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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NOS. 47537-2019 & 47538-2019
)	
v.)	BINGHAM COUNTY NOS. CR-2015-3677
)	& CR-2016-3050
DAVID RAY KILLAM,)	
)	APPELLANT'S BRIEF
Defendant-Appellant.)	
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STATEMENT OF THE CASE

Nature of the Case

In the first case at issue here, David Ray Killam pleaded guilty to felony possession of a controlled substance, methamphetamine. The district court imposed a unified sentence of seven years, with three years fixed, suspended the sentence, and placed him on probation. In the second case, Mr. Killam pleaded guilty to felony principal to grand theft by receiving/possessing stolen property. The district court imposed a concurrent unified sentence of ten years, with four years fixed, suspended the sentence, and placed him on probation.

Mr. Killam subsequently admitted to violating his probation in several following proceedings. The district court ultimately revoked probation and executed the underlying

sentences in both cases. In this consolidated appeal, Mr. Killam asserts the district court abused its discretion when it revoked probation and executed the underlying sentences in both cases.

Statement of the Facts & Course of Proceedings

Deputy Henrie with the Bingham County Sheriff's Office stopped a vehicle for not using a turn signal. (No. CR-2015-3677 Presentence Report, 2/1/16 (*hereinafter*, PSI), p.3.) While speaking to the driver, Mr. Killam, the deputy noticed a round black pipe on the passenger-side floor. (*See* PSI, p.3.) Deputy Henrie asked Mr. Killam for the pipe and his identification. (PSI, p.3.) Dispatch informed the deputy that Mr. Killam had a warrant out of Bannock County. (PSI, p.3.) Deputy Henrie performed a pat search on Mr. Killam, finding a metal pipe and a used syringe with blood inside of it. (PSI, p.3.)

In Bingham County No. CR-2015-3677 (*hereinafter*, the 2015 case), the State charged Mr. Killam by Prosecuting Attorney's Information with felony possession of a controlled substance, methamphetamine, misdemeanor unlawfully possessing drug paraphernalia, and a persistent violator sentencing enhancement. (No. 47537 R., pp.44-47.) Mr. Killam ultimately pleaded guilty, pursuant to a plea agreement, to possession of a controlled substance, methamphetamine, and the State dismissed the other charge and the sentencing enhancement. (*See* No. 47537 R., pp.121-35.) The district court imposed a unified sentence of seven years, with three years fixed, suspended the sentence, and placed Mr. Killam on probation for a period of five years. (No. 47537 R., pp.166-71.)

Mr. Killam later admitted to violating his probation by not successfully completing the Bingham County Mental Health Court, as required by a special condition of his probation. (*See* No. 47537 R., pp.187, 192-93, 197-98.) The district court continued Mr. Killam on probation,

modifying the terms of probation to require him to successfully complete the Bonneville County Mental Health Court. (No. 47537 R., pp.203-06.)

Meanwhile, while in custody, Mr. Killam told a detective that, several months before his arrest in the 2015 case, he had towed a vehicle for two friends and acted as lookout while they burned the vehicle. (See No. CR-2016-3050 Update to Bingham Presentence Report CR-2015-3677 (Dated February 1, 2016), 8/8/16 (*hereinafter*, PSI Update), p.1.) The vehicle had been reported stolen out of Idaho Falls. (See PSI Update, p.1.)

In Bingham County No. CR-2016-3050 (*hereinafter*, the 2016 case), the State charged Mr. Killam by Prosecuting Attorney's Information with felony principal to arson in the third degree, felony principal to malicious injury to property, and felony principal to grand theft by receiving/possessing stolen property. (No. 47538 R., pp.77-79.) Under a plea agreement, Mr. Killam pleaded guilty to felony principal to grand theft by receiving/possessing stolen property, and the State dismissed the other charges and agreed to not file a persistent violator sentencing enhancement. (See No. 47538 R., pp.87-94, 100-02.) The district court imposed a unified sentence of ten years, with four years fixed, to run concurrently with the sentence imposed in the 2015 case. (No. 47538 R., pp.220-25.) The district court suspended the sentence and placed Mr. Killam on probation for a period of five years, with the special condition that he successfully complete the Bonneville County Mental Health Court. (No. 47538 R., p.221.)

Mr. Killam subsequently admitted to violating his probation in both cases by not successfully completing the Bonneville County Mental Health Court, and by avoiding supervision. (See No. 47537 R., pp.212-13, 219-21; No. 47538 R., pp.239-40, 248-50.) In both cases, the district court revoked probation and retained jurisdiction. (No. 47537 R., pp.224-26; No. 47538 R., pp.251-53.) After Mr. Killam participated in a "rider," the district court placed

him back on probation in both cases. (*See* No. 47537 R., pp.227, 232-37; No. 47538 R., pp.257-63.)

Later, Mr. Killam admitted to violating his probation in both cases by not successfully completing drug/alcohol treatment, using controlled substances, and being kicked out of his reported residence. (*See* No. 47537 R., pp.240-42, 249-50; No. 47538 R., pp.266-68, 274-75.) In the 2015 case, the district court placed him on probation for a new period of five years from the date of disposition. (*See* No. 47537 R., pp.257-63.) In the 2016 case, the district court placed him on probation for a new period of four years from the date of disposition. (*See* No. 47538 R., pp.283-89.) The district court required Mr. Killam to report to the court for a bi-weekly review hearing in both cases. (No. 47537 R., p.260; No. 47538 R., p.286.)

About five months later, the State filed a Motion for Probation Violation in each case. (No. 47537 R., pp.279-83; No. 47538 R., pp.301-04.) Mr. Killam initially denied the alleged violations, and the district court released him on his own recognizance. (No. 47537 R., pp.290-91; No. 47538 R., pp.323-24.) He subsequently admitted to violating his probation by not reporting to three of the bi-weekly review hearings, not obtaining employment, using controlled substances, and not reporting to his supervising officer. (Tr. 8/26/19, p.4, L.15 - p.6, L.25.) The district court accepted the admissions. (Tr. 8/26/19, p.7, L.1.)

At the probation violation disposition hearing for both cases, Mr. Killam recommended that the district court place him back on probation. (Tr. 10/7/19, p.7, Ls.12-19.) The State recommended that the district court execute the sentences. (Tr. 10/7/19, p.7, L.21 – p.8, L.5.) In each case, the district court revoked probation and executed the original sentence. (No. 47537 R., pp.305-07; No. 47538 R., pp.336-38.)

Mr. Killam, in each case, filed a Notice of Appeal timely from the district court's Order on Probation Violation. (No. 47537 R., pp.308-10; No. 47538 R., pp.339-41.) The Idaho Supreme Court ordered that the appeals be consolidated for all purposes. (No. 47537 R., p.316; No. 47538 R., p.347.)

ISSUE

Did the district court abuse its discretion when it revoked Mr. Killam's probation and executed his underlying sentences in both cases?

ARGUMENT

The District Court Abused Its Discretion When It Revoked Mr. Killam's Probation And Executed His Underlying Sentences In Both Cases

Mr. Killam asserts the district court abused its discretion when it revoked his probation and executed his underlying sentences in both cases. The district court should have instead followed Mr. Killam's recommendation by placing him back on probation. (*See* Tr. 10/7/19, p.7, Ls.12-19.)

A district court is empowered by statute to revoke a defendant's probation under certain circumstances. I.C. §§ 19-2602, 19-2603 & 20-222. "A district court's decision to revoke probation will not be overturned on appeal absent a showing that the court abused its discretion." *State v. Sanchez*, 149 Idaho 102, 105 (2009). In reviewing a district court's discretionary decision, appellate courts conduct an inquiry to determine whether the district court correctly perceived the issue as one of discretion, acted within the boundaries of its discretion, acted consistently with the applicable legal standards, and reached its decision by an exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018).

Appellate courts use a two-step analysis in reviewing a probation revocation proceeding. *Sanchez*, 149 Idaho at 105. First, the appellate court determines “whether the defendant violated the terms of his probation.” *Id.* “If it is determined that the defendant has in fact violated the terms of his probation, the second question is what should be the consequences of that violation.” *Id.*

Mr. Killam concedes he admitted to violating his probation. (*See* Tr. 8/26/19, p.4, L.15 - p.6, L.25.) When a probationer admits to a direct violation of his probation agreement, no further inquiry into the question is required. *State v. Peterson*, 123 Idaho 49, 50 (Ct. App. 1992). Thus, this Court may go to the second step of the analysis and determine whether the district court abused its discretion when it revoked Mr. Killam’s probation. *State v. Hoskins*, 131 Idaho 670, 672 (Ct. App. 1998) (internal citations omitted). As Idaho’s appellate courts have held, “[i]f 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.” *Sanchez*, 149 Idaho at 106 (quoting *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001)).

However, probation may not be revoked arbitrarily. *State v. Adams*, 115 Idaho 1053, 1055 (Ct. App. 1989). The purpose of probation is to provide an opportunity to be rehabilitated under proper control and supervision. *Peterson*, 123 Idaho at 50. Thus, 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 district court may revoke probation if it reasonably concludes from the defendant’s conduct that probation is not achieving its rehabilitative purpose. *Adams*, 114 Idaho at 1055. The district court may consider the defendant’s conduct both before and during the probationary period. *State v. Roy*, 113 Idaho 388, 392 (Ct. App. 1987).

Here, Mr. Killam's counsel informed the district court at the disposition hearing, "Mr. Killam recognizes that he has both . . . a drug issue and mental health issues, which is why he's been making particular efforts in the last year on his own to try to resolve those." (Tr. 10/7/19, p.6, Ls.11-14.) Counsel stated that Mr. Killam "has been readmitted to Free Spirit treatment program, and that's really what he wants to pursue." (Tr. 10/7/19, p.6, Ls.21-22.) According to counsel, Mr. Killam had been "proactive . . . in trying to follow through with his treatment because he really would like to overcome this problem that he has, and he hasn't had any dirty UAs in month." (Tr. 10/7/19, p.6, L.22 – p.7, L.1.) Further, defense counsel explained that Mr. Killam "recently had a GAIN evaluation, and it also recommended out-patient treatment." (Tr. 10/7/19, p.7, Ls.3-4; *see* GAIN-I Recommendation and Referral Summary (GRRS), 9/23/19, pp.13-14.)¹

In a letter, Anna Davenport, a case manager at the crisis center, reported that Mr. Killam came to the crisis center after the State filed its most recent motion for probation violation, and he wanted to get into inpatient treatment. (*See* Def. Ex. A, admitted 10/7/19.) Ms. Davenport wrote, "David has been going to meetings and has been very active in his treatment." (Def. Ex. A.) She also stated: "I personally have known David in the recovery world since 2015 when he was on Mental Health Court. David is a different person than he was then. He is more stable and determined to stay clean off of drugs and be a citizen that gives back to his community rather than taking from it." (Def. Ex. A.) She wrote, "He has been through a lot but he is seeking the help he needs to recover." (Def. Ex. A.) Ms. Davenport noted that Mr. Killam "has advocated for himself by calling treatment providers to see who would accept him in treatment," and he "called inpatient treatment providers asking for help." (Def. Ex. A.) She stated that Mr. Killam

¹ The GRRS is part of the 154-page PDF version of the Confidential Documents filed in No. 47537.

“has cut off a lot of people in his life due to the negative influence they have on him and his recovery.” (Def. Ex. A.) Per Ms. Davenport: “David has initiated the help he’s getting all on his own. He came to the crisis center with a plan and he followed through with it.” (Def. Ex A.)

At the disposition hearing, Mr. Killam told the district court that, following the initial admit/deny hearing and his release on his own recognizance, he “immediately went to the crisis center and sought treatment.” (*See* Tr. 10/7/19, p.8, Ls.10-11; No. 47537 R., p.290.) He asserted, “The next morning, I waited on the steps at Probation and Parole for an hour to be the first person to check in and see my PO.” (Tr. 10/7/19, p.8, Ls.12-14.) Mr. Killam stated, “I spent 35 days busting my butt to show you and myself that I can do this, that the treatment works if I apply it.” (Tr. 10/7/19, p.8, Ls.14-15.) While Mr. Killam knew “that I’ve shown a long history of just sitting back and doing nothing,” he emphasized, “This is the only time I’ve come in front of you that I’ve actually spent time and effort into doing something about making myself a person and changing the things that I’ve done in my past.” (Tr. 10/7/19, p.8, Ls.16-20.) He asserted: “I learned a lot about myself and about addiction, and I believe in myself, and I know that I can this. I can go back to treatment. They’ve accepted me.” (Tr. 10/7/19, p.8, Ls.21-23.)

When the district court asked about the bi-weekly review hearings where problems eventually developed, Mr. Killam explained: “I was in and out of the hospital. You asked me to bring you paperwork to show that I was in and out, and I did that, and you released me once again.” (*See* Tr. 10/7/19, p.8, L.25 – p.9, L.6.) His defense counsel had told the district court, “he’s been in and out of the hospital, but he also has gone out of his way to find employment.” (Tr. 10/7/19, p.6, Ls.15-18.) Mr. Killam’s counsel informed the district court, “Prior to being picked up on this violation, he was employed with Pacific Steel and can return to that job as soon as he is released once again.” (Tr. 10/7/19, p.6, Ls.18-20.)

Mr. Killam acknowledged he had other repeated issues, and addressed the district court: “I’m not a perfect person, I’ve never claimed to be.” (See Tr. 10/7/19, p.9, Ls.9-10.) However, Mr. Killam asserted that, after the district court last released him, “I spent all my time trying to right the things that the probation violated stated.” (Tr. 10/7/19, p.9, Ls.10-12.) He continued: “I showed for court. I showed up at the treatment. I missed a few days because I was working. I got a job. I passed all my UAs.” (Tr. 10/7/19, p.9, Ls.12-14.) Mr. Killam concluded, “Everything that the violation claims, I busted my butt to make sure that those things weren’t continued.” (Tr. 10/7/19, p.9, Ls.14-16.)

In light of the above, Mr. Killam asserts the district court abused its discretion when it revoked his probation and executed his underlying sentences in both cases. The district court should have instead followed Mr. Killam’s recommendation by placing him back on probation.

CONCLUSION

For the above reasons, Mr. Killam respectfully requests that this Court reduce his sentences in both cases as it deems appropriate.

DATED this 2nd day of April, 2020.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of April, 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
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BPM/eas