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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 46728-2019, 46729-2019, 46730-2019
Plaintiff-Respondent,)	
)	ADA COUNTY NOS. CR-FE-2015-13350,
v.)	CR-FE-2015-14637, CR01-18-53830
)	
ERIC CHRISTOPHER NASKER,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Eric Nasker was on probation stemming from his guilty pleas to possession of a controlled substance and grand theft, when he absconded from supervision and a warrant was issued for his arrest. When Mr. Nasker was arrested on the warrant, he was found to be in possession of a pipe that contained methamphetamine residue and he was charged with possession of methamphetamine and possession of drug paraphernalia. Mr. Nasker admitted that he violated the terms of his probation by absconding and he pled guilty to possession of methamphetamine, and the district court revoked his probation and sentenced Mr. Nasker to a concurrent unified term of six years, with one and one-half years fixed. Mr. Nasker asserts that

the district court abused its discretion by revoking probation and by imposing an excessive sentence.

Statement of the Facts & Course of Proceedings

In 2015, the State filed two separate informations charging Eric Nasker with possession of methamphetamine and possession of drug paraphernalia (Ada County case number CR-2015-13350 (44027)), and with two counts of grand theft by possession of stolen property, and criminal possession of a financial transaction card (Ada County case number CR-2015-14637 (44028)). (R. 44027, pp.25-26, 83-84.)¹ During separate entry of plea hearings, Mr. Nasker pled guilty to possession of a methamphetamine and to one count of grand theft by possession of stolen property. (R. 44027, pp.30-37, 90-97; Tr. 11/20/15, p.5, L.13 – p.16, L.6; Tr. 12/3/15, p.5, L.17 – p.18, L.18.) The district sentenced Mr. Nasker to concurrent unified terms of six years, with two years fixed, and retained jurisdiction. (R. 44027, pp.42-52, 107-110; Tr. 2/26/16, p.40, L.18 – p.42, L.1.) The Court of Appeals affirmed the district court’s sentencing decisions. *State v. Nasker*, Unpublished Opinion No. 759 (Ct. App. 10/31/16.)

Mr. Nasker successfully completed his retained jurisdiction program, and the district court placed him on probation in both cases. (R., pp.15-21, 117-23.) In September of 2017,

¹ These initial cases were consolidated on appeal by this Court under Supreme Court docket number 44027. (See R. 44027, p.2.) The appeal in this case involves a second appeal from those two prior cases (46728-2019 and 46729-2019) which have been consolidated with the appeal stemming from a third Ada County case number, CR01-18-53830 (46730-2019), under docket number 46728-2018. (R., p.2.) Additionally, this Court has ordered the Clerk’s Record and Reporter’s Transcripts from Supreme Court docket numbers 44027 and 44028 be augmented into the present appeal. (R., p.2.) Citations to the Clerk’s Record created for Mr. Nasker’s first appeal will use the designation “R. 44027,” and citations to the Presentence Investigation Report and its attached documents created for the first appeal will use the designation “PSI. 44027.” Citations to the Clerk’s Record created for the current appeal will use the designation “R,” and citations to the confidential exhibits created for the current appeal will use the designation “PSI.” Citations to the transcripts will include the date upon which the hearing occurred.

Mr. Nasker admitted to violating the terms of his probation in a variety of ways, and the district court revoked and reinstated Mr. Nasker's probation. (R., pp.49-51, 59-60, 63-38, 125-33, 154-55, 158.) A few months later, the State alleged that Mr. Nasker again violated the terms of his probation by failing to make himself available for supervision, absconding, failing to pay fines, and failing to pay restitution. (R., pp.69-74, 159-64.) The State also filed a new information charging Mr. Nasker with possession of methamphetamine and possession of drug paraphernalia. (R., pp.210-11.)

Pursuant to an agreement with the State, Mr. Nasker admitted to violating the terms of his probation by absconding from supervision, and he pled guilty to possession of methamphetamine; in exchange, the State agreed to dismiss the remaining probation violation allegations and the possession of paraphernalia charge, and agreed to recommend revocation of probation and a concurrent sentence of six years, with one and one-half years fixed, for the new possession of methamphetamine charge. (R. pp.215-24; Tr. 12/14/18, p.6, L.25 – p.17, L.8.) During the joint disposition / sentencing hearing, Mr. Nasker's counsel recognized "this is a case of imposition," and asked the court to impose a concurrent unified sentence of six years, with one year fixed, for the new possession of methamphetamine conviction. (Tr. 1/11/19, p.8, L.6 – p.9, L.6.) The district court revoked Mr. Nasker's probation in the two earlier cases, executing his previously suspended concurrent terms of six years, with two years fixed, and sentenced Mr. Nasker to a concurrent unified term of six years, with one and one-half years fixed, for the new possession of methamphetamine conviction. (R., pp.93-95, 182-84, 233-36; Tr. 1/11/19,

p.11, L.5 – p.12, L.6.) Mr. Nasker filed timely notices of appeal from all three of the final judgments.² (R., pp.100-02, 189-91, 241-43.)

ISSUE

Did the district court abuse its discretion when it revoked Mr. Nasker's probation and when it imposed a concurrent unified sentence of six years, with one and one-half years fixed, in light of the mitigating evidence present in this case?

ARGUMENT

The District Court Abused Its Discretion When It Revoked Mr. Nasker's Probation And When It Imposed A Concurrent Unified Sentence Of Six Years, With One And One-Half Years Fixed, In Light Of The Mitigating Evidence Present In This Case

Mindful of his counsel's recognition that imposition of his prior sentences was warranted in this case, Mr. Nasker asserts that the district court abused its discretion by revoking his probation. Additionally, Mr. Nasker asserts that, given any view of the facts, his unified sentence of six years, with one and one-half years fixed, imposed based upon his new conviction for possession of methamphetamine, 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 considering the nature of the offense, the character of the offender, and the protection of the public interest. 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.

² Mr. Nasker also filed timely Rule 35 motions seeking leniency in all three cases which the district court denied. (R., pp.96-99, 185-88, 237-40.) In light of the relevant standards of review he does not challenge the district court's denial of his Rule 35 motions in this appeal.

Mr. Nasker's criminal actions in these cases are the direct result of his addiction to methamphetamine. (PSI 44027, pp.4, 148.) When asked to describe his family history, Mr. Nasker stated, "My childhood is very vague since I have been doing drugs since age 13," and he stated he dropped out of school when he was 16 because of his drug use. (PSI 44027, p.13.) Mr. Nasker started drinking alcohol and using marijuana at age 13, he started using methamphetamine occasionally when he was 15, he started using meth more regularly when he turned 18, and he eventually became a daily user. (PSI 44027, pp.13, 17.) At age 33, and while awaiting his sentencing in his earlier cases, Mr. Nasker realized the toll meth has taken on his life and he actively sought treatment. (PSI 44027, pp.1, 17-18, 145.)

Mr. Nasker's sister-in-law, Heather Nasker, wrote a letter in support prior to imposition of his initial sentences. (PSI 44027, pp.25-26.) In addition to noting that Mr. Nasker is a hard worker and is great with his nieces and nephews, Ms. Nasker stated that she has been in active recovery from her own substance abuse for seven years, and that she believed Mr. Nasker could be successful in community-based group treatment programs, as long as he started in an inpatient program, and was closely monitored while on probation. (PSI 44027, pp.25-26.) Ms. Nasker noted that she and her husband would be willing to assist Mr. Nasker in making all of his required appointments, and they would provide him with groceries and clothing, but would not give him cash. (PSI 44027, pp.25-26.)

Both in writing and orally during his original sentencing hearing, Mr. Nasker expressed his sincere remorse for his actions and the damage he caused his victims in those cases, and he expressed his desire to continue to seek treatment so that he could beat his addiction. (Tr. 2/26/16, p.37, L.5 – p.38, L.4; PSI 44027, pp.145, 148-157.) He made some progress towards his recovery as exemplified by his successful period of retained jurisdiction. (PSI, pp.1-

6.) However, as often happens with people addicted to methamphetamine, Mr. Nasker relapsed. He attempted to deal with his continuing addiction through the drug court program; unfortunately, the staff deemed him to not be an appropriate candidate for that program. (R., pp.90, 197, 227.) Idaho Courts recognize that substance abuse and the willingness to seek treatment, support from family, and remorse for one's actions, are all mitigating factors that should counsel the district court to impose a lesser sentence. *See State v. Nice*, 103 Idaho 89, 91 (1982); *State v. Shideler*, 103 Idaho 593 (1982); *State v. Alberts*, 121 Idaho 204 (Ct. App. 1991). Mr. Nasker asserts that, in light of the mitigating factors that exist in his case, the district court abused its discretion in its sentencing decisions.

CONCLUSION

Mr. Nasker respectfully requests that this Court reduce his sentences as it deems appropriate.

DATED this 31st day of October, 2019.

/s/ Jason C. Pintler

JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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/s/ Kylie M. Fournier

KYLIE M. FOURTNER
Administrative Assistant

JCP/kmf