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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46655-2019
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR01-2017-9200
)	
KENNETH W. CAMPBELL,)	
)	RESPONDENT’S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Campbell failed to establish that the district court abused its discretion either by revoking his probation or by declining to retain jurisdiction a second time?

Campbell Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Campbell pled guilty to possession of methamphetamine and, on July 12, 2017, the district court imposed a unified sentence of seven years, with two years fixed, and retained jurisdiction. (R., pp.33-36.) Following a period of retained jurisdiction, the district court

suspended the sentence and placed Campbell on supervised probation for five years. (R., pp.39-45.)

Approximately seven months later, in October 2018, the state filed a motion for probation violation alleging that Campbell had violated the conditions of his probation by changing residences without permission, failing to abide by his supervising officer's instruction to not associate with Kimberly Campbell, failing to attend/successfully complete sex offender treatment, failing to maintain full-time employment, consuming and/or possessing an alcoholic beverage, using a controlled substance without a prescription, failing to submit to a chemical test of his blood, breath, saliva and/or urine, failing to report for SILD as instructed, failing to report to his supervising officer, failing to comply with the lawful request to stop donating plasma, failing to abide by the lawful request that he have no internet access while on probation, failing to abide by his curfew, failing to pay his cost of supervision, failing to pay restitution, and failing to pay "fines, fees, funds, surcharges and/or costs as ordered by the Court." (R., pp.60-63.) Campbell admitted that he violated the conditions of his probation by using a controlled substance without a prescription, failing to submit to a chemical test of his blood, breath, saliva and/or urine, failing to comply with the lawful request to stop donating plasma, and failing to abide by the lawful request that he have no internet access while on probation, and the state dismissed the remaining allegations. (R., p.74; 11/21/18 Tr., p.18, L.25 – p.19, L.3.) The district court revoked Campbell's probation and executed his underlying sentence. (R., pp.79-82.) Campbell filed a notice of appeal timely from the district court's order revoking probation. (R., pp.88-90.)

Campbell asserts that the district court abused its discretion by revoking his probation and declining to retain jurisdiction a second time in light of his mental health issues, the fact that

he “ha[s] done vocational rehabilitation,” is “trying to get into treatment and attend college,” is “concerned about the stigma of being a sex offender when he [gets] out of prison,” and because “the AP rider would also potentially let Mr. Campbell ‘have a little more insight into himself and what he needs to do when he gets out in the community...’” (Appellant’s brief, pp.3-7.) Campbell has failed to establish an abuse of discretion.

“Probation is a matter left to the sound discretion of the court.” I.C. § 19-2601(4). The decision whether to revoke a defendant’s probation for a violation is within the discretion of the district court. State v. Garner, 161 Idaho 708, 710, 390 P.3d 434, 436 (2017) (quoting State v. Knutsen, 138 Idaho 918, 923, 71 P.3d 1065, 1070 (Ct. App. 2003)). In determining whether to revoke probation, a court must examine whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society. State v. Cornelison, 154 Idaho 793, 797, 302 P.3d 1066, 1070 (Ct. App. 2013) (citations omitted). A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. Id. at 798, 302 P.3d at 1071 (citing State v. Beckett, 122 Idaho 324, 326, 834 P.2d 326, 328 (Ct. App. 1992)).

The decision whether to retain jurisdiction is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). Probation is the ultimate goal of retained jurisdiction. State v. Jones, 141 Idaho 673, 677, 115 P.3d 764, 768 (Ct. App. 2005). There can be no abuse of discretion if the district court has sufficient evidence before it to conclude that the defendant is not a suitable candidate for probation. Id.

Contrary to Campbell’s assertions on appeal, the record supports the district court’s determination that Campbell was no longer a suitable candidate for probation, particularly in

light of his unwillingness to abide by the conditions of community supervision and failure to rehabilitate or be deterred.

Campbell's extensive criminal record includes 22 misdemeanor convictions, five felony convictions, and multiple charges that were ultimately dismissed. (PSI, pp.65-72.¹) Campbell has also been incarcerated multiple times over the last three decades. (PSI, p.72.) IDOC records also show he amassed eight DOR's while incarcerated, and Campbell reported spending "15 days in the hole" after being found with someone else's medication. (PSI, p.72.) In this case, Campbell violated the terms of his probation the very day he was released from his rider by consuming alcohol and having contact with Kimberly Campbell, with whom his probation officer had instructed him not to associate. (11/21/18 Tr., p.20, L.24 – p.21, L.7.)

Campbell claims that the district court erred by not placing him on a second rider in this case; however, Campbell has participated in multiple treatment programs while in the community and two prior rider programs, but has failed to be deterred in his criminal offending and substance abuse. (PSI, pp.68, 72-73.) Campbell has also received treatment for his mental health issues that include prescription medication and hospital stays to address his depression, anxiety, and ADHD. (PSI, p.78.) The fact that Campbell has completed vocational rehabilitation and is attempting to further his education does not outweigh his continued decisions to violate the conditions of his probation or his continued abuse of controlled substances.

At the disposition hearing, the district court articulated its reasons for revoking Campbell's probation, including his failure to participate in treatment programs, abuse of

¹ PSI page numbers correspond with the page numbers of the electronic file "Appeal Confidential Documents Record.pdf."

controlled substances, and failure to abide by the conditions of community supervision.

(11/21/18 Tr., p.32, L.10 – p.37, L.16.) The district court concluded:

... You cannot let your designation as a sex offender impact your obligations of completing probation. That is a fact you cannot change. That is a fact that is going to be with you the rest of your life. Okay.

So in Alcoholics Anonymous they talk about recognizing those things you cannot change and having the wisdom to realize that and then changing the things you can change. You need to recognize your sex offender designation is not going to change. When you are placed on parole or probation that sex offender conviction, and I agree it was a number of years ago in the 1990s, is still going to impact your case. Accept that and move forward in your life.

(11/21/18 Tr., p.36, Ls.11-25.) The state submits that Campbell has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the disposition hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm the district court's order revoking Campbell's probation.

DATED this 24th day of May, 2019.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of May, 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:

BEN P. MCGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

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12:38PM 1 ain't going to help me. It is going to stick me
 12:38PM 2 in a cell again. I am dealing with some guy right
 12:38PM 3 now calling me ChoMo in my dorm. It doesn't stop.
 12:38PM 4 You know, every time I get on probation
 12:38PM 5 they put me on sex offender caseload. Why? My
 12:38PM 6 case is 30 years ago. It was dismissed in '96 by
 12:38PM 7 Daniel Eismann. You know, I just don't understand
 12:38PM 8 every time I get on probation they want to put me
 12:38PM 9 on sex offender caseload. I did a nine month
 12:38PM 10 treatment in Orofino in 2015 and I graduated from
 12:38PM 11 that. I graduated from the SANE, in 1995. And
 12:37PM 12 I've registered all the time. I haven't committed
 12:37PM 13 another sex crime. That's what gets me, kind of,
 12:37PM 14 flustered is when they do that to me and then they
 12:37PM 15 want me to do treatment. But I've already done
 12:37PM 16 treatment.
 12:37PM 17 The only thing -- I talked to my
 12:37PM 18 provider and all he wanted me to do was a
 12:37PM 19 polygraph and we had that set up right when I was
 12:37PM 20 supposed to get out. And my PO goes it ain't
 12:37PM 21 worth it, you ain't doing it. I tried everything.
 12:37PM 22 My aunt and uncle were going to pay for my
 12:37PM 23 polygraph so I would get off the sex offender
 12:37PM 24 caseload. And she said goes you are never getting
 12:37PM 25 off it. And that's what got me.

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12:38PM 1 willing to back me up and stand for me and be
 12:38PM 2 there for me? You know, she's the only person I
 12:38PM 3 got out there. My family is dying. My mom's dying
 12:38PM 4 and that's the only person I can talk to.
 12:38PM 5 She's always there for me, always. When
 12:38PM 6 there are bumps in the road she pulls me aside and
 12:38PM 7 talks to me. Why are you doing this? Quit doing
 12:38PM 8 this, do this. She wants me to go get my GED. We
 12:38PM 9 want to move to Medford, Oregon. We want to get
 12:38PM 10 out of Idaho. Your Honor, that would be in the
 12:38PM 11 best step for me to get out of Idaho not knowing
 12:38PM 12 nobody where I go. Because every time I turn the
 12:40PM 13 corner I run into old friends, I don't like that.
 12:40PM 14 I don't like to run into old friends no more. I
 12:40PM 15 want a positive life. And I think this AP rider
 12:40PM 16 would help me to get the ability for more
 12:40PM 17 knowledge.
 12:40PM 18 What I was talking to Reed about is the
 12:40PM 19 FOP class in the jail. I could start off with
 12:40PM 20 that. That is one thing that would help me too is
 12:40PM 21 to start out with that class. I want treatment.
 12:40PM 22 I don't want to sit in a jail cell or a prison
 12:40PM 23 cell no more. I am sick of it. 18 years of
 12:40PM 24 sitting out there. I'm done. I'm fed up. I
 12:40PM 25 can't do it no more. I can't live that life. I

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12:37PM 1 I want to stay sober. I want to be a
 12:37PM 2 normal person in society and live a normal life.
 12:38PM 3 I just can't be around users. And I don't want to
 12:38PM 4 be around users. I want to function in society
 12:38PM 5 like a man should. And be able to say yes -- lift
 12:38PM 6 my head up high and say yes, I've done this. I've
 12:38PM 7 stayed sober. I want to go to college. I want to
 12:38PM 8 get my GED. Right now I have never read a tape
 12:38PM 9 measure in my life. I've got a friend in jail
 12:38PM 10 right now teaching me how to learn to read a tape
 12:38PM 11 measure. I have a friend at Western Builders that
 12:38PM 12 is willing to give me another chance at a job.
 12:38PM 13 And I want to take full advantage of it. Go out
 12:38PM 14 there and just work and make something of my life
 12:38PM 15 and make my life better.
 12:38PM 16 Especially with my girlfriend Kim. You
 12:38PM 17 know she does smart groups at Pure Wellness. She
 12:38PM 18 does three of them. She has been sober for seven
 12:38PM 19 months. She is going to college. I don't
 12:38PM 20 expect -- what I don't see is she is the most
 12:38PM 21 important person in my life and she's doing all
 12:38PM 22 this good stuff. Every time I walk out they say
 12:38PM 23 no, you guys can't be together. I don't get it.
 12:38PM 24 If you want me to be productive in life, wouldn't
 12:38PM 25 you want me with a supportive person that is

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12:40PM 1 don't want to live that life and I will not live
 12:40PM 2 that life again.
 12:40PM 3 I want in this life program at the
 12:40PM 4 homeless shelter. The 12-month or 18-month
 12:40PM 5 program. I want that. If I go to prison I am
 12:40PM 6 coming out to get it. I don't care. I want it.
 12:41PM 7 I want treatment.
 12:41PM 8 THE COURT: Thank you very much.
 12:41PM 9 THE DEFENDANT: You're welcome.
 12:41PM 10 THE COURT: Sir, based on your admissions to
 12:41PM 11 probation violation, seven, eight, 11 and 12; and
 12:41PM 12 in an exercise of my discretion in disposition, I
 12:41PM 13 have considered to Toohill factors and the nature
 12:41PM 14 of the offense; the character of the offender; any
 12:41PM 15 mitigating or aggravating factors; fulfilling the
 12:41PM 16 objectives of protecting society and achieving
 12:41PM 17 deterrence, rehabilitation or retribution.
 12:41PM 18 Sir, I hear what you are saying, but
 12:41PM 19 your actions have not supported that that is what
 12:41PM 20 you will do if you were placed on probation. You
 12:41PM 21 have been sent on two riders. And the most resent
 12:41PM 22 rider you completed in approximately March of
 12:41PM 23 2018. In considering that rider and your
 12:41PM 24 performance on that rider, I placed you on
 12:42PM 25 probation. So that was approximately six months

<p style="text-align: center;">33</p> <p>12:42PM 1 ago.</p> <p>12:42PM 2 The progress report from your probation</p> <p>12:42PM 3 officer clearly indicates that it's not just use.</p> <p>12:42PM 4 You've violated the terms and conditions of your</p> <p>12:42PM 5 probation in numerous ways. You've failed to pay</p> <p>12:42PM 6 court costs, fines and restitution. You failed to</p> <p>12:42PM 7 maintain any employment. You have a positive drug</p> <p>12:42PM 8 test. You were specifically doing activities,</p> <p>12:42PM 9 donating plasma, that you were instructed not to</p> <p>12:42PM 10 do. You ignored your officer's instructions. You</p> <p>12:42PM 11 had a smart phone knowing that you couldn't have a</p> <p>12:42PM 12 phone that had internet access.</p> <p>12:42PM 13 You appeared to be engaged in stalking</p> <p>12:42PM 14 behavior. I realize you have a relationship with</p> <p>12:42PM 15 a person that you have a complex relationship, but</p> <p>12:42PM 16 when a probation officer instructs you that your</p> <p>12:42PM 17 conduct is -- could be considered stalking, you</p> <p>12:43PM 18 didn't change your behavior. You failed to go to</p> <p>12:43PM 19 the treatment ordered by the probation officer.</p> <p>12:43PM 20 And the probation officer is given authority to</p> <p>12:43PM 21 order you to attend treatment beyond what was just</p> <p>12:43PM 22 placed by the Court. I said these programs and</p> <p>12:43PM 23 any other programs found appropriate by the</p> <p>12:43PM 24 probation officer.</p> <p>12:43PM 25 So you are a sex offender and placing</p>	<p style="text-align: center;">34</p> <p>12:43PM 1 you on the sex offender level of supervision is</p> <p>12:43PM 2 consistent with what the Idaho Department of</p> <p>12:43PM 3 Correction does for sex offenders. I realize this</p> <p>12:43PM 4 charge, the underlying charge in this case, is</p> <p>12:43PM 5 possession of controlled substance. But you have</p> <p>12:43PM 6 a history of felony convictions, including failing</p> <p>12:43PM 7 to report as a sex offender. And it is not a</p> <p>12:44PM 8 violation of your rights to be placed sex offender</p> <p>12:44PM 9 level of supervision to make your don't engage in</p> <p>12:44PM 10 additional criminal activity.</p> <p>12:44PM 11 I understand that you want help, but</p> <p>12:44PM 12 when I released you on the -- after the rider on</p> <p>12:44PM 13 probation, my notes indicat that you were on two</p> <p>12:44PM 14 mental health medications. And while you say you</p> <p>12:44PM 15 are trying to seek mental health counseling, you</p> <p>12:44PM 16 should have continued that when you were released</p> <p>12:44PM 17 in March which clearly did not occur. And I</p> <p>12:44PM 18 believe you started self-medicating by using the</p> <p>12:44PM 19 controlled substances.</p> <p>12:44PM 20 So you simply have been noncompliant</p> <p>12:44PM 21 with the conditions of probation and in numerous</p> <p>12:44PM 22 ways. You do find that you present a risk of</p> <p>12:44PM 23 additional criminal activity. You have the six</p> <p>12:44PM 24 felony convictions. You have already done two</p> <p>12:44PM 25 riders. This Court simply has no other choice in</p>
<p style="text-align: center;">35</p> <p>12:44PM 1 this case.</p> <p>12:44PM 2 The Court is going to revoke your</p> <p>12:44PM 3 probation and impose your sentence at two years</p> <p>12:45PM 4 fixed, plus five years indeterminate, for a total</p> <p>12:45PM 5 sentence of seven years. I am going to impose that</p> <p>12:45PM 6 sentence. Give you credit for the 412-days that</p> <p>12:45PM 7 you currently have -- for time served in this</p> <p>12:45PM 8 case. Meaning you will be eligible for release on</p> <p>12:45PM 9 parole in less than a year. That is a consequence</p> <p>12:45PM 10 for violating probation. The balance of your</p> <p>12:45PM 11 probation violations are going to be dismissed</p> <p>12:45PM 12 that you did not admit in accordance with your</p> <p>12:45PM 13 agreement with the State.</p> <p>12:45PM 14 I am going to recommend you get</p> <p>12:45PM 15 additional substance abuse treatment and mental</p> <p>12:45PM 16 health treatment while you are in the custody of</p> <p>12:45PM 17 the IDOC. But it is disingenuous, sir, when you</p> <p>12:45PM 18 say you haven't been provided treatment and you</p> <p>12:45PM 19 need treatment, when the record reflects</p> <p>12:46PM 20 opportunities have been provided and you simply</p> <p>12:46PM 21 wait too long to follow-up on those opportunities.</p> <p>12:46PM 22 You end up violating in other manners and then you</p> <p>12:46PM 23 want the Court to accept that you were going to</p> <p>12:46PM 24 proceed with those activities. And that is simply</p> <p>12:46PM 25 not indicated by the record and the Court has</p>	<p style="text-align: center;">36</p> <p>12:46PM 1 already provided programming in the form of two</p> <p>12:46PM 2 different riders.</p> <p>12:46PM 3 If you disagree with the Court's</p> <p>12:46PM 4 judgment you have the right to appeal. Any appeal</p> <p>12:46PM 5 must be filed within 42 days. You have a right to</p> <p>12:46PM 6 counsel for purposes of appeal.</p> <p>12:46PM 7 Now, you can take advantage of the</p> <p>12:46PM 8 programming at the Idaho Department of Corrections</p> <p>12:46PM 9 and continue to move forward in your life. It is</p> <p>12:46PM 10 up to you to have the attitude to make the changes</p> <p>12:46PM 11 that fundamentally need to be made. You cannot let</p> <p>12:46PM 12 your designation as a sex offender impact your</p> <p>12:46PM 13 obligations of completing probation. That is a</p> <p>12:46PM 14 fact you cannot change. That is a fact that is</p> <p>12:47PM 15 going to be with you the rest of your life. Okay.</p> <p>12:47PM 16 So in Alcoholics Anonymous they talk</p> <p>12:47PM 17 about recognizing those things you cannot change</p> <p>12:47PM 18 and having the wisdom to realize that and then</p> <p>12:47PM 19 changing the things you can change. You need to</p> <p>12:47PM 20 recognize your sex offender designation is not</p> <p>12:47PM 21 going to change. When you are placed on parole or</p> <p>12:47PM 22 probation that sex offender conviction, and I</p> <p>12:47PM 23 agree it was a number of years ago in the 1990s,</p> <p>12:47PM 24 is still going to impact your case. Accept that</p> <p>12:47PM 25 and move forward in your life.</p>

12:47PM 1 But you have to comply with the terms
12:47PM 2 of parole when you are released into the
12:47PM 3 community. And you are going to have that higher
12:47PM 4 level of supervision. So violations of having
12:47PM 5 smart phones. Violations of not going to
12:47PM 6 treatment. Violations of using. Violations of
12:48PM 7 not following-up on your mental health in a timely
12:48PM 8 manner. They all going to impact whether or not
12:48PM 9 you can be successful. So your attitude when
12:48PM 10 you are placed back into the community is going to
12:48PM 11 be critical. You have the ability to rewrite your
12:48PM 12 future.
12:48PM 13 THE DEFENDANT: Yes, ma'am, I do.
12:48PM 14 THE COURT: But you have to approach it with
12:48PM 15 the understanding that certain facts are not going
12:48PM 16 to change.
12:48PM 17 Good luck to you, sir.
12:48PM 18
19 (Hearing concluded.)
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