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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NOS. 46465-2018 & 46466-2018
)	
v.)	BANNOCK COUNTY NOS.
)	CR-2017-5222 & CR-2018-4631
JORGE ARMANDO)	
GONZALES BARRAGAN,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

In the first case at issue here, Jorge Armando Gonzales Barragan pleaded guilty to felony driving under the influence of alcohol and/or drugs, a repeated offense, and the district court withheld judgment and placed him on probation for a period of four years. Mr. Gonzales Barragan was subsequently charged with another count of felony DUI in a second case. He admitted to violating his probation in the first case, and pleaded guilty to felony DUI in the second case. In the first case, the district court revoked the withheld judgment and probation, imposed a unified sentence of five years, with three years fixed, and retained jurisdiction. In the second case, the district court imposed a unified sentence of six years, with three years fixed, and

also retained jurisdiction. In this consolidated appeal, Mr. Gonzales Barragan asserts the district court abused its discretion when it revoked the withheld judgment and probation, imposed the sentence, and retained jurisdiction in the first case, and when it imposed the sentence in the second case.

Statement of the Facts & Course of Proceedings

Sergeant Winans was travelling north on U.S. 91 in Bannock County, when he overheard the Chubbuck Police Department put out an attempt to locate on a possible DUI driver near his position. (*See* No. 46465 Presentence Report (*hereinafter*, No. 46465 PSI), p.4.)¹ He noticed the matching vehicle ahead of him, and saw that it was swerving dramatically from one side of its lane to the other. (*See* No. 46465 PSI, p.4.) Sergeant Winans activated his emergency light to catch up to the vehicle, and stop it, and he saw the vehicle drift over the fog line on the right shoulder of the road without stopping. (*See* No. 46465 PSI, p.4.) The vehicle drove on the right shoulder for a long while before halting, and Sergeant Winans then contacted the driver, later identified as Mr. Gonzales Barragan. (*See* No. 46465 PSI, p.4.) Mr. Gonzales Barragan gave the sergeant a blank stare, and appeared to be dazed. (*See* No. 46465 PSI, p.4.)

Sergeant Winans thought Mr. Gonzales Barragan seemed to be very intoxicated: he had extremely slurred speech, glassy and bloodshot eyes, and the smell of an alcoholic beverage on his breath. (*See* No. 46465 PSI, p.4.) Mr. Gonzales Barragan had difficulty with pulling his ID card from his wallet to hand to the sergeant, and did not provide a driver's license or registration and insurance paperwork. (*See* No. 46465 PSI, p.4.) When Sergeant Winans had Mr. Gonzales

¹ All citations to "No. 46465 PSI" refer to the 38-page PDF version of the Presentence Report and its attachments.

Barragan leave the vehicle, he had trouble getting out of the vehicle, but insisted he had nothing to drink. (*See* No. 46465 PSI, p.4.)

Mr. Gonzales Barragan did not pass the administered field sobriety tests, and Sergeant Winans placed him under arrest. (*See* No. 46465 PSI, p.4.) Mr. Gonzales Barragan demanded to speak with an attorney, became argumentative and verbally abusive, and refused to take a breath test. (*See* No. 46465 PSI, p.4.) The sergeant inventoried Mr. Gonzales Barragan's vehicle, and found an empty beer can behind the driver's seat. (*See* No. 46465 PSI, p.4.) While they were on route to a medical clinic, Mr. Gonzales Barragan began spitting in the patrol car, and Sergeant Winans secured a spit hood on his head. (*See* No. 46465 PSI, p.4.) Sergeant Winans obtained a search warrant for a blood draw, which took place at the clinic. (*See* No. 46465 PSI, p.4.)

In Bannock County No. CR-2017-5222 (*hereinafter*, the 2017 case), the State charged Mr. Gonzales Barragan by Prosecuting Attorney's Information with driving under the influence of alcohol and/or drugs, I.C. §§ 18-8004 and 18-8005(6), a repeated offense. (No. 46465 R., pp.46-51.)² Mr. Gonzales Barragan initially entered a not guilty plea. (*See* No. 46465 R., p.59.)

Pursuant to a plea agreement, Mr. Gonzales Barragan later agreed to plead guilty to driving under the influence of alcohol and/or drugs, a repeated offense. (*See* No. 46465 R., pp.69-72, 77-83.) The district court accepted his guilty plea. (*See* No. 46465 R., p.70.) The district court subsequently entered a withheld judgment and placed Mr. Gonzales Barragan on probation for a period of four years. (No. 46465 R., pp.91-93.)

² All citations to "No. 46465 R." refer to the 178-page PDF version of the corrected Clerk's Record.

About six months later, Officer McClure pulled over Mr. Gonzales Barragan for speeding. (*See* No. 46466 Presentence Report (*hereinafter*, No. 46466 PSI), p.4.)³ While Officer McClure was speaking with Mr. Gonzales Barragan, he smelled the odor of an intoxicating substance coming from the car. (*See* No. 46466 PSI, p.4.) Mr. Gonzales Barragan was unable to perform the administered field sobriety tests in a satisfactory manner, and the officer arrested him for driving under the influence. (*See* No. 46466 PSI, p.4.)

In Bannock County No. CR-2018-4631 (*hereinafter*, the 2018 case), the State charged Mr. Gonzales Barragan by Prosecuting Attorney's Information with driving under the influence of alcohol and/or drugs, a repeated offense, I.C. §§ 18-8004 and 18-8005(9). (No. 46466 R., pp.51-54.)⁴ Mr. Gonzales Barragan entered a not guilty plea. (No. 46466 R., p.55.) Meanwhile, in the 2017 case, the State filed a Report of Probation Violation alleging Mr. Gonzales Barragan had violated his probation. (No. 46465 R., pp.102-03.)

Pursuant to a global plea agreement, Mr. Gonzales Barragan agreed to plead guilty to felony DUI in the 2018 case, and to admit to violating his probation in the 2017 case. (*See* Tr. July 16, 2018, p.5, L.12 – p.6, L.20.) The State agreed to dismiss another case, Bannock County No. CR-2018-6085, and to “concur in the PSI no more than a rider” as its sentencing recommendation. (*See* Tr. July 16, 2018, p.5, L.16 – p.6, L.20.) The district court accepted Mr. Gonzales Barragan's guilty plea in the 2018 case. (*See* Tr. July 16, 2018, p.11, Ls.10-15.) He then admitted to violating his probation in the 2017 case by being charged with a new crime of driving under the influence, not completing treatment, and not reporting to his probation officer as directed. (*See* Tr. July 16, 2018, p.12, L.3 – p.15, L.2.)

³ All citations to “No. 46466 PSI” refer to the 30-page PDF version of the Presentence Report and its attachments.

⁴ All citations to “No. 46466 R.” refer to the 121-page PDF version of the Clerk's Record.

At the disposition hearing for both cases, Mr. Gonzales Barragan recommended the district court consider placing him on probation to allow him to be released for treatment. (*See* Tr. Sept. 4, 2018, p.5, Ls.1-24.) The State recommended that the district court retain jurisdiction. (*See* Tr. Sept. 4, 2018, p.6, Ls.15-25.) In the 2017 case, the district court revoked the withheld judgment, imposed a unified sentence of five years, with three years fixed, and retained jurisdiction. (No. 46465 R., pp.137-41.) In the 2018 case, the district court imposed a unified sentence of six years, with three years fixed, and retained jurisdiction. (No. 46466 R., pp.92-96.)

In both cases, Mr. Gonzales Barragan filed a timely Notice of Appeal from the district court's Minute Entry and Order. (No. 46465 R., pp.146-49; No. 46466 R., pp.98-101.) The Idaho Supreme Court ordered the appeals consolidated for all purposes. (No. 46465 R., p.164; No. 46466 R., p.116.)

ISSUES

- I. In the 2017 case, did the district court abuse its discretion when it revoked Mr. Gonzales Barragan's withheld judgment and probation, imposed an underlying sentence of five years, with three years fixed, and retained jurisdiction?
- II. In the 2018 case, did the district court abuse its discretion when it imposed a unified sentence of six years, with three years fixed, upon Mr. Gonzales Barragan following his guilty plea to felony DUI, and retained jurisdiction?

ARGUMENT

I.

In The 2017 Case, The District Court Abused Its Discretion When It Revoked Mr. Gonzales Barragan's Withheld Judgment And Probation, Imposed An Underlying Sentence Of Five Years, With Three Years Fixed, And Retained Jurisdiction

Mr. Gonzales Barragan asserts the district court in the 2017 case abused its discretion when it revoked his withheld judgment and probation, imposed an underlying sentence of five

years, with three years fixed, and retained jurisdiction. The district court should have instead followed Mr. Gonzales Barragan's recommendation by placing him back on probation so he could be released for treatment. (*See* Tr. Sept. 4, 2018, p.5, Ls.1-24.)

When judgment is withheld under I.C. § 19-2601(3), no sentence is actually imposed on the defendant and no judgment of conviction is entered. *State v. Murillo*, 135 Idaho 811, 814 (Ct. App. 2001) (citing *State v. Branson*, 128 Idaho 790, 793 (1996)). When a defendant is given a withheld judgment and placed on probation, the district court has continuing jurisdiction to modify all aspects of the disposition. *Id.* If the conditions of probation are violated, the district court may revoke the defendant's probation and impose any sentence which originally might have been imposed. *Id.*

"A district court's decision to revoke probation will not be overturned on appeal absent a showing that the court abused its discretion." *State v. Sanchez*, 149 Idaho 102, 105 (2009). In reviewing a district court's discretionary decision, an appellate court conducts an inquiry into "[w]hether 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).

Appellate courts use a two-step analysis in reviewing a probation revocation proceeding. *Sanchez*, 149 Idaho at 105. First, the appellate court determines "whether the defendant violated the terms of his probation." *Id.* Next, "If it is determined that the defendant has in fact violated the terms of his probation, the second question is what should be the consequences of that violation." *Id.*

Mr. Gonzales Barragan concedes he admitted to violating his probation. (*See* Tr. July 16, 2018, p.12, L.3 – p.15, L.2.) When a probationer admits to a direct violation of his probation agreement, no further inquiry into the question is required. *State v. Peterson*, 123 Idaho 49, 50 (Ct. App. 1992). Thus, this Court may go to the second step of the analysis and determine whether the district court abused its discretion when it revoked the withheld judgment and probation, imposed the sentence, and retained jurisdiction. *See State v. Hoskins*, 131 Idaho 670, 672 (Ct. App. 1998).

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 “due regard to the nature of the offense, the character of the offender, and the protection of the public interest.” *State v. Strand*, 137 Idaho 457, 460 (2002). 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) (internal quotation marks omitted). Mr. Gonzales Barragan does not assert that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Gonzales Barragan 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.* An appellate court, “[w]hen reviewing the length of a sentence . . . consider[s] the defendant’s entire sentence.” *State v. Oliver*, 144 Idaho 722, 726 (2007). The reviewing court will “presume that the fixed portion of the sentence will be the defendant’s probable term of confinement.” *Id.* In cases where probation was revoked following the grant of a withheld

judgment, the district court in imposing the sentence may properly consider circumstances arising after the grant of the withheld judgment. *Murillo*, 135 Idaho at 814.

Here, the statements by Mr. Gonzales Barragan and his counsel at the disposition hearing suggest the district court abused its discretion when it revoked his withheld judgment and probation, imposed the sentence, and retained jurisdiction. Counsel informed the district court that Mr. Gonzales Barragan “has been in contact with BPA and he does have funding available to attend treatment.” (Tr. Sept. 4, 2018, p.5, Ls.1-3.) Mr. Gonzales Barragan’s counsel also notified the district court that “funding for BPA tends to be cyclical and we would like him to take advantage of this opportunity that the funds are available now for him to use. They may not be there in the next few months or the next six months.” (Tr. Sept. 4, 2018, p.5, Ls.17-21.) Counsel additionally stated Mr. Gonzales Barragan had not had the opportunity to be out working and engaging in treatment. (*See* Tr. Sept. 4, 2018, p.6, Ls.4-10.)

Mr. Gonzales Barragan explained to the district court that he had been kicked out of treatment at Gateway Counseling (*see* No. 46465 R., pp.102-03), because he had decided to meet with his bishop (*see* Tr. Sept. 4, 2018, p.7, L.11 – p.8, L.5). He also stated that he “never once gave a dirty UA.” (Tr. Sept. 4, 2018, p.8, L.6.) Further, Mr. Gonzales Barragan clarified that the incident where he was left in booking after refusing to ride in a van with other inmates, and was then reportedly rude to jail officers (*see* No. 46466 PSI, pp.27-30), happened “because I couldn’t get in the van with those two individuals who[] have threatened to jump me and gone to great lengths to try to do it” (*see* Tr. Sept. 4, 2018, p.8, L.24 – p.9, L.5). He told the district court: “I think the best thing for me, because of the added stress with some of the inmates, I can’t even walk around without being threatened, you know. I think the best option is an outside treatment source where I don’t have the added stress of these people, you know, threatening me.”

(Tr. Sept. 4, 2018, p.7, Ls.18-23.) He had told the officers he did not know the names of those individuals, but he could not be in there with them. (See Tr. Sept. 4, 2018, p.9, Ls.11-12.) Mr. Gonzales Barragan admitted to making an obscene gesture at an officer, stating, “Sometimes it’s officers like that that get under people’s skin and don’t really realize the underlying thing, that I am being threatened at every jump.” (See Tr. Sept. 4, 2018, p.9, Ls.16-20.)

Moreover, Mr. Gonzales Barragan stated, “if I have to do treatment in jail this is what it’s going to be like. Me having to dodge these people to get my treatment done.” (Tr. Sept. 4, 2018, p.9, Ls.21-23.) He also explained his misgivings with the district court retaining jurisdiction: “these aren’t the only two gentlemen that have gone out of their way to sabotage my time in jail. If I go on a rider they already have said that they would sabotage that, so what will happen is I’ll go and mess up.” (Tr. Sept. 4, 2018, p.10, Ls.21-25.)

In light of the above statements from the disposition hearing, Mr. Gonzales Barragan submits the district court in the 2017 case abused its discretion when it revoked his withheld judgment and probation, imposed an underlying sentence of five years, with three years fixed, and retained jurisdiction. The district court should have instead followed Mr. Gonzales Barragan’s recommendation by placing him back on probation so he could be released for treatment.

II.

In The 2018 Case, The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Six Years, With Three Years Fixed, Upon Mr. Gonzales Barragan Following His Guilty Plea To Felony DUI, And Retained Jurisdiction

Mr. Gonzales Barragan asserts the district court in the 2018 case abused its discretion when it imposed a unified sentence of six years, with three years fixed, upon him following his guilty plea to felony DUI, and retained jurisdiction. The district court should have instead

followed Mr. Gonzales Barragan's recommendation by placing him on probation so he could be released for treatment. (*See* Tr. Sept. 4, 2018, p.5, Ls.1-24.)

"The choice of probation, among the available sentencing alternatives, is committed to the sound discretion of the trial court." *State v. Hostetler*, 124 Idaho 191, 192 (Ct. App. 1993) (per curiam) (citing *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982)). "The denial of probation will not be deemed an abuse of discretion if the decision is consistent with the criteria articulated in I.C. § 19-2521." *Id.*

Mr. Gonzales Barragan submits the district court the district court abused its discretion in the 2018 case when it imposed the sentence and retained jurisdiction, for the reasons articulated above in Part I of the Argument and incorporated herein by reference thereto.

CONCLUSION

For the above reasons, Mr. Gonzales Barragan respectfully requests that this Court reduce his sentences as it deems appropriate.

DATED this 20th day of February, 2019.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of February, 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
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/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

BPM/eas