

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

PAUL R. PANTHER  
Deputy Attorney General  
Chief, Criminal Law Division

LORI A. FLEMING  
Deputy Attorney General  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534  
E-mail: [ecf@ag.idaho.gov](mailto:ecf@ag.idaho.gov)

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 46988-2019
Plaintiff-Respondent,	)	
	)	Ada County Case No.
v.	)	CR-FE-2012-13591
	)	
DAVID JOSEPH LOPEZ,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Lopez failed to establish that the district court abused its discretion by revoking his probation and executing his underlying unified sentence of five years, with one and one-half years fixed, imposed following his guilty plea to possession of methamphetamine?

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

Lopez purchased “packages of ‘meth’ and marijuana in Washington prior to driving to Boise,” Idaho, and he and his brother, Robert, subsequently “smoked ‘meth’ as they were driving

to Boise.” (PSI, p.3.<sup>1</sup>) An officer observed the brothers’ vehicle fail to maintain its lane of travel and conducted a traffic stop, during which a drug detection K-9 “alerted to the presence of a narcotic substance inside the vehicle.” (PSI, p.3.) A search of the vehicle yielded several packages of methamphetamine, a “baggie of marijuana,” a pill organizer “which had multiple types of medication inside,” a “light bulb that had been altered into a ‘meth’ smoking device,” a marijuana pipe, and a medication bottle containing marijuana. (PSI, p.3.)

The state charged Lopez with possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia. (R., pp.45-46.) Pursuant to a plea agreement, Lopez pled guilty to possession of methamphetamine and the state dismissed the remaining charges. (R., p.55.) The district court imposed a unified sentence of five years, with one and one-half years fixed, suspended the sentence, and placed Lopez on supervised probation for five years, with the condition that he successfully complete “Substance Abuse or ABC programming.” (R., pp.64-69.) Lopez completed the “Substance Abuse Program” and the “Active Behavior Change” program and was released from the Ada County Jail on March 29, 2013. (R., p.78.)

On October 17, 2014, the state filed a motion for probation violation alleging that Lopez had violated the conditions of his probation by committing the new crime of felony possession of a controlled substance (methamphetamine), failing to notify his probation officer of his contact with law enforcement, failing to report for supervision as instructed, changing residences without permission, absconding supervision, and failing to pay restitution and his other court-ordered financial obligations. (R., pp.80-82, 90.) The district court issued a bench warrant, and Lopez was at large and unsupervised for approximately one year before he was finally located and

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<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file “Lopez 46988 psi.pdf.”

arrested on the warrant in October 2015. (R., pp.121-22.) Lopez subsequently admitted that he violated the conditions of his probation by committing the new crime of felony possession of a controlled substance, absconding supervision, and failing to pay restitution, and the district court revoked Lopez's probation, executed the underlying sentence, and retained jurisdiction. (R., pp.130, 132-34.) Following the period of retained jurisdiction, the district court suspended Lopez's sentence and placed him on supervised probation for five years, beginning on April 18, 2016. (R., pp.139-43.)

On January 18, 2019, the state filed a second motion for probation violation, alleging that Lopez had violated the conditions of his probation by committing the new crime of felony possession of a controlled substance in July 2014, committing the new crimes of possession of methamphetamine and possession of amphetamine/dextroamphetamine in December 2018, changing residences without permission, leaving his assigned district without permission, failing to attend any AA/NA meetings and/or to obtain a sponsor, failing to make himself available for supervision and program participation as instructed, absconding supervision, and failing to pay his cost of supervision fees. (R., pp.154-56.) Lopez admitted that he violated the conditions of his probation by failing to attend AA/NA meetings and failing to obtain a sponsor, and by absconding supervision, and the state agreed to strike the allegation that Lopez committed the new crime of felony possession of a controlled substance in July 2014, "as it occurred prior to him being reinstated on probation." (4/8/19 Tr., p.4, Ls.8-22; p.5, L.21 – p.6, L.4; R., p.183.) The district court revoked Lopez's probation and executed the underlying sentence. (R., pp.185-87.) Lopez filed a notice of appeal timely from the district court's order revoking probation and executing his underlying sentence. (R., pp.188-90.)

Lopez asserts that the district court abused its discretion by revoking his probation in light of his employment at Denny's and his "explanations" for his probation violations. (Appellant's brief, pp.4-7.) Lopez 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 district court's decision to revoke Lopez's probation was appropriate in light of Lopez's ongoing criminal conduct and refusal to abide by the terms of probation, his repeated decisions to abscond supervision, and his failure to rehabilitate. Lopez has a long history of disregarding the law. The instant offense was Lopez's third conviction for a drug-related crime and, both of the times that he violated his probation in this case, he absconded supervision and was arrested for new felony drug charges. (PSI, pp.4-5; R., pp.84, 158.) Lopez – now 44 years old – reported that he began using illegal drugs at age 12 and that he "get[s] high every day pretty much." (PSI, pp.1, 11; R., p.108.) He continued to use methamphetamine and marijuana while on pretrial release in this case, and he also failed to contact the "PSI office" as instructed, was not available for his scheduled phone interview with the presentence investigator, and failed

to respond when the presentence investigator attempted to contact him to reschedule the interview. (PSI, pp.11, 13, 17.)

Although Lopez completed the “Substance Abuse Program” and the “Active Behavior Change” program before he was released on probation in this case, he nevertheless chose to resume his use of illegal drugs. (R., pp.78, 101.) In June 2014, an officer stopped him in Pend Oreille County, Washington, noted that it appeared Lopez was involved in “some type of drug deal,” and asked him “what kind of drugs were in [his] truck.” (R., p.101.) Lopez responded that he was “not sure” and that the drugs were “from when [he] was not being good”; the officer then asked “how long that had been, to which [Lopez] said, ‘Since about January of this year.’” (R., p.101.) The officer subsequently searched Lopez’s truck and found baggies containing methamphetamine, glass pipes with methamphetamine residue, a plastic case with “numerous pills inside of different shapes and sizes,” a digital scale, and “numerous baggies.” (R., pp.100-01.) Lopez then admitted that he “get[s] high every day pretty much.” (R., p.108.) Lopez was arrested for possession of a controlled substance with intent to deliver, possession of a controlled substance, “Possession of [a] Legend Drug,” and possession of drug paraphernalia; he was later convicted of possession of methamphetamine and was “sentenced in Pend Oreille County Superior Court to credit for time served and 12 months of supervision.” (R., pp.84, 89.) Just six days after he was sentenced for the new charge, he absconded supervision, and was thereafter at large and unsupervised for approximately one year before he was finally located and arrested on the probation violation bench warrant in this case. (R., pp.85, 89, 121-22.)

Following Lopez’s first probation violation in this case, the district court placed him in the retained jurisdiction program, where he completed the “A New Direction” substance abuse program and “Pre-release” before the district court reinstated him on probation. (PSI, p.210; R.,

pp.139-43.) Lopez “was required to report to [the] Washington Department of Corrections upon his release from his rider”; however, he “failed to ever check in with his supervising officer in Washington. His supervising officer in Washington made multiple unsuccessful attempts to contact [him],” and ultimately “the Washington Department of Corrections issu[ed] a felony warrant.” (R., p.159 (capitalization altered).) Lopez also “avoided supervision” in Idaho and “continuously moved around without prior approval from his supervising officer.” (R., p.159.) He eventually absconded supervision altogether and “moved to Spokane, Washington, without approval.” (R., pp.155, 159.) On December 8, 2018, officers located Lopez “working on his car outside of his home” in Spokane, Washington. (R., p.157.) Upon searching Lopez, officers found “methamphetamine, five small orange pills identified as amphetamine/dextroamphetamine, and one yellow pill identified as Adderall. ... The pills were found loosely in [Lopez’s] pocket without a prescription.” (R., pp.157-58.) Lopez told the officers that the methamphetamine was “his meth” and that he “has been using meth for the last 20 years.” (PSI, p.261.) The officers arrested Lopez on his outstanding warrant and for new charges of possession of methamphetamine and possession of amphetamine/dextroamphetamine. (PSI, p.261.)

On appeal, Lopez argues that his “explanations at the probation violation disposition hearing show the district court could only reasonably conclude from his conduct that probation was achieving its rehabilitative purpose.” (Appellant’s brief, p.7.) Lopez’s first “explanation” is that he has been sober since he completed his rider and that, when he was arrested in Spokane, Washington, “with methamphetamine, amphetamine/dextroamphetamine, and Adderall on his person,” he was “found with [his] son’s Adderall,” for which he had a prescription. (Appellant’s brief, p.6 (quoting 4/22/19 Tr., p.13, L.10).) While it could be true that the single

Adderall pill that was found “loosely in [Lopez’s] pocket” was his son’s Adderall pill, Lopez’s “explanation” does not account for the container of methamphetamine or for the amphetamine/dextroamphetamine pills – for which he did not have a prescription – that were also found in his pocket, and his claim of sobriety is belied by his admission, to the arresting officers, that the methamphetamine “located in his pocket was his meth and he has been using meth for the last 20 years.” (PSI, p.261.) Lopez’s second “explanation” is that “he had been living in Oldtown and Coeur d’Alene in Idaho, ‘but [he] was given verbal permission by the PO to go visit [his] kids whenever [he] wanted to’” and, when he was found in Washington, he was “‘simply stay[ing] with [his] kids all day long’” to “‘save money on daycare.’” (Appellant’s brief, pp.6-7.) This “explanation” is contradicted by his probation officer’s report that Lopez “was not approved to leave the State of Idaho,” and he did not have approval to move to Coeur d’Alene or to Oldtown in the first instance. (R., pp.158-59.)

Lopez’s “explanations” for violating the conditions of his probation do not show that probation was achieving the goal of rehabilitation. If anything, these excuses and justifications indicate that Lopez is unwilling to accept full responsibility for his unlawful behavior and is not amenable to rehabilitative treatment, as he does not acknowledge any wrongdoing or behavior in need of correction. Moreover, Lopez absconded supervision both of the times that he was granted the opportunity of probation in this case, and an offender’s decision to abscond, no matter the reason, prevents authorities from ensuring that probation is serving its intended function. (R., pp.81, 130, 155, 183.) In no way can probation meet the goals of protecting the community and rehabilitation if the probationer chooses to remove himself from probation supervision. See State v. Sandoval, 92 Idaho 853, 860, 452 P.2d 350, 357 (1969) (citing State v. Oyler, 92 Idaho 43, 436 P.2d 706 (1968)) (emphasis added) (purpose of probation is to give the

offender “an opportunity to be rehabilitated *under proper control and supervision*”). As the district court stated, at the disposition hearing, “This is the second absconding. When you have a rider, they cover what you are suppose[d] to do as far as probation. This makes probation not workable.” (4/22/19 Tr., p.15, Ls.6-9.)

The district court considered all of the relevant information and reasonably determined that Lopez was no longer an appropriate candidate for community supervision, particularly in light of his ongoing criminal conduct and refusal to abide by the terms of probation, his repeated decisions to abscond supervision, and his failure to rehabilitate while in the community. Given any reasonable view of the facts, Lopez has failed to establish an abuse of discretion.

#### Conclusion

The state respectfully requests this Court to affirm the district court’s order revoking Lopez’s probation and executing his underlying sentence.

DATED this 4th day of September, 2019.

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

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of September, 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](mailto:documents@sapd.state.id.us).

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