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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 47046-2019 & 47047-2019
Plaintiff-Respondent,)	
)	KOOTENAI CO. NOS. CR-2016-12710
v.)	& CR28-18-17644
)	
WAYNE DOUGLAS)	
WISNIEWSKI,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

In these consolidated appeals, Wayne Douglas Wisniewski appeals from his judgment of conviction in Docket No. 47047-2019 (*hereinafter*, 47047) and from the district court's order revoking probation in Docket No. 47046-2019 (*hereinafter*, 47046). In 47047, Mr. Wisniewski pleaded guilty to a felony DUI charge and the district court imposed a sentence of ten years, with three years determinate. The court then revoked Mr. Wisniewski's probation in 47046 and executed the original sentence of six years, with two years fixed, with the sentences to run consecutive. Pursuant to Mr. Wisniewski's Idaho Criminal Rule (*hereinafter*, Rule) 35 motion

for reduction of sentence, the court ordered the sentences to run concurrent. Mr. Wisniewski appeals.

Statement of the Facts & Course of Proceedings

On October 15, 2018, a Kootenai County Sheriff's Deputy stopped a vehicle driven by Mr. Wisniewski for driving 65 MPH in a 55 MPH zone. (Presentence Investigation Report (*hereinafter*, PSI), p.3.) The deputy detected the smell of alcohol and stated that Mr. Wisniewski had glassy eyes. (PSI, p.3.) Officer found cans of alcoholic beer and nonalcoholic beer in the vehicle; Mr. Wisniewski stated that he combined the two beers together to drink but not get drunk. (PSI, p.3.) His BAC was measured at .157. (PSI, p.3.)

Mr. Wisniewski was charged with one count of DUI, made a felony by virtue of his prior convictions. (47047 R., p.36.) He pleaded guilty and the district court imposed a sentence of ten years, with three years fixed. (47047 R., p.64.) Mr. Wisniewski was on probation for a previous DUI at the time. (47046 R., p.80.) He admitted to violating his probation by getting the new charge and the district court revoked his probation and executed the original sentence of six years, with two years fixed. (47046 R., p.165.) The court ordered that the sentence for the new charge run consecutive. (47047 R., p.64.) Mr. Wisniewski subsequently filed a Rule 35 motion, which the district court granted by ordering that the sentences run concurrently. (47047 R., p.62; 84.) Mr. Wisniewski appealed. (47046 R., p. 171; 47047 R., p.71.)

ISSUES

- I. Did the district court abuse its discretion when it imposed a unified sentence of ten years, with three years fixed, in 47047, and when it revoked probation and executed the sentence of six years, with two years fixed, in 47046.
- II. Did the district court abuse its discretion by partially granting Mr. Wisniewski's Rule 35 motion?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Ten Years, With Three Years Fixed in 47047, And When It Revoked Probation And Executed The Sentence Of Six Years, With Two Years Fixed, In 47046

“It is well-established that ‘[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.’” *State v. Pierce*, 150 Idaho 1, 5 (2010) (quoting *State v. Jackson*, 130 Idaho 293, 294 (1997) (alteration in original)). Here, Mr. Wisniewski's sentences do not exceed the statutory maximum. Accordingly, to show that the sentences imposed were unreasonable, Mr. Wisniewski “must show that the sentence, in light of the governing criteria, is excessive under any reasonable view of the facts.” *State v. Strand*, 137 Idaho 457, 460 (2002).

“‘Reasonableness’ of a sentence implies that a term of confinement should be tailored to the purpose for which the sentence is imposed.” *State v. Adamcik*, 152 Idaho 445, 483 (2012) (quoting *State v. Stevens*, 146 Idaho 139, 148 (2008)).

In examining the reasonableness of a sentence, the Court conducts an independent review of the entire record available to the trial court at sentencing, focusing on the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public; (3) possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

Stevens, 146 Idaho at 148. “A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution.” *State v. Delling*, 152 Idaho 122, 132 (2011). “The decision of whether to impose sentences concurrently or consecutively is within the sound discretion of the trial court.” *State v. Helms*, 130 Idaho 32, 35 (Ct. App. 1997); *see also* I.C. § 18-308.

“The primary purpose of the retained jurisdiction program is to enable the trial court to gain additional information regarding the defendant’s rehabilitative potential and suitability for probation.” *State v. Jones*, 141 Idaho 673, 676 (Ct. App. 2005). “[P]robation is the ultimate objective of a defendant who is on retained jurisdiction.” *Id.* at 677. The district court’s decision to retain jurisdiction is reviewed for an abuse of discretion. *Id.* “There can be no abuse of discretion in a trial court’s refusal to retain jurisdiction if the court already has sufficient information upon which to conclude that the defendant is not a suitable candidate for probation.” *Id.*

Similarly, “[t]he choice of probation, among available sentencing alternatives, is committed to the sound discretion of the trial court” *State v. Landreth*, 118 Idaho 613, 615 (Ct. App. 1990). 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.*

“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.” *State v. Upton*, 127 Idaho 274, 275 (Ct. App. 1995). The court may consider the defendant’s conduct before and during probation. *Roy*, 113 Idaho at 392. Here, Mr. Wisniewski does not challenge his admission to violating his probation. “When a probationer admits to a direct violation of her probation agreement, no further inquiry into the question is required.” *State v. Peterson*, 123 Idaho 49, 50 (Ct. App. 1992). Rather, Mr. Wisniewski submits that the district court abused its discretion by revoking his probation in 47046.

Daryl Cline testified in support of Mr. Wisniewski at the sentencing hearing. (Tr. p.27, Ls.9-20.) Mr. Cline was an addiction therapist with the Department of Veteran’s Affairs who had recently helped Mr. Wisniewski enter inpatient treatment in Walla Walla, Washington. (Tr., p.27, L.15 – p.28, L.9.) This program is a “28-day intensive inpatient residential treatment program that works with substance abuse and co-occurring disorders,” and Mr. Wisniewski had recently completed the program. (Tr., p.28, Ls.13-18.) At the time of the sentencing hearing, Mr. Wisniewski was attending a relapse prevention course at the Coeur d’Alene CBOC in outpatient treatment. (Tr., p.28, Ls.19-25.) As part of the program, Mr. Wisniewski was

required to participate in random UA's; he was in compliant with the treatment program and had never tested positive during his time in the program. (Tr., p.29, Ls.2-15.)

Mr. Cline was also Mr. Wisniewski's "mental health treatment coordinator. So if he needs any additional mental health for any of his other disorders, the schizoaffective, I can get him into treatment for that also." (Tr., p.29, Ls.19-23.) Mr. Cline praised Mr. Wisniewski for his efforts in working on his addiction. He testified, "I've met him after his previous DUI on July 4th, 2016. At that time he successfully completed treatment the first time, but this time he's been more serious and more involved, and he's getting more out of it or showing he's getting more out of it. He's more compliant and he's doing really well." (Tr., p.30, Ls.4-10.) This treatment program lasts an entire year and there is aftercare for individuals who need it. (Tr., p.30, Ls.11-20.)

Counsel for Mr. Wisniewski recommended that the court suspend any imposed sentence and place Mr. Wisniewski on probation. (Tr., p.37, Ls.18-22.) Counsel emphasized that Mr. Wisniewski understood that there was a price to be paid for what he had admitted to, "but I think that that's also important that he has admitted guilt in this case. He is not trying to hide behind anything right now." (Tr., p.37, L.23 – p.38, L.2.) Counsel also noted that Mr. Wisniewski "had the opportunity or availability to be discharged from probation early from the email from his probation officer. So I think that that was something that he was looking forward to. You don't get to that point during your supervision because you're slacking off." (Tr., p.38, Ls.11-21.)

Mr. Wisniewski addressed the district court at the sentencing. He informed that the court at a previous hearing where he was released to the Walla Walla program, Judge Christensen had informed him that the outcome of his sentences depended on how well he did in the program.

(Tr., p.40, Ls.15-25.) Mr. Wisniewski stated that he did his very best while there. (Tr., p.41, Ls.1-2.) Mr. Wisniewski stated, “there’s many of us that have substance abuse problems, whether it’s drugs or mine happens to be alcohol. And by God, I’ve certainly learned a lot and I am kicked in the head the day I got arrested. I was kicking myself all over the street. Didn’t need the sheriffs to do it. I was doing it to myself and I’m doing it to this day.” (Tr., p.41, Ls.17-23.)

When asking for probation, Mr. Wisniewski stated,

As part of my recovery process I’ve decided to quit smoking cigarettes, been taking Chantix, you know, to quit smoking and organize everything at my house. I’ve been there since 2012, not 2015, to clean and repaint everything in my home because of the nicotine everywhere in that house. To start a life over. I got clothes hanging all over the place.

I got a game plan to get my life free of alcohol for absolute eternity. I understand, absolutely I understand about the safety issues, the public safety issues. It’s pretty darn obvious to me. I mean I’ve been doing to many, many, many, many, many group meetings in the last couple of years and hearing a lot of stories from a lot of people that will – it could have been a lot worse. I got lucky.

I got stopped for speeding and that was it. That was bad enough, but I can’t do that anymore. I won’t do that anymore. I won’t smoke anymore because a lot of things that’s screwing up my body, and that one of my recovering – they call it a discharge when you leave Walla Walla. What are you going to do to make things different in your life?

Well, here’s my game plan. I need to follow through, thanks to Daryl and the group at the VA, to continue with the group outpatient SAGs, which is very, very helpful and the person that’s at my house right now, he’s one of the members of that group, which is great.

(Tr., p.46, L.8 – p.47, L.12.) Mr. Wisniewski recognized that the recovery process was not just to stop drinking, it was a change in behavior and in doing things that did not involve alcohol.

(Tr., p.47, Ls.21-25.) Mr. Wisniewski asked that he able to complete his aftercare on probation.

(Tr., p.48, Ls.8-12.)

The State recommended a sentence of eight years, with three years fixed, in 47047 and that the court execute the sentence in 47046 and that the court retain jurisdiction with the

sentences set to run consecutively. (Tr., p.25, Ls.16-24.) The court exceeded even the State's recommendation by imposing ten years, with three years fixed, and by not retaining jurisdiction. Mr. Wisniewski submits that the record shows that he recognized his addiction and was taking concrete steps to address it. He completed the Walla Walla program and was currently in outpatient treatment in Coeur d'Alene and could complete that program and do aftercare if he were placed on probation. He knew that he needed not only to stay away from alcohol but to start behaving more in a healthier way generally, including quitting smoking. He has no criminal history apart from drinking, and he has never harmed anyone. (PSI, pp.4-5.) Considering this information, Mr. Wisniewski submits that the court abused its discretion by imposing excessive sentences.

II.

The District Court Abused Its Discretion When It Partially Granted Mr. Wisniewski's Rule 35 motion

An order denying a motion for reduction of a sentence under Rule 35 is reviewed for an abuse of discretion. *State v. Hillman*, 143 Idaho 295, 296 (Ct. App. 2006) If the sentence is found to be reasonable at the time of pronouncement, the defendant must then show that it is excessive in view of the additional information presented with the motion for reduction. *Id.*

Mr. Wisniewski's daughter, Chrisanne Wisniewski, testified at the Rule 35 hearing. (Tr., p.56, Ls.9-15.) She stated that when her father was in the VA treatment program she noticed a significant change for the positive. (Tr., p.56, L.22 – p.57, L.6.) She stated that it had not been uncommon in the past for the two of them to “butt heads” because they were both strong-willed people, but that after they had an argument he called and apologized for how their previous conversations had been conducted, and that “I honestly can't tell you a time when he's

apologized to me for anything.” (Tr., p.57, Ls.15-17.) In another conversation, he thanked her for the all of the hard work that she and her brother had been doing. (Tr., p.57, Ls.18-21.) She stated that he been doing different activities such as skiing, volunteering, and walking dogs. (Tr., p.58, Ls.1-9.) Further, at the end of a conversation he told her that he loved her and it had been a long time since she had heard that. (Tr., P.58, Ls.14-22.) She believed that through the program “he was able to talk about his feelings. He was about to talk through some of his issues and get to a point where he would focus on family and be able to express his feelings in a way that I’ve never heard him do before.” (Tr., p.58, L25 – p.59, L.4.)

She also believed that her father had previously been in denial about any mental health issues but that he had acknowledged, “one thing I am learning is that I don’t know how to control myself in stressful situations, and I’m learning that there are steps I need to be taking to work on my anxiety.” (Tr., p.59, Ls.10-19.) She believed that since he had been incarcerated, Mr. Wisniewski had “done a 180” and was now angry when she spoke to him. (Tr., p.59, Ls.2-12.) She testified, “I’m no doctor so I couldn’t fully diagnose anything, of course, but being in a safe environment like in treatment, where’s he able to have professionals who are focusing on – of course, he was there for substance abuse, but through that process you talk a lot about things, you know, again, your feelings and coping skills, and being in the correctional institute you’re – that’s not happening.” (Tr., p.60, Ls.18-60.)

Counsel noted that she had submitted documents from the VA indicating that Mr. Wisniewski had been diagnosed with obsessive compulsive disorder, PTSD, and schizoaffective disorder bipolar type. (Tr., p.63, Ls.1-5.) She also emphasized that Mr. Wisniewski was a [REDACTED] Vietnam Veteran and was willing to engage in treatment through the VA. (Tr., p.63, Ls.20-25.) Counsel therefore requested that the court retain

jurisdiction, and, if the court was unwilling retain jurisdiction, that the court order that the sentences run concurrently. (Tr., p.64, L.20 – p.65, L.10.) The court ordered that the sentences run concurrently but rejected a retained jurisdiction. (Tr., p.67, L.19 – p.68, L.13.) In denying Mr. Wisniewski’s request, the court noted that he was at an establishment that serves alcohol. (Tr., p.66, Ls.9-12.) Mr. Wisniewski notes that he was at the American Legion in Athol, where, as a veteran, he was a member. (PSI, p.3.) As the nation’s largest veteran’s service organization, the American Legion is a not a place whose primary purpose is to serve alcohol. (*See* The American Legion, a U.S. Veterans Association, <http://www.legion.org>, last visited on December 4, 2019.)

Considering all of the information in support of the Rule 35 motion, Mr. Wisniewski submits that the district abused its discretion when it declined to retain jurisdiction.

CONCLUSION

Mr. Wisniewski respectfully requests that this Court reduce his sentences as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing or a new Rule 35 hearing.

DATED this 4th day of December, 2019.

/s/ Justin M. Curtis
JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of December, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

JMC/eas