up” by his history, including failed past attempts at rehabilitation and his action in committing crimes while on release. (1/17/18 Tr., p. 55, Ls. 14-21.) The district court retained jurisdiction for “evaluative purposes,” which it explained meant that “this Court’s intention is to relinquish jurisdiction” unless Asian completed a “spectacular rider.” (1/17/18 Tr., p. 59, L. 16 – p. 61, L. 21.)

Near the conclusion of his program, IDOC recommended the court “consider placing Mr. Asian on a period of supervised probation.” (PSI, p. 367 (underlining and bolding omitted).) This recommendation was based on Asian’s “positive attitude,” completion of assignments, participation, identification of “his high risk situations” and planning how to cope with them, learning how to identify his feelings, signing up for a fly-tying class, having a job, and completing 25 hours of community service. (PSI, pp. 371-72.)

In relinquishing jurisdiction, the district court articulated several concerns it had. The concerns from the initial sentencing included that at that time Asian “was completely out of control when it came to methamphetamine and doing whatever he needed to get it” (10/4/18 Tr., p. 28, Ls. 8-25); Asian’s record included three felonies and eight misdemeanors prior to this crime, and he committed two more felonies while on pre-sentencing release (10/4/18 Tr., p. 29, L. 11 – p. 30, L. 14); Asian’s lack of participation in jail programming (10/4/18 Tr., p. 30, L. 15 – p. 31, L. 8); the GAIN evaluation of his severe amphetamine addiction (10/4/18 Tr., p. 31, Ls. 9-19); and Asian’s association with other felons (10/4/18 Tr., p. 31, L. 20 – p. 32, L. 16). The district court concluded that Asian was a persistent violator who “at some level still represents a risk to society,” “has a below-average rehabilitation potential,” and may be “specifically deterred” by imposition of the sentence.” (10/4/18 Tr., p. 32, L. 17 – p. 33, L. 6.) The record shows that the district court correctly perceived the issue as one of discretion, acted within the outer boundaries of its discretion and consistently with applicable the legal standards, and reached its decision by the exercise of reason. Therefore, the record shows no abuse of discretion.

Asian argues that the district court abused its discretion, primarily by misrepresenting the record both affirmatively and by omission. Asian argues on appeal that the court “penalized” him “for getting ‘an abbreviated rider’ through no fault of his own” and held inadequate reporting on Asian’s conduct “against Mr. Asian.” (Appellant’s brief, p. 6.) However, the district court repeatedly stated it was *not* penalizing Asian for these things. In its initial comments the district court noted that Asian “was not sent to a program that I had recommended and believed was necessary to set the defendant up for long-term success in the community.” (10/4/18 Tr., p. 10, Ls. 15-18.) The district court then stated, “This is not the defendant's fault, *and I don't hold this against him ....*” (10/4/18 Tr., p. 10, Ls. 19-20 (emphasis added).) The district court then stated

that “the issue, or the question for the court is, did the defendant get what he needs to be successful? That's the issue I'm struggling with.” (10/4/18 Tr., p. 10, Ls. 20-23.)

Later, in a conversation about the conduct notes, Asian’s trial counsel stated that a self-report from Asian was “all we have” in relation to a particular point. (10/4/18 Tr., p. 20, Ls. 3-18.) The district court stated this was part of the “frustration” the court had with the particular rider program, “but I’m not holding that fact against Mr. Asian.” (10/4/18 Tr., p. 20, Ls. 19-22.)

The record shows that the district court did not hold IDOC’s programming decisions or any lack of full reporting of his conduct against him. (10/4/18 Tr., p. 10, Ls. 19-20; p. 20, Ls. 19-22.) It concluded that Asian had done “at least an average, if not an above-average rider. He was good.” (10/4/18 Tr., p. 11, Ls. 9-18.) The issue the district court was “struggling with” was “did the defendant get what he needs to be successful.” (10/4/18 Tr., p. 10, Ls. 19-23.) Rather than address the district court’s concerns, Asian has simply chosen to misrepresent the record. He has thus failed to show an abuse of discretion.

#### CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 16th day of April, 2019.

/s/ Kenneth K. Jorgensen  
KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th 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:

ANDREA W. REYNOLDS  
DEPUTY STATE APPELLATE PUBLIC DEFENDER  
[documents@sapd.state.id.us](mailto:documents@sapd.state.id.us)

/s/ Kenneth K. Jorgensen  
KENNETH K. JORGENSEN  
Deputy Attorney General