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State v. Garner Appellant's Brief Dckt. 43493

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NOS. 43493, 43494
)	
v.)	CANYON COUNTY NOS. CR 2014-
)	11002, CR 2014-11016
JASON ZANE GARNER,)	
)	APPELLANT'S BRIEF
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Jason Zane Garner was on probation for possession of a controlled substance, possession with the intent to deliver, and stalking. Following an evidentiary hearing, the district court found that Mr. Garner violated the terms of his probation. The district court then revoked his probation and executed his aggregate sentence of ten years, with six years fixed. Mr. Garner appeals from the amended judgment and commitment.

Statement of Facts and Course of Proceedings

In August of 2014, Mr. Garner pled guilty to charges in two separate cases arising out of Canyon County. In one case, CR 2014-11002, Mr. Garner entered into an

*Alford*¹ plea to stalking in the first degree. (R., pp.35, 113–18.) In the other case, CR 2014-11016, Mr. Garner pled guilty to possession of a controlled substance and possession of a controlled substance with the intent to deliver. (R., pp.113–18, 136.) For the drug offenses, the district court sentenced Mr. Garner to five years, with three years fixed, for each offense, to be served concurrently. (R., pp.136–38.) For the stalking offense, the district court sentenced Mr. Garner to five years, with three years fixed, to be served consecutive to the sentences for drug offenses. (R., pp.35–37.) The district court retained jurisdiction over both cases. (R., pp.36, 137.) After a rider review hearing, the district court suspended execution of the sentences and placed Mr. Garner on probation. (R., pp.38–40, 148–49, 151–53.)

In June of 2015, the State filed a Petition for Probation Violation in both CR 2014-11002 and CR 2014-11016. (R., pp.45–48, 158–59.) The alleged probation violations for each case slightly differed. In CR 2014-11002, the Report of Probation Violation alleged Mr. Garner left the Third Judicial District without permission and violated the no contact order with the victim. (R., pp.47–48.) In CR 2014-11016, the Report alleged the same allegation for leaving the Third Judicial District, but, instead of the no contact order violation, the Report alleged Mr. Garner failed to follow the instruction of his supervising officer not to have contact with the victim in the staking case. (R., pp.160–61.) Following an evidentiary hearing, the district court found Mr. Garner violated these terms of his probation. (Tr. Vol. I,² p.59, L.21–p.63, L.13.)

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

² There are two transcripts on appeal. The first, cited as Volume I, contains the probation violation evidentiary hearing. The second, cited as Volume II, contains the probation disposition hearing.

The district court³ held a disposition hearing in August of 2015. (Tr. Vol. II, p.4, L.1–p.17, L.22.) The district court revoked probation in both cases and executed the underlying sentences. (Tr. Vol. II, p.17, Ls.19–21.) The district court entered an Amended Judgment and Commitment in each case, from which Mr. Garner timely appealed.⁴ (R., pp.58–62; 178–82.)

ISSUE

Did the district court err by revoking Mr. Garner’s probation and executing his underlying aggregate sentence of ten years, with six years fixed?

ARGUMENT

The District Court Erred By Revoking Mr. Garner’s Probation And Executing His Underlying Aggregate Sentence Of Ten Years, With Six Years Fixed

The district court is empowered by statute to revoke a defendant’s probation under certain circumstances. I.C. §§ 19-2602, -2603, 20-222. The Court uses a two-step analysis to review a probation revocation proceeding. *State v. Sanchez*, 149 Idaho 102, 105 (2009). First, the Court determines “whether the defendant violated the terms of his probation.” *Id.* Second, “[i]f it is determined that the defendant has in fact violated the terms of his probation,” the Court examines “what should be the consequences of that violation.” *Id.* The determination of a probation violation and the determination of the consequences, if any, are separate analyses. *Id.*

³ The Honorable Dennis E. Goff presided over the evidentiary hearing, and the Honorable Christopher S. Nye presided over the disposition hearing. (Tr. Vol. I, p.3; Tr. Vol. II, p.2.)

⁴ Mr. Garner moved for reconsideration of his sentences pursuant to Idaho Criminal Rule 35, which the district court denied without a hearing. (R., pp.67, 187, 194–96.) Mr. Garner does not challenge on appeal the district court’s denial of his motions for reconsideration.

In this case, Mr. Garner challenges both the district court's factual finding that he violated the terms of his probation and its decision to revoke his probation. Each will be addressed in turn.

A. The District Court Lacked Substantial And Competent Evidence To Find Mr. Garner Willfully Violated The Terms Of His Probation

Idaho Criminal Rule (I.C.R.) 33(f) provides: "The court shall not revoke probation unless there is an admission by the defendant or a finding by the court, following a hearing, that the defendant *willfully* violated a condition of probation." I.C.R. 33(f) (emphasis added).⁵ This new, current version of I.C.R. 33(f) indicates that the district court must find a "willful" violation in order to revoke the defendant's probation. See *Doe v. State*, 137 Idaho 758, 760 (2002) (holding that the word "may" is permissive, unlike the mandatory meaning of the words "must" or "shall," when interpreting an Idaho Rule of Civil Procedure); *Rife v. Long*, 127 Idaho 841, 848 (1995) ("When used in a statute, the word 'may' is permissive rather than the imperative or mandatory meaning of 'must' or 'shall.'"). In other words, I.C.R. 33(f) precludes the district court from revoking the defendant's probation if the district court finds that the defendant's violation was non-willful. The district court's finding of a willful probation violation must be supported by substantial and competent evidence in the record. *State v. Easley*, 156 Idaho 214, 222 (2014); *Sanchez*, 149 Idaho at 105.

Although the appellate courts have not interpreted this current version of I.C.R. 33(f), previous Idaho case law provides some guidance on the difference between a

⁵ This new version of I.C.R. 33(f) became effective July 1, 2015. Since the State filed its Petition for Probation Violations in both CR 2014-11002 and CR 2014-11016 after this date, this version of I.C.R. 33 was in effect. (R., pp.45, 158.)

willful and non-willful violation. The Court in *Easley*, in discussing the applicable legal standards for a district court's decision to revoke probation, explained:

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. However, if a probationer's violation of a probation condition was *not willful, or was beyond the probationer's control*, a court may not revoke probation and order imprisonment without first considering alternative methods to address the violation.

156 Idaho at 222–23 (emphasis added) (quoting *Sanchez*, 149 Idaho at 105). This discussion indicates that a willful violation is knowing and intentional. Conversely, it indicates that a non-willful violation occurs when the defendant did not act knowingly and intentionally or had no control over the commission of the violation. See *State v. Lafferty*, 125 Idaho 278, 380, 382 (Ct. App. 1994) (holding the defendant's probation violation was non-willful because defendant's disability prevented him from performing a work assignment). The burden is on the State to show a willful violation. *Id.* at 382.

Here, in CR 2014-11002, the State alleged Mr. Garner violated the term of his probation that required him to abide by the no contact order. (R., pp.45–48.) The no contact order provided: "You shall not harass, follow, contact, attempt to contact, communicate with in any form, or knowingly remain within 300 feet of the alleged victim(s) or his/her property, residence, work or school." (R., p.19.) The State claimed Mr. Garner violated this term by sitting in his truck at the victim's employment on May 21, 2015, and by repeatedly driving by the victim's residence on May 26, 2015. (R., pp.48, 161.) In CR 2014-11016, the State alleged Mr. Garner violated the term of his probation that required him to "follow the advice and instructions of the supervising officer." (R., pp.158–61.) The supervising officer's instruction was "not to have contact with the victims in his stalking case." (R., p.161.) The State claimed Mr. Garner violated

this term with the same conduct: sitting in his truck at the victim's employment on May 21 and repeatedly driving by the victim's residence on May 26. (R., p.161.)

The State has not met its burden to show willful violations based on the evidence presented at the evidentiary hearing. First, the district court expressly declined to find that Mr. Garner repeatedly drove by the victim's residence on May 26. (Tr. Vol. I, p.62, L.15–p.63, L.11.) The district court reasoned that the hearsay testimony proffered by the State to support this allegation lacked any indicia of reliability or credibility. (Tr. Vol. I, p.62, L.15–p.63, L.11.) Second, the evidence is insufficient to establish Mr. Garner willfully violated the no contact order and willfully disobeyed the supervising officer's instruction not to contact the victim by sitting in his truck at the victim's employment.

The evidence to support these allegations is as follows. Mr. Garner's supervising officer testified that she had been contacted by another probation officer who had contact with a police officer. (Tr. Vol. I, p.15, Ls.1–2, p.16, L.8–p.17, L.24, p.34, Ls.2–8.) According to the supervising officer, the other probation officer had told her that Mr. Garner "was in Boise and allegedly stalking the victim again." (Tr. Vol. I, p.16, L.8–p.17, L.18, p.34, Ls.2–8, p.26, Ls.6–13.) The supervising officer also said that she had spoken with the police officer, but she could not recall her name and never received an incident report. (Tr. Vol. I, p.16, Ls.20–24, p.26, Ls.10–24.) The supervising officer did not provide any testimony as to the specifics of her conversation with the police officer. (See Tr. Vol. I, p.16, L.8–p.17, L.24, p.26, L.6–p.27, L.14, p.34, Ls.2–8; R., pp.47–48, 160–61.)

Next, the victim testified that, on May 21, she was leaving her work at the liquor store on 17th and State in Boise when she saw Mr. Garner sitting in his parked truck

across the street at the Albertson's grocery store parking lot. (Tr. Vol. I, p.36, L.14–p.37, L.16.) The victim took pictures of the truck, and a police officer verified that the truck was registered to Mr. Garner. (Tr. Vol. I, p.37, L.21–p.38, L.3, p.48, Ls.10–22.) The victim testified that Mr. Garner never made an effort to get out of the truck, speak with her, or go into the liquor store. (Tr. Vol. I, p.42, Ls.15–23, p.44, Ls.12–14.) The victim explained that Mr. Garner's truck was parked where someone would park to go to Albertson's. (Tr. Vol. I, p.45, Ls.1–3, p.45, L.20–p.46, L.5.) Additionally, the victim testified that she had worked at a different liquor store in Nampa when she was in a relationship with Mr. Garner. (Tr. Vol. I, p.43, Ls.2–21.) She had been transferred to two different stores since their relationship. (Tr. Vol. I, p.43, Ls.2–4.) She never worked at the 17th and State liquor store while she was dating Mr. Garner. (Tr. Vol. I, p.43, Ls.8–21.) She did not know if Mr. Garner knew that she worked at the 17th and State liquor store. (Tr. Vol. I, p.45, Ls.4–7.)

On recall, the supervising officer testified that she never told Mr. Garner that the victim worked at the 17th and State liquor store. (Tr. Vol. I, p.54, Ls.12–16.)

Finally, the State admitted two pictures of text messages on Mr. Garner's cell phone between him and a friend named "Diamond." (Tr. Vol. I, p.56, Ls.4–24; Aug. R., State's Exs. 1–2.) In these text messages, Mr. Garner tells Diamond that his "ex"—"The one that says I'm stalking her"—"just drove by and took a pic of my truck." (Aug. R., State's Ex. 1.) He also messages to Diamond, "She is going to try to bust me." (Aug. R., State's Ex. 2.) While Diamond suggests that Mr. Garner should say he "was looking at some places for rent," Mr. Garner does not directly respond to or endorse this

suggestion. (State's Ex. 2.) Instead, he explains, "I was in the albertsons [sic] parking lot," and tells Diamond to meet him. (State's Ex. 2.)

The district court found the probation violation allegations to be "true," but the district court never expressly found that the violations were willful. (Tr. Vol. I, p.61, L.6–p.63, L.13.) Substantial and competent evidence does not support such a finding. The evidence shows Mr. Garner was in his truck in a grocery store parking lot. Mr. Garner made no effort to communicate with the victim. There is no testimony by the victim or the supervising officer that Mr. Garner knew the location of the victim's work. Moreover, the text messages do not establish Mr. Garner knew the location. The messages merely corroborate the testimony already provided by the victim—Mr. Garner was in the Albertson's parking lot across the street from the victim's work and the victim saw him. The messages certainly demonstrate that Mr. Garner was aware of the terms of his no contact order, but the messages themselves do not indicate any intent by Mr. Garner to be at Albertson's for the purpose of violating the no contact order or otherwise contacting the victim. Based on the evidence, the State has not met its burden to show Mr. Garner willfully violated the no contact order and willfully disobeyed the supervising officer's instruction not to contact victim. Rather, substantial and competent evidence indicates Mr. Garner inadvertently or accidentally went to a grocery store that he did not know was across the street from the victim's work.

Moreover, the district court improperly placed the burden on Mr. Garner to disprove the State's allegations. In finding the allegations to be "true," the district court stated, "There is no testimony that the defendant did *not* know where [the victim] was working. There is no testimony as to why the defendant would be in the Albertson[']s

parking lot across the street from [the victim's] present place of employment.” (Tr. Vol. I, p.62, Ls.1–6 (emphasis added).) The burden is on the State, however, to prove the allegations by substantial and competent evidence. *Lafferty*, 125 Idaho at 382. The burden is not on Mr. Garner to disprove the allegations by substantial and competent evidence.

The lack of substantial and competent evidence to show Mr. Garner willfully violated the no contact order and willfully disobeyed the supervising officer's instruction not to contact the victim requires a remand. “When a discretionary ruling has been tainted by legal or factual error,” the appellate courts “ordinarily vacate the decision and remand the matter for a new, error-free discretionary determination by the trial court.” *State v. Upton*, 127 Idaho 274, 276 (Ct. App. 1995). A remand may be avoided, however, “where it is apparent from the record that the result would not change or that a different result would represent an abuse of discretion.” *Id.* “Therefore, if the district court erred in finding one probation violation but correctly found one or more other violations, remand is not necessary if it is clear from the record that the district court would have revoked probation based solely upon the other violations.” *Id.* Here, the State's argument in support of revocation centered on Mr. Garner's alleged willful contact with the victim. (Tr. Vol. II, p.5, L.13–p.8, L.6, p.15, L.19–p.16, L.2, p.16, Ls.22–25.) The State even highlighted the unsubstantiated violation of Mr. Garner driving by the victim's residence, which had been rejected by the district court at the evidentiary hearing. (Tr. Vol. II, p.7, L.20–p.8, L1.) The district court's decision to revoke Mr. Garner's probation also focused on the alleged willful contact with the victim:

MS. MORRISON [The State]: I think it's convenient that today, the defendant is telling people for the first time that he was going to AA with

his girlfriend and yes, he didn't have permission to go to AA in Ada County but there was a completely innocuous reason for him being there and he just happened to be sitting there in his truck at the same time [the victim] gets off work at the location that she's worked at for some time, part of the liquor store chain. It's just a matter of chance that he's just sitting here.

THE COURT: I agree that it's too convenient that this just happened, *but does it justify a 10-year sentence?* I'm just asking that rhetorically. He had 2 plus 3, two sentences consecutive.

MS. MORRISON: I think it does, Judge.

THE COURT: Or another rider? I'm asking that. I can ask the probation officer that.

(Tr. Vol. II, p.15, L.19–p.16, L.9 (emphasis added).) The district court's rhetorical question of whether Mr. Garner's alleged violations for contacting the victim at her work justified imprisonment demonstrate that those alleged violations were one of its primary considerations. Due to the emphasis of Mr. Garner's alleged contact with the victim, it is not clear from the record that the district court would have revoked Mr. Garner's probation based solely upon his other violation for leaving the Third Judicial District without permission.⁶ Remand is necessary for "a new, error-free discretionary determination" by the district court on the alleged probation violations. *Upton*, 127 Idaho at 276. In addition, remand is necessary because the district court did not make a finding that the violations were willful, which is explicitly required by the current version of I.C.R. 33(f).

⁶ Mr. Garner does not challenge the district court's finding on this violation. (Tr. Vol. I, p.60, L.24–p.61, L.5.)

B. The District Court Abused Its Discretion By Revoking Mr. Garner's Probation

Assuming *in arguendo* the evidence is sufficient for the violations, Mr. Garner asserts that the district court erred by revoking his probation and imposing his sentence.

"After a probation violation has been proven, the decision to revoke probation and pronounce sentence lies within the sound discretion of the trial court." *State v. Roy*, 113 Idaho 388, 392 (Ct. App. 1987). "A judge cannot revoke probation arbitrarily," however. *State v. Lee*, 116 Idaho 38, 40 (Ct. App. 1989). "The purpose of probation is to give the defendant an opportunity to be rehabilitated under proper control and supervision." *State v. Mummert*, 98 Idaho 452, 454 (1977). "In determining whether to revoke probation a court must consider whether probation is meeting the objective of rehabilitation while also providing adequate protection for society." *Upton*, 127 Idaho at 275. The court may consider the defendant's conduct before and during probation. *State v. Roy*, 113 Idaho 388, 392 (Ct. App. 1987).

In this case, Mr. Garner had a serious drug addiction to prescription medications when he began the rider program. (Presentence Investigation Report ("PSI"),⁷ p.14.) He also used marijuana and had abused methamphetamine and alcohol in the past. (PSI, pp.22–24.) Despite these obstacles, Mr. Garner did very well on the rider. (PSI, pp.84–88.) He had no behavioral issues, and he was on track to complete all assignments. (PSI, p.88.) He took the Moral Reconciliation Therapy, Relapse Prevention TAP 19, Workforce Readiness, and Partners in Parenting programs. (PSI, pp.84–87.) After the rider program, Mr. Garner was "completely sober." (Tr. Vol. II, p.13, L.21.) He explained that getting sober was "the best thing" he had ever done in his life. (Tr. Vol. II,

⁷ Citations to the PSI refer to the electronic file of the confidential exhibits titled "Garner Exhibits #43493."

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of February, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JASON ZANE GARNER
INMATE #112882
ISCC
PO BOX 70010
BOISE ID 83707

CHRISTOPHER S NYE
DISTRICT COURT JUDGE
E-MAILED BRIEF

DAVID A CHRISTENSEN
CANYON COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
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_____/s/_____
EVAN A. SMITH
Administrative Assistant

JCS/eas