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### State v. Burke Appellant's Brief Dckt. 47311

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 47311-2019
Plaintiff-Respondent,	)	
	)	LATAH COUNTY NO. CR-2016-2199
v.	)	
	)	
SCOTT DOUGLAS BURKE,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Scott Douglas Burke was on probation for almost two years for burglary. After admitting to violating his probation, the district court revoked Mr. Burke's probation and executed a sentence of five years, with three years fixed. Mr. Burke appeals and argues the district court abused its discretion by revoking his probation.

Statement of the Facts & Course of Proceedings

In July 2016, a criminal complaint was filed charging Mr. Burke with one count of burglary and one count of petit theft. (R., pp.18-19.) The following month, Mr. Burke was arrested in Oregon and extradited back to Idaho. (R., p.27.) An Information was then filed

charging Mr. Burke with one count of burglary and one count of petit theft. (R., pp.75-76.) Mr. Burke was then arraigned on the charges from this case, along with charges in Latah County Case No. CR-2016-2198, and Nez Perce County Case No. CR-2016-4706. (R., pp.78-80.) During his arraignment, counsel for Mr. Burke informed the court that a global resolution of all three cases was being prepared. (R., p.79.)

Mr. Burke agreed to plead guilty to a number of charges, including burglary from this case. (R., pp.82-85.) Mr. Burke waived a presentence investigation and his right to delay sentencing for 48 hours. (R., pp.82-85.) The court then sentenced him after accepting his pleas. (R., pp.86-89.) Mr. Burke was given a unified sentence of sentence of five years, with three years fixed, after pleading guilty to burglary in this case. (R., pp.90-93.) The sentence was ordered to run concurrently with the sentences imposed in the other two cases. (R., pp.90-93.) The district court then retained jurisdiction. (R., pp.90-93.) In September 2017, Mr. Burke's sentences were suspended and he was placed on probation for three years. (R., pp.101-07, 109-15.)

Two months later, Mr. Burke was alleged to have violated his probation by absconding from supervision. (R., pp.117-18.) He was subsequently arrested in Washington and returned to Idaho. (R., pp.119-20.) After being released, Mr. Burke was arrested by his probation officer after being caught with drug paraphernalia and admitting to smoking methamphetamine. (R., pp.126-28.) The prosecutor then suggested that Mr. Burke be screened for participation in one of the specialty courts. (R., p.137.) He began treatment for an addiction, and after being accepted into Drug Court, Mr. Burke was returned to probation. (R., p.139 (Order Authorizing Treatment Release); pp.141-43, 158-59 (Orders Readmitting the Defendant to Probation); pp.147-49 (Order Admitting Defendant into Drug Court Program).)

After successfully completing almost seven months of Drug Court, Mr. Burke again absconded supervision for “close to [five] months.” (R., pp.185-86.) He was subsequently terminated from Drug Court. (R., pp.185, 192.) Mr. Burke admitted to violating the terms and conditions of his probation by failing to successfully complete Drug Court and by absconding. (R., pp.188-89.) The District Court then revoked his probation and executed the underlying sentence of five years, with two years fixed. (R., pp.194-96.)

Eleven days later, Mr. Burke filed a Rule 35 Motion asking for the court *inter alia* to reduce the fixed portion of his sentence by one year and increase the indeterminate portion by one year. (R., p.199.) He asked for this because “it would allow [him] to assist various family members with health and other issues which have recently arisen.” (R., p.199.) The State objected, arguing that he had waived his right to file any modification or reduction in his sentence. (R., p.203.) The court denied that Motion, stating that Mr. Burke “has failed to demonstrate that the sentence is unduly severe.” (R., p.213.) It further stated that Mr. Burke “did precious little while on probation and while in Drug Court to demonstrate that he could maintain his sobriety and follow the rules.” (R., p.213.)<sup>1</sup>

Mr. Burke timely appealed from the order revoking his probation. (R., pp.217-19.)

### ISSUE

Did the district court abuse its discretion when it revoked Mr. Burke’s probation and executed his underlying sentence of five years, with three years fixed?

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<sup>1</sup> In his Rule 35 Motion, Mr. Burke also asked the court to recalculate his time served. (R., pp.198-99.) The Court granted that request, adjusting his credit for time served from 392 days to 483 days (R., p.214.) An Amended Judgment of Conviction was filed to retroactively make that correction. (R., pp.207-09.) Mr. Burke does not contest this portion of the court’s decision.

## ARGUMENT

### The District Court Abused Its Discretion When It Revoked Mr. Burke’s Probation And Executed His Underlying Sentence Of Five Years, With Three Years Fixed

Mr. Burke asserts that the district court abused its discretion when the court revoked his probation and executed his original sentence of five years, with two years fixed, without any reduction.

#### A. Standard Of Review

In Idaho, “the primary objective of sentencing is protection of society” as well as the “related goals of deterrence, rehabilitation, and retribution.” *State v. Schiermeier*, 165 Idaho 447, (2019). “A sentence of confinement fixed for longer than necessary to accomplish these purposes is unreasonable.” *State v. Sheahan*, 139 Idaho 267, 284 (2003). “Moreover, it is clear, as a matter of policy in Idaho, that the primary consideration is ‘the good order and protection of society.’ All other factors must be subservient to that end.” *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982) (quoting *State v. Moore*, 78 Idaho 359, 363 (1956)).

Once placed on probation, “a probationer does have at least some constitutionally protected right in continuing probation.” *State v. Egersdorf*, 126 Idaho 684, 686 (Ct. App. 1995) (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972)). However, the district court is empowered to revoke a defendant’s probation under certain circumstances. I.C. §§ 19-2602, 19-2603, 20-222. Determining the consequences of a probation violation is a separate analysis from whether a probation violation occurred. *State v. Sanchez*, 149 Idaho 102, 105 (2009). First, the court determines “whether the defendant violated the terms of his probation.” *Id.* “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).

Once a violation is admitted, the court then needs to determine “what should be the consequences of that violation.” *Sanchez*, 149 Idaho at 105. “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. *State v. Roy*, 113 Idaho 388, 392 (Ct. App. 1987). If a probationer “cannot perform a fundamental condition of probation,” revoking probation may be appropriate. *Roy*, 113 Idaho at 392. But if there is evidence that the probationer is capable “of complying with the conditions of probation,” a second chance at probation may be appropriate. *See Id.* But the court “cannot revoke probation arbitrarily.” *State v. Lee*, 116 Idaho 38, 40 (Ct. App. 1989) (citing *State v. Hancock*, 111 Idaho 835 (Ct.App.1986)). “After a probation violation has been proven, the decision to revoke probation and pronounce sentence lies within the sound discretion of the trial court.” *Roy*, 113 Idaho at 392. Thus, this decision will only be overturned if the defendant can show that the trial court abused its discretion in doing so. *State v. Knowlton*, 123 Idaho 916, 920–21 (1993), *abrogated on other grounds by State v. Perry*, 150 Idaho 209 (2010); *State v. Beckett*, 122 Idaho 324, 326 (Ct. App. 1992). The defendant must show that the trial court did not “(1) correctly [perceive] the issue as one of discretion; (2) [act] within the outer boundaries of its discretion; (3) [act] consistently with the legal standards applicable to the specific choices available to it; [or] (4)

[reach] its decision by the exercise of reason.” *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018).

B. The District Court Abused Its Discretion By Revoking Probation And Denying Mr. Burke’s Rule 35 Motion

Mr. Burke asserts that the District Court abused its discretion when it revoked his probation, denied his Rule 35 motion, and executed his underlying sentence instead of returning him to probation. Mr. Burke alleges the district court executed his sentence without properly considering mitigating factors and thus abused its discretion by not “[acting] consistently with the legal standards applicable to the specific choices available to it,” and by not “[reaching] its decision by the exercise of reason.” *My Fun Life*, 163 Idaho at 863. Deterrence to the individual is one of the four objectives governing criminal punishment. *Toohill*, 103 Idaho at 568. But “[i]n fixing sentence, the trial court should consider the previous character of the defendant, both good and bad.” *State v. Fuchs*, 100 Idaho 341, 344 (1979).

Because a defendant has previously been sentenced, the same criteria courts are required to consider during the initial sentencing may “lessen in significance.” *State v. Lee*, 116 Idaho 38, 40, 773 P.2d 655, 657 (Ct. App. 1989) (discussing the applicability of the criteria from I.C. § 19-2521 in continuing probation proceedings). Because a defendant’s mental health is required to be considered during sentencing proceedings, courts should also consider it before revoking probation. *See State v. Odiaga*, 125 Idaho 384, 391 (1994) (“Idaho Code § 19–2523, which requires that the trial court consider the defendant's mental illness as a sentencing factor, was an integral part of the legislature’s repeal of mental condition as a defense.”).

Certain facts may be mitigating, even if they do not bear directly on the offense of conviction. *See State v. Caudill*, 109 Idaho 222, 224 (1985) (“The sentencing judge found several mitigating factors, including Caudill’s youthful age, prior nonviolent nature, lack of prior

criminal record, potential for rehabilitation, and remorse.”). A defendant’s acceptance of responsibility for their actions, together with a need for and willingness to participate in drug or alcohol rehabilitation should weigh in favor of the defendant. *See State v. Shideler*, 103 Idaho 593, 595 (1982) (reducing indeterminate portion of sentence for robbery based on, among other things, defendant’s voluntary drug addiction rehabilitation and acceptance of responsibility for actions); *State v. Coffin*, 146 Idaho 166, 171 (Ct. App. 2008) (A “willingness to seek treatment for an alcohol problem [was a ] mitigating circumstance[.]” taken into account by the court before finding that Coffin’s sentence was not excessive) (internal quotation marks removed). Family support may also be another mitigating factor. *Shideler*, 103 Idaho at 595 (reducing sentence of defendant who, *inter alia*, had the support of his family and his employer). In addition, a sentencing court should consider a defendant’s willingness and need to support a family. *State v. Nice*, 103 Idaho 89, 91 (1982) (reducing the sentence of a defendant, in part, because he “was working and helping to support his children at the time of the conviction”).

Here, Mr. Burke was given a five-year sentence, with three years fixed, after pleading guilty to burglary. (R., pp.82-85.) During the disposition hearing, Mr. Burke told the court that while he was on probation, he “wasn’t being honest with [him]self.” (Tr., p.7, L.9.) He explained that at the time he absconded from supervision, he “had bad depression,” and had been dealing “with panic attacks and crap,” and “the two-year anniversary of [his] father’s death.” (Tr., p.7, Ls.11-12, 17, 19-20.) Due to “the state of mind [he] was in, . . . [he] kind of felt that [he] probably hurt [him]self more than anything.” (Tr., p.8, Ls.1-3.) He told the judge that he was finally able to “grieve over the loss of [his] brother and [his] dad.” (Tr., p.16, Ls.19-20.) He told the court that he was “not trying to blame [his actions] on anything, just been through a lot of trauma from the loss of family.” (Tr., p.20, Ls.20-22.)



Mr. Burke has acknowledged his crimes and said there was “[r]eally no excuse” for absconding from supervision. (*See* Tr., p.7, Ls.9-11.) He admits that he “lied, [he] wasn’t being honest” with the court before. (Tr., p.17, Ls.7-9.) He also spoke about those he didn’t allow to help him before:

I would like to apologize to everyone on the Drug Court team. I know they went way out of the way for me. It took me a bit to realize that people actually care about me. I think that I was harder on myself than anyone was being or could be so.

(Tr., p.17, Ls.11-15.) He acknowledged what the court told him about not “accepting responsibility for [his] actions.” (Tr., p.19, L.16.) He said that he realizes now that “they’re all [his] sole decisions [and that he] should make a lot better decisions.” (Tr., p.20, Ls.17-18; *see also* p.21, Ls.4-6.) He recognized this and told the court, “It’s just hurting myself.” (Tr., p.24, L.8.)

Mr. Burke has the support of his family, and the need – and willingness – to support his own family. (*See* R., p.199 (“The effect of this requested reduction in determinate prison time is that it would allow Mr. Burke to assist various family members with health and other issues which have recently arisen.”).) Mr. Burke also asserts that he can still be rehabilitated on probation. During the disposition hearing, Mr. Burke’s counsel stated that he “does have some addiction struggles,” but that Drug Court was helpful for that. He has made progress. . . . [H]e learned a lot through the Drug Court Program. He stayed sober during that.” (Tr., p.14, Ls.21-25.) The court acknowledged that “a lot of what . . . [he] achieved in Drug Court was very positive.” (Tr., p.21, Ls.12-13.) Mr. Burke acknowledges that Drug Court was something that could have helped him with both his addiction and mental health struggles. He admits that absconding was a bad decision, one that was driven by his addiction and mental health struggles.

Thus, Mr. Burke asserts he has presented mitigating evidence showing he would be an appropriate candidate for probation and that the district court abused its discretion in twice denying him that chance.

CONCLUSION

Mr. Burke respectfully requests that this Court vacate the order revoking probation and remand his case to the district court with an order that he be returned to probation.

DATED this 11<sup>th</sup> day of March, 2020.

/s/ R. Jonathan Shirts  
R. JONATHAN SHIRTS  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11<sup>th</sup> day of March, 2020, 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](mailto:ecf@ag.idaho.gov)

/s/ Evan A. Smith  
EVAN A. SMITH  
Administrative Assistant

RJS/eas