

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. 46472-2018 & 46473-2018
Plaintiff-Respondent,)	
)	Kootenai County Case Nos. CR-12-5732
v.)	& CR-15-16813
)	
LEO JOSEPH DECKER,)	
)	RESPONDENT’S BRIEF
Defendant-Appellant.)	
_____)	

Has Decker failed to show that the district court abused its discretion when it did not reduce his sentences when it revoked his probation?

ARGUMENT

Decker Has Failed Show That The District Court Abused Its Discretion

A. Introduction

The state charged Decker with possession of a controlled substance with intent to deliver. (46472 R., pp. 73-74.) He pled guilty to a reduced charge of possession of a controlled substance, and was ordered to participate in drug court. (46472 R., pp. 82-90.)

A few months later Decker was arrested for possession of stolen property and concealment of evidence and the state moved to revoke his drug court placement and probation. (46472 R., pp. 92-123.) Decker admitted violating his probation and the state dismissed the stolen property and evidence concealment charges. (46472 R., pp. 128-29.) The district court entered judgment, sentenced Decker to serve five years with two years determinate, and retained jurisdiction. (46472 R., pp. 133-35.) The court thereafter suspended Decker's sentence and placed him on probation. (46472 R., pp. 137-41.)

Immediately, Decker failed to show up for drug testing and then, upon showing up, tested positive for methamphetamine. (46472 R., pp. 143, 147-51.) He was also arrested for burglary and possession of stolen property. (Id.) He also refused a polygraph. (46472 R., pp. 159-63.) Decker admitted some probation violations and was found to have committed others after a hearing. (46472 R., pp. 153-57.) The district court continued Decker's probation. (46472 R., pp. 164-65.)

A few months later the state filed another report of probation violation for committing three counts of burglary and three counts of grand theft, as well as failing to attend AA/NA, failing to participate in his aftercare, and testing positive for methamphetamine use. (46472 R., pp. 170-79, 181-92.) Decker later admitted failing to attend AA/NA and aftercare and testing positive for methamphetamine and the state dismissed the other alleged violations. (R., pp. 200-01.) The district court again continued probation. (46472 R., pp. 203-04.)

About two months later Decker's probation officer reported that Decker was again in violation of his probation by not showing for random drug tests, failing to attend AA/NA, failing to attend aftercare, failing to attend treatment, failing to report to his probation officer, and testing positive for methamphetamine. (46472 R., pp. 205-07.) Decker admitted the probation violations.

(46472 R., pp. 238-39.) The district court revoked probation, imposed the sentence, and retained jurisdiction. (46472 R., pp. 241-42.) At the conclusion of the retained jurisdiction the district court suspended execution of the remainder of the sentence and placed Decker back on probation. (46472 R., pp. 245-49.)

About two months after Decker was reinstated on probation, the probation officer filed a notice of probation violation and the state filed to revoke the probation. (46472 R., pp. 258-65.) Later the state charged Decker with two counts of possession of a controlled substance with intent to deliver. (46473 R., pp. 14-15, 51-52.) The state added the new charges to the grounds to revoke Decker's prior probation. (46472 R., pp. 267-89, 294-97.)

Decker pled guilty to possession of methamphetamine and admitted violating his probation. (46472 R., pp. 298-99; 46473 R., pp. 54-58.) The district court imposed a sentence of seven years determinate on the new conviction, to run consecutive to the sentence in the old conviction; revoked probation on the old conviction; and retained jurisdiction in both cases. (46472 R., pp. 302-08; 46473 R., pp. 60-65.) At the conclusion of the retained jurisdiction the district court placed Decker on probation. (46472 R., pp. 309-15; 46473 R., pp. 68-74.)

About a year later Decker's probation officer reported Decker violated the terms of his probation by using methamphetamine, failing his treatment, failing to submit to drug testing, and associating with a parolee. (46472 R., pp. 316, 319, 322-45; 46473 R., pp. 75-80, 81-105.) Decker admitted violating his probation and the district court revoked probation, ordered the sentences executed, and retained jurisdiction. (46472 R., pp. 346-50; 46473 R., pp. 106-10.) The court later put Decker back on probation. (46472 R., pp. 355-62; 46473 R., pp. 115-22.)

Decker violated his probation again. (46472 R., pp. 368-78; 46473 R., pp. 133-43.) Decker admitted violating his probation and the district judge retained jurisdiction for the fifth time.

(46472 R., pp. 379-89; 46473 R., pp. 144-54.) Decker appealed from the judgment imposing his sentences and retaining jurisdiction. (46472 R., pp. 390-92; 46473 R., pp. 155-57.) Thereafter the district court again granted probation to Decker. (Aug., pp. 2-8.)

On appeal, Decker raises two issues: whether the district court erred by not reducing his sentences upon revoking probation and whether the court erred by not placing him back on probation. (Appellant’s brief, p. 7.) The latter issue he admits is moot (Appellant’s brief, pp. 8-9), so the state will not address it. He has failed to show error on the first issue, because he has failed to show that he raised the issue below and cannot show fundamental error. Even if addressed on the merits the record does not support Decker’s claim.

B. Standard Of Review

“A district court may reduce a sentence upon revocation of probation, but it is not required to do so.” State v. Krambule, 163 Idaho 264, 266, 409 P.3d 844, 846 (Ct. App. 2017). The decision whether to reduce a sentence upon revocation of probation “is committed to the discretion of the court.” State v. Hoskins, 131 Idaho 670, 672, 962 P.2d 1054, 1056 (Ct. App. 1998). It is not fundamental error if the court does not *sua sponte* reduce a sentence upon revocation of probation. State v. Clontz, 156 Idaho 787, 789–92, 331 P.3d 529, 531–34 (Ct. App. 2014).

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

Decker claims that he made a motion to reduce his sentence, but the record does not support this claim. “This Court does not review an alleged error on appeal unless the record discloses an adverse ruling forming the basis for the assignment of error.” Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP, 148 Idaho 479, 491, 224 P.3d 1068, 1080 (2009) (internal citations omitted). See also Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole,

P.S., 159 Idaho 679, 691, 365 P.3d 1033, 1045 (2016). “Even if an issue was argued to a lower court, to preserve an issue for appeal there must be a ruling by the lower court.” Johnson v. Crossett, 163 Idaho 200, 207, 408 P.3d 1272, 1279 (2018) (internal citations and brackets omitted).

Decker filed a Rule 35 motion in the second case. (46473 R., pp. 66-67.) No disposition of this motion appears in the record, however. At sentencing defense counsel stated that Decker requested that he ask “to consider modifying the fixed term on the sentence.” (8/28/18 Tr., p. 46, Ls. 19-21.) The court stated it wished to finish the task it was performing at the time. (8/28/18 Tr., p. 46, Ls. 22-23.) No additional request nor express ruling on a reduction appears thereafter. (8/28/18 Tr., pp. 46-50.) Decker has failed to show on the record that he obtained a ruling on whether his sentences should be reduced upon revoking his probation, and has therefore failed to show that this issue is preserved for appellate review.

Even if the district court’s order executing the sentences were deemed an implicit rejection of the request to “consider modifying the fixed term on the sentence” Decker has failed to show an abuse of discretion. Decker has a lengthy criminal history including five felony and 12 misdemeanor convictions. (PSI, pp. 4-14.) By the time of the probation violation hearing at issue, Decker had violated his probation seven times and performed the rider program four times. Decker did not go more than a year without violating his probation, and among the longer periods he went without violating his probation were when he was actually incarcerated. He served 1,339 days of his sentences (Aug., p. 3), all because of probation violations. The district court also presumably retains the right to reduce the sentences when, and if, it finally imposes them without retaining jurisdiction. Decker’s performance on probation in these cases does not instill a great deal of optimism in his rehabilitation.

Decker's argument on appeal is based entirely upon his representations to the district court. (Appellant's brief, pp. 7-8 (citing 8/28/18 Tr., p. 45, L. 10 – p. 46, L. 13).) The district court was in the best position to weigh those claims. Certainly after four riders Decker knew what to say about how committed he was to his own rehabilitation. The problem is that his words were diminished a great deal by his actions.

Decker has failed to show that the district court abused its discretion by not reducing his sentences.

CONCLUSION

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

DATED this 15th day of July, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of July, 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:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

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