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5-13-2020

### State v. Ferguson Appellant's Brief Dckt. 47491

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 47491-2019
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO.
v.	)	CR01-18-21147
	)	
DAVID GEORGE FERGUSON, III,	)	
	)	APPELLANT'S BRIEF
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

David George Ferguson, III, appeals from the district court's order revoking his probation and executing his two unified sentences of ten years, with two years fixed, for attempted strangulation and domestic battery in the presence of a child. He contends the district court abused its discretion when it revoked his probation and executed his sentences because his violations were not serious enough to warrant revocation, and did not suggest he could not be successful on probation.

## Statement of Facts and Course of Proceedings

Mr. Ferguson pled guilty to attempted strangulation and domestic battery in the presence of a child, and was sentenced to two unified terms of ten years, with seven years fixed, to be served concurrently, with a period of retained jurisdiction. (R., pp.47, 52.) The Idaho Department of Correction (IDOC) assessed Mr. Ferguson and placed him in a rider program focusing on cognitive behavioral interventions for substance abuse and aggression. (R., p.55.) Mr. Ferguson successfully completed the rider program and the IDOC recommended probation. (Presentence Investigation Report (“PSI”), p.496.) On June 10, 2019, the district court suspended Mr. Ferguson’s sentences and placed him on supervised probation for a period of ten years. (R., pp.59-64.)

On August 26, 2019, the State filed a motion for bench warrant for probation violation, alleging Mr. Ferguson violated probation. (R., pp.66-83.) Mr. Ferguson admitted to violating probation by failing to get permission from his probation officer before changing his residence, using methamphetamine on one occasion, failing to attend or successfully complete an aftercare treatment program, and absconding from supervision. (Tr., p.5, L.11 – p.6, L.2.) The district court accepted Mr. Ferguson’s admissions, revoked his probation, and executed his sentences. (R., pp.87-88.) The order revoking probation, judgment of conviction, and order of commitment was entered on October 17, 2019, and Mr. Ferguson filed a timely notice of appeal on October 18, 2019. (R., pp.89-95.)

## ISSUE

Did the district court abuse its discretion when it revoked Mr. Ferguson’s probation and executed his underlying sentences?

## ARGUMENT

### The District Court Abused Its Discretion When It Revoked Mr. Ferguson's Probation And Executed His Underlying Sentences

#### A. Introduction

The district court abused its discretion when it revoked Mr. Ferguson's probation and executed his underlying sentences because his violations were not serious enough to warrant revocation, and did not suggest he could not be successful on probation. Mr. Ferguson needed additional substance abuse treatment and the district court should have retained jurisdiction, allowing Mr. Ferguson to complete a second rider program.

#### B. Standard Of Review

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. Upton*, 127 Idaho 274, 275 (Ct. App. 1995); *State v. Beckett*, 122 Idaho 324, 325 (Ct. App. 1992); *State v. Hass*, 114 Idaho 554, 558 (Ct. App. 1998). After a probation violation has been established, the court may order the suspended sentence be executed or, in the alternative, reduce the sentence under Idaho Criminal Rule 35. *Beckett*, 122 Idaho at 325; *State v. Marks*, 116 Idaho 976, 977 (Ct. App. 1989). A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. *Beckett*, 122 Idaho at 325. In reviewing the propriety of a probation revocation, the focus of the inquiry is the conduct underlying the trial court's decision to revoke probation. *State v. Morgan*, 153 Idaho 618, 621 (Ct. App. 2012). Thus, this Court will consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal. *Id.*

C. Mr. Ferguson's Violations Were Not Serious Enough To Warrant Revocation And Did Not Suggest He Could Not Be Successful On Probation

Mr. Ferguson admitted to violating probation by failing to get permission from his probation officer before changing his residence, using methamphetamine on one occasion, failing to attend or successfully complete an aftercare treatment program, and absconding from supervision. (Tr., p.5, L.11 – p.6, L.2.) These violations do not relate to Mr. Ferguson's original crimes (attempted strangulation and domestic battery in the presence of a child) and were not serious enough to warrant revocation.

Mr. Ferguson has always acknowledged he has trouble with alcohol and needs substance abuse treatment. Unfortunately, the funds he needed to attend Rising Sun Sober Living were delayed, and he relapsed while awaiting those funds. (Tr., p.6, Ls.12-22.) Mr. Ferguson accepted 100 percent responsibility for violating his probation. (Tr., p.7, Ls.16-19.) He told the district court he "honestly could not manage his substance abuse problem" and "spiraled out of control quickly." (Tr., p.7, L.25 – p.8, L.2) Mr. Ferguson asked the district court for "an opportunity for more programming" and begged the court not to give up on him. (Tr., p.8, Ls.21-24.) Counsel for Mr. Ferguson asked the district court to retain jurisdiction, allowing Mr. Ferguson to complete a second rider program. (Tr., p.7, Ls.7-12.) The district court should have granted counsel's request.

In explaining its decision to revoke Mr. Ferguson's probation, the district court focused on the circumstances of his underlying criminal conduct rather than on his probation violations. (See Tr., p.9, L.5 – p.10, L.5.) But Mr. Ferguson's failure to comply with the terms of his probation does not mean he will return to criminal activity. Mr. Ferguson identifies alcohol as the "root of all of [the problems that led to his criminal conduct]." (PSI, pp.245-46.) There is every indication that, if given the tools to successfully address his addiction to alcohol,

Mr. Ferguson can succeed on probation and be a contributing member of society. The underlying offenses were Mr. Ferguson's first felony convictions and his probation violations should not have led to his imprisonment. (See PSI, p.249.)

CONCLUSION

Mr. Ferguson respectfully requests that the Court vacate the district court's order revoking his probation, and remand this case to the district court with instructions to retain jurisdiction.

DATED this 13<sup>th</sup> day of May, 2020.

/s/ Andrea W. Reynolds  
ANDREA W. REYNOLDS  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13<sup>th</sup> day of May, 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

AWR/eas