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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NOS. 46483-2018 & 46484-2018
)	
v.)	ADA COUNTY NOS. CRFE-2015-2232
)	& CR01-18-24449
ANTHONY CHARLES SCHWAB,)	
)	APPELLANT'S BRIEF
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Anthony Schwab pled guilty to possession of a controlled substance, heroin. He received a unified sentence of seven years, with two years fixed, and the court placed him on probation with the condition that he complete drug court. After a probation violation in 2016, the district court retained jurisdiction and then placed him on probation. He violated the terms of his probation by (and had his probation revoked for) committing a new crime: possession of a controlled substance, methamphetamine. On the new crime the district court sentenced Mr. Schwab to an aggregate unified sentence of five years, with two years fixed, to be served concurrently to his 2015 probation violation case.

On appeal, Mr. Schwab asserts that the district court abused its discretion by revoking his probation on the heroin case and by imposing an excessive sentence in the methamphetamine case.

Statement of the Facts & Course of Proceedings

Supreme Court Docket No. 46483-2018 (Ada County district court case number CR-FE-2015-2232), (*hereinafter*, the heroin case), and Supreme Court Docket No. 46484-2018 (Ada County district court case number CR01-18-24449), (*hereinafter*, the methamphetamine case)), have been consolidated for appellate purposes. (R., p.2.)

In the heroin case, on February 16, 2015, relatives contacted law enforcement about items of drug paraphernalia they had found in the bedroom where their nephew, Anthony Schwab, was residing. (Presentence Investigation Report (*hereinafter*, PSI),¹ p 3.) Law enforcement located syringes containing a substance that tested presumptively positive for heroin and a baggie with residue which tested presumptively positive for methamphetamine. (PSI, p.3.) Based on these facts, an Information was filed alleging that Mr. Schwab possessed heroin, methamphetamine, and drug paraphernalia. (R., pp.49-50.)

Mr. Schwab pled guilty to possession of a controlled substance, and was sentenced to seven years, with two years fixed, but the district court suspended the sentence and placed Mr. Schwab on probation for seven years. (R., pp.53-63, 82-87.) As a condition of probation, Mr. Schwab was required to complete drug court. (R., pp.82-83.)

In 2016, Mr. Schwab was discharged from drug court, and a report of probation violation was filed which alleged that he violated the terms and conditions of his probation by being

discharged from drug court and by failing to pay his fines, fees, and restitution. (R., pp.109-114.) After Mr. Schwab admitted to violating a term and condition of his probation, his probation was revoked, but the district court retained jurisdiction for 365 days. (R., pp.115-119.) Thereafter, Mr. Schwab was reinstated back on probation for seven years. (R., pp.122-126.)

In 2018, the State filed another report of probation violation. (R., pp.129-139.) The report alleged that Mr. Schwab violated the terms and conditions of his probation by: using controlled substances, by failing to complete rider aftercare programming, by absconding from probation, by failing to obtain his probation officer's permission prior to changing residences, and by committing a new crime—possession of a controlled substance in Ada County case number CR-01-18-24449 (the methamphetamine case). (R., pp.129-139, 149-154.)

Mr. Schwab admitted to violating some of the terms and conditions of his probation by committing a new crime. (10/1/18 Tr., p.4, Ls.7-24; R., p.158.) At Mr. Schwab's disposition hearing, Mr. Schwab asked the court to place him back on probation so he could complete the substance abuse treatment program he had been accepted into. (10/22/18 Tr., p.10, Ls.7-11.) The district court revoked his probation. (10/22/18 Tr., p.13, L.25 – p.14, L.5; R., pp.161-163.) Mr. Schwab filed a motion for leniency pursuant to I.C.R. 35. (R., pp.168-170.) Mr. Schwab's Rule 35 motion was denied.² (R., pp.174-175.) Mr. Schwab filed a timely notice of appeal. (R., pp.164-166.)

¹ Appellant's use of the designation "PSI" includes the packet of documents grouped with the electronic copy of the PSI, and the page numbers cited shall refer to the corresponding page of the electronic file.

² Mr. Schwab does not assert on appeal that the district court erred by denying his Rule 35 motion, as no new or additional information was introduced in support of his motion for leniency. (R., pp.168-170, 174.) The Idaho Supreme Court has held that "[w]hen 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). "An appeal from the denial of a Rule 35

In the methamphetamine case, on May 8, 2018, Mr. Schwab had contact with law enforcement, who found a plastic baggie containing residue that tested presumptively positive for methamphetamine. (R., pp.130, 133, 202-203; 9/18/18 Tr., p.16, Ls.8-25.) Based on these facts, Mr. Schwab was charged by Information with one count of possession of a controlled substance, methamphetamine. (R., pp.202-203.)

Pursuant to a plea agreement, Mr. Schwab pled guilty to possessing a controlled substance. (9/18/18 Tr., p.8, Ls.1-13 p.16, L.8 – p.17, L.12; R., pp.209, 211-218.) In exchange for Mr. Schwab's guilty plea, the State agreed to recommend a maximum sentence of seven years, with two years fixed, concurrent with the heroin case.³ (9/18/18 Tr., p.10, Ls.1-18; R., p.209.) At sentencing, the State recommended a sentence of five years, with two years fixed. (10/22/18 Tr., p.6, Ls.19-24; R., p.220.) Mr. Schwab's counsel asked the district court to place him on probation to allow him to complete the program he had been accepted into. (10/22/18 Tr., p.10, Ls.7-11; R., p.220.) Mr. Schwab was sentenced to five years, with two years fixed, for possession of methamphetamine. (8/14/18 Tr., p.13, Ls.22-24; R., pp.221-223.) The sentence was ordered to turn concurrent with the sentence executed in the heroin case. (R., p.222.) Pursuant to I.C.R. 35, Mr. Schwab filed a motion for leniency. (R., pp.228-230.) The district court denied the motion without a hearing.⁴ (R., pp.234-235.) Mr. Schwab filed a timely notice of appeal. (R., pp.224-226.)

On appeal, Mr. Schwab contends that the district court abused its discretion in sentencing him excessively in the methamphetamine case. Mr. Schwab contends that the district court

motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information.” *Id.*

³ As part of the plea agreement, the State also agreed to dismiss a misdemeanor case, Ada County case number CR01-18-39759. (9/18/18 Tr., p.8, Ls.9-13.)

abused its discretion by revoking his probation in the heroin case instead of suspending the sentence.

ISSUES

- I. Did the district court abuse its discretion when it sentenced Mr. Schwab to five years, with two years fixed, following his plea of guilty to one count of possession of methamphetamine?
- II. Did the district court abuse its discretion when it revoked Mr. Schwab's probation?

ARGUMENT

I.

The District Court Abused Its Discretion When It Sentenced Mr. Schwab To Five Years, With Two Years Fixed, Following His Plea Of Guilty To One Count Of Possession Of Methamphetamine

Mr. Schwab asserts that, given any view of the facts, his unified sentence of five years, with two 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. Schwab does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Schwab 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. Schwab's rehabilitative potential, the district court abused its discretion in sentencing him excessively. The district court failed to consider the fact that Mr. Schwab was aware of his controlled substances addiction, was interested in seeking treatment for his addiction, and that after completing the programming he had been accepted into, Mr. Schwab could likely be successful in the community. (10/22/18 Tr., p.10, L.7 – p.11, L.17.)

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 a 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. Schwab realizes that he has an addiction to controlled substances. (10/22/18 Tr., p.12, Ls.2-9.) However, Mr. Schwab wants to stop using and have a better life, and his goal is to stay sober. (10/22/18 Tr., p.12, L.7 – p.13, L.5.)

Mr. Schwab has a supportive family and his employer to help him in his efforts to maintain his sobriety. (PSI, pp.6-8.) Mr. Schwab has a young son whom he loves very much—his son is his world. (PSI, pp.6-8, 13-14.) He wants to be there for his son. (PSI, pp.8, 13-14.) *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. Schwab expressed remorse for his acts. At sentencing, Mr. Schwab wanted the court to know that he realized that he had an opiate addiction and that he needs help to remain sober. (10/22/18 Tr., p.11, L.23 – p.12, L.13.) 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*, the 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. Schwab’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. Schwab 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 New Life programming as a condition of his probation.

II.

The District Court Abused Its Discretion When It Revoked Mr. Schwab's Probation

Mr. Schwab asserts that the district court abused its discretion when it revoked his probation and executed his original sentence of seven 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. Schwab 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. Schwab showed good insight into his addiction issues and his criminal thinking—he wants to get better. Mr. Schwab can be rehabilitated and be a productive member of society. As Mr. Schwab told the court:

[A]s I stand here today, I find myself very nervous and scared. Scared what the future may hold. And I've reached the point in my life where I'm tired of being sick. Sick of watching my loved ones suffer as I have while this disease slowly kills me.

I continue to give up everything to stay on the path of chemical dependency and self-destruction.

Substance abuse has always plagued me and allowed me to wrongfully hurt those that I love, and today I'm over it. I'm done living this way. I realize I cannot stop using on my own. I need help. I need to start from ground zero, and I know that the New Life Program is the program meant for me. It is my level ground.

(10/22/18 Tr., p.11, L.23 – p.12, L.13.)

Mr. Schwab 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 reinstate Mr. Schwab on probation and order him to complete the New Life Program by an exercise of reason, where he had already been accepted into the program and was ready to complete an intensive inpatient treatment program to help him remain sober from controlled substances. (10/22/18 Tr., p.10, Ls.7-25; p.12, L.4 – p.13, L.5.) The New Life Program is an intensive, community-based program with a duration of 12 to 18 months. (10/22/18 Tr., p.10, Ls.7-21.) Mr. Schwab is addicted to opiates, but is ready to stay sober and stop alienating his loved ones. (10/22/18 Tr., p.11, L.25 – p.12, L.10; PSI, p.6.)

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

CONCLUSION

Mr. Schwab respectfully requests that this Court reduce his sentences as it deems appropriate or place him on probation in both cases. Alternatively, he requests that his case be remanded to the district court for a new probation violation and sentencing hearing.

DATED this 29th day of April, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 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