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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 47617-2019**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR-FE-2015-17170**
v.	)	
	)	
STEPHANIE SUE HENNING	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MICHAEL REARDON
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Stephanie Henning pled guilty to two counts of grand theft. She received an aggregate unified sentence of 24 years, with three years fixed. After the State accused Ms. Henning of failing to pay the full amount of restitution for eight months, the district court found Ms. Henning had willfully violated that term of her probation and revoked her probation. On appeal, Ms. Henning contends that the district court erred in concluding that she willfully violated her probation where she had demonstrated an inability to pay the full monthly restitution amount. Alternatively, and assuming *arguendo* that Ms. Henning's violation was willful, the district court abused its discretion by revoking Ms. Henning's probation not because of her violation, but because it would not have chosen to put her on probation had it been the district court that initially sentenced her. Ms. Henning also asserts that the district court abused its discretion by revoking her probation where the court failed to consider alternatives to revocation and where revocation did not serve the objectives of her probation.

Statement of the Facts & Course of Proceedings

In 2015, Stephanie Henning pled guilty to two counts of grand theft after an investigation revealed that she had taken approximately $155,000 from her employer over the course of five years. (R., p.89.) (Presentence Investigation Report (*hereinafter*, PSI),[1] pp.2-3.) The district court sentenced Ms. Henning to a unified sentence of fourteen years, with two years fixed, on one count, and ten years, with one year fixed, on the other count. (R., pp.70-73.) The district

[1] Appellant's use of the designation "PSI" includes the packet of documents grouped with the electronic copy of the PSI, and the page numbers cited shall refer to the corresponding page of the electronic file.

court ordered the sentences to be served consecutively, but retained jurisdiction. (R., p.71.) After a period of retained jurisdiction, the district court suspended the sentence and placed Ms. Henning on probation for twenty-four years. (R., pp.748-757.)

In 2017, the State accused Ms. Henning of violating her probation by failing to pay each month's restitution payment in full. (R., pp.88-107.) Pursuant to a plea agreement with a reinstatement recommendation, Ms. Henning admitted to violating her probation, and the district court reinstated her on probation on May 25, 2018, under the same terms and conditions. (10/1/19 Tr., p.45, L.20 – p.46, L.11; R, pp.118-26.)

In 2019, the State again alleged that Ms. Henning violated her probation by failing to make the requisite restitution payments in full from June 2018 to January 2019. (R., pp.127-73.) Ms. Henning was approximately $1,200 behind on her payments during that six-month period. (State's Exhibit 1.)

Ms. Henning denied the probation violation allegations. (R., p.180.) At the evidentiary hearing, Ms. Henning's probation officer testified that Ms. Henning had come to him in December of 2018, and said she was having trouble making the requisite monthly payment—she was struggling. (10/1/2019 Tr., p.11, Ls.2-28.) After the hearing, the district court found Ms. Henning had willfully failed to pay $650 per month from May 2018 to January 2019, as required by the terms and conditions of her probation. (10/1/19 Tr., p.46, L.12 – p.47, L.24.) In finding the allegations to be "willful," the district court stated, "I'm not satisfied that the surpluses were spent in a way that was consistent with complying with the terms of her probation." (10/1/19 Tr., p.62, Ls.1–6.)

At the disposition hearing, Ms. Henning's counsel asked the court to continue her on probation. (11/26/19 Tr., p.58, L.25 – p.59, L.1; p.62, Ls.6-8.) The State asked for imposition of

the suspended sentence. (11/26/19 Tr., p.58, Ls.18-20.) The State highlighted the underlying crime, arguing to the court, "I am asking the Court to impose the sentence that was previously given to Ms. Henning, but I'm not doing it because she isn't paying her restitution per se. I'm asking that the Court do that because she embezzled almost $200,000 from [the victim] and that crime deserves prison." (11/26/19 Tr., p.55, Ls.19-24.) The district court agreed, telling Ms. Henning, "You were fortunate that Judge Neville was here the first time, because, frankly, I would have sent you to prison the first time." (11/26/19 Tr., p.63, Ls.23-25.) The district court told Ms. Henning at disposition, "[the prosecutor]'s right, this isn't about the probation violation. This is a sentence for the original offense." (11/26/19 Tr. p.65, Ls.2-4.)

The district court revoked Ms. Henning's probation. (11/26/19 Tr., p.65, Ls.5-9; R., pp.194-97.) Ms. Henning filed a timely Notice of Appeal.[2] (R., pp.198-200.)

[2] Ms. Henning filed an I.C.R. 35 motion for leniency, but did not submit new or additional information in support of her motion. (R., pp.202-03.) The district court denied the motion. (R., pp.211-14.) Ms. Henning does not challenge the district court's denial of her motion for leniency on appeal. The Idaho Supreme Court has held that "[w]hen presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion. *State v. Huffman*, 144 Idaho 201, 203 (2007). "An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information." *Id.*

ISSUES

I. Did the district court err in finding that Ms. Henning willfully violated her probation where she was unable to pay the monthly restitution amount in full due to her indigency?

II. Did the district court abuse its discretion when it revoked Ms. Henning's probation?

ARGUMENT

I.

The District Court Erred In Finding Ms. Henning Willfully Violated Her Probation

A. Introduction

The district court erred by finding that Ms. Henning willfully violated her probation where she was unable to pay the full amount of restitution each month due to her indigency. The finding of willfulness is unsupported by substantial and competent evidence.

B. Standard Of Review

The Idaho Supreme Court recently set forth the standards of review applicable to a trial court's decision to revoke probation:

> Review of a probation revocation proceeding involves a two-step analysis. First, the Court determines whether the terms of probation have been violated. If they have, it is determined whether the violation justifies revocation of the probation. *Id.*
>
> With regard to the first step, a district court may revoke probation only upon evidence that the probationer has violated probation. . . . A court's finding that a violation has been proved will be upheld on appeal if there is substantial evidence in the record to support the finding. . . .
>
> As to the second step, the decision whether to revoke a defendant's probation for a violation is within the discretion of the district court. Thus, we review a district court's decision to revoke probation under an abuse of discretion standard.
>
> In determining whether the district court abused its discretion, this Court considers (1) whether the trial court understood the issue as discretionary; (2) whether the trial court acted within its discretionary scope and ***under applicable legal standards***; and (3) whether the trial court exercised reason.

State v. Garner, 161 Idaho 708, 713 (2017) (emphasis added) (internal citations omitted).

C. The District Court Erred In Finding Ms. Henning Willfully Violated Her 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).[3] The Rule indicates that the district court must find a "willful" violation in order to revoke the defendant's probation. *See Garner*, 161 Idaho at 711 (holding "probation may *only* be revoked if the defendant's violation was willful"); *see also State v. Clausen*, 163 Idaho 180, 184 (Ct. App. 2017) (holding "if full review of the evidence by the district court does not support a finding of willfulness then revocation would be inappropriate"). 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); *State v. Sanchez*, 149 Idaho 102, 105 (2009).

The *Easley* Court, 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); *see also State v. Lafferty*, 125 Idaho 278, 380, 382 (Ct. App. 1994) (holding the defendant's probation violation

[3] I.C.R. 33(f) was previously codified at I.C.R. 33(e). *See* Order, In re: Amendment of Idaho Criminal Rule (I.C.R.) 33, dated April 23, 2015, *available at* http://www.isc.idaho.gov/orders/ICR_Order_33_7.15.pdf, at p.3.

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.

In this case, the State accused Ms. Henning of violating the term of her probation to pay restitution. (R., p.128.) Ms. Henning was required to "pay at least $8,000 per year for restitution or $665 per month beginning within 30 days after employment." (R., p.135.) She was accused of violating this term by not paying the full monthly amount from May 2018 through January 2019. (R., pp.127-29.) She was required to make monthly payments of $650.[4] At the time of the evidentiary hearing, Ms. Henning had paid $2,663 over the six months, instead of the $3,900 she owed for that period. (State's Exhibit 1.)

At that time, Ms. Henning was employed in the service industry, making $5 per hour plus tips. (10/01/19 Tr., p.14, L.23 – p.15, L.21.) Ms. Henning was asked by one probation officer to prepare a written budget (Defendant's Exhibit A), which documented her monthly income and expenses. (10/1/19 Tr., p.6, L.19 – p.9, L.5.) Ms. Henning's income varied because she relied heavily on tips. (Defendant's Exhibit A.) Ms. Henning also submitted a payment ability evaluation, dated February 1, 2019. (10/1/19 Tr., p.8, Ls.18-21; State's Exhibit 2.) The Payment Ability Evaluation indicated that she made $2,441.14 per month, but had $641 in monthly bills for medical care and insurance. (R., pp.144-52.) Ms. Henning also testified that she was paying $400 per month for rent, plus $200 for utilities. (10/1/19 Tr., p.18, L.8 – p.19, L.11.) Ms. Henning estimated $400 per month for groceries, she owned a 2010 vehicle costing $286 per month for payments and insurance, and she had a cellular telephone, because her home did not

[4] Ms. Henning was required to pay $8,000 per year. (R., p.100.) The monthly breakdown is a little more than $665 per month; however, the district court at one hearing told Ms. Henning she was required to make payments of $650 per month. (10/1/19 Tr., p.46, Ls.4-11.) Regardless of the precise monthly amount owed, Ms. Henning was unable to make the full payment each month from June 2018 to January 2019, the months she is accused of violating her probation. (10/1/19 Tr., p.43, Ls.6-9.)

have a landline. (10/1/19 Tr., p.19, L.12 – p.20, L.13.) Ms. Henning also had additional vehicle maintenance expenses that were not on her budget. (10/1/19 Tr., p.21, Ls.1-16.) Further, Ms. Henning's probation officer testified that Ms. Henning had come to him in December of 2018, and said she was struggling financially to make the requisite monthly payment. (10/1/2019 Tr., p.11, Ls.2-28.) Prior to December 2018, Ms. Henning did not have medical insurance and was paying out-of-pocket for medication and medical treatment. (10/1/19 Tr., p.22, Ls.5-11.) Ms. Henning's medical expenses had gone up, culminating in surgery later that spring. For example, in January 2019, Ms. Henning documented $750 in medical expenses. (Defendant's Exhibit A.)

Around this time, Ms. Henning had serious medical problems.[5] In 2005, Ms. Henning had a ventral shunt placed to drain her spinal fluid into her abdominal cavity; however, she continued to suffer from post-surgical complications. (10/1/19 Tr., p.22, L.16 – p.23, L.11.) In January 2019, Ms. Henning went to see a neurosurgeon due to abdominal pain, and she learned that the tube had perforated her bowel. (10/1/19 Tr., p.23, Ls.2-21.) She subsequently had surgery to remove the shunt and the adhesions on her intestine in March 2019. (10/1/19 Tr., p.24, Ls.2-6.) As a result, Ms. Henning incurred additional medical expenses and was unable to work for a week. (10/1/19 Tr., p.24, Ls.7-24.) She suffered post-surgery complications and was in and out of the emergency room, ending in a hospital stay of one or two days. (10/1/19 Tr., p.24, L.10 – p.25, L.2.) Ms. Henning advised her probation officer that she was unable to work for a week and one-half to two weeks. (10/1/19 Tr., p.25, Ls.1-11.) At the

[5] Although the most costly of Ms. Henning's medical expenses were incurred after the pertinent dates she was accused of violating her probation, her increased medical expenses are germane to the issues on appeal, because the district court considered Ms. Henning's restitution payments made between the evidentiary hearing and the sentencing/disposition hearing in deciding to revoke probation. (11/26/19 Tr., p.53, L.10 – p.54, L.14.)

time of the probation violation disposition hearing, Ms. Henning estimated that she still owed close to $1,000 on her medical bills. (10/1/19 Tr., p.26, Ls.1-8.)

Although Ms. Henning's budget was not precise, it demonstrated that she was making restitution payments in the amounts she could afford. Ms. Henning made payments to her restitution balance every month during the time at issue—from June 2018 to January 2019. (10/1/19 Tr., p.42, Ls.7-9; State's Exhibit 1.) Ms. Henning demonstrated that she was not willfully withholding money from restitution payments, but she was paying what should could every month—she was simply unable to pay the full amount each month. (10/1/19 Tr., p.44, Ls.10-25.)

The State claimed that the car payments were a choice—that Ms. Henning should have bought a car for a couple hundred dollars or "maybe a little more expensive if you want something more reliable." (10/1/19 Tr., p.39, Ls.3-13.) The State took issue with Ms. Henning's rent at $499 per month, and claimed that there were less expensive options, but did not providing any evidence of support of its claim. (10/1/19 Tr., p.39, Ls.19-22.)

In faulting Ms. Henning for failing to establish that there was not a cheaper alternative to her rent or car payments, the State shifted its burden to prove that Ms. Henning willfully violated her probation to Ms. Henning, arguing that she had not proven that she was living as cheaply as possible. 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 Ms. Henning to prove that there were not cheaper car or rental options or to show that she would not be eligible to stay at the homeless shelter.[6]

[6] The district court suggested at the probation violation disposition hearing that Ms. Henning should live at the homeless shelter. (11/26/19 Tr., p.64, Ls.20-23.)

At the conclusion of the hearing, the district court found the State proved the probation violation allegation and expressly found that the violation was willful:

> The question – I think nobody's disputing that [Ms. Henning did not pay $650 per month during the relevant time period]. The question is whether or not her failure to pay was willful. And it seems to me that I have to think about what are the expenses that are available to – what income is available to her against which expenses are necessary.
>
> It doesn't appear to me that she could have made the entire – well, there may have been a couple months that she could have made the entire payment and she didn't based upon surpluses reflected in her exhibits.
>
> But even those months where she couldn't have made those payments, there appears to me to be, at least technically, violations based upon what she did have and what she could have paid and her decision not to pay what she could even if it was short of the $650 or $665.
> . . .
> I'm not satisfied that the surpluses were spent in a way that was consistent with complying with the terms of her probation.
>
> Based on the consideration of all of the evidence and her ability and what weight I can attach to the testimony, I'm going to find that the State has met its burden that Ms. Henning has willfully violated her probation by failing to pay at least as much as she could.

(10/1/19 Tr., p.46, L.12 – p.47, L.24.) Substantial and competent evidence does not support such a finding. The evidence shows Ms. Henning made bona fide efforts to pay restitution every month. (State's Exhibit 1.) Ms. Henning was working as a waitress at this time and living with a roommate. (10/01/19 Tr., p.14, L.23 – p.15, L.21.)) She was not living an extravagant lifestyle on her $1,852 to $2,929 per month earnings. (Defendant's Exhibit A.) Although the State and the district court faulted Ms. Henning for having a cell phone, a cell phone is a necessity, not a luxury, for most people. *See Johnson v. State*, 126 So.3d 1129, 1131 n.4 (Fla. Dist. Ct. App. 2012) (noting trial court's dismissal of State's argument that cell phone was a "luxury item," and instead concluding that a cell phone was a necessity).; *see also Riley v. California*, 573 U.S. 373, 395 (2014) (discussing the rarity of an American adult who does not have a cellular phone where

more than 90% of American adults own one); *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 760 (2010) (discussing cell phone and text message communications and concluding they "are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.")

The State has not met its burden to show willful violations based on the evidence presented at the evidentiary hearing. Because Ms. Henning's probation violation was not willful, the court erred by revoking her probation. *See Clausen*, 163 Idaho at 184.

II.

Alternatively, The District Court Abused Its Discretion By Revoking Ms. Henning's Probation

A. Introduction

Assuming *arguendo* the evidence is sufficient to support the district court's finding that Ms. Henning willfully violated her probation, Ms. Henning asserts that the district court abused its discretion by revoking her probation and imposing her sentence.

B. Standard Of Review

"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). In reviewing a trial court's decision for an abuse of discretion, the relevant inquiry regards four factors:

> Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg v. My Fun Life, 163 Idaho 856, 863 (2018).

"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 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. *Sanchez*, 149 Idaho at 106. 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.*

Only if the trial court determines that alternatives to imprisonment are not adequate in a particular situation to meet the state's legitimate interest in punishment, deterrence, or the protection of society, may the court imprison a probationer who has made sufficient, genuine efforts to obey the terms of the probation order. *Lafferty*, 125 Idaho at 382.

1. The District Court Abused Its Discretion When It Essentially Re-Sentenced Ms. Henning At The Probation Violation Disposition Hearing

The district court abused its discretion by failing to act consistently with the legal standards applicable to the specific choices available to it, and by failing to exercise reason, when it told Ms. Henning that it was not sentencing her for her probation violation, but was sentencing her as it would have sentenced her originally, had it been the district court assigned to

Ms. Henning's case from the beginning. Instead of considering the appropriate factors for evaluating a probation violation decision—whether probation is meeting the objective of rehabilitation while also providing adequate protection for society—the district court essentially re-sentenced Ms. Henning to the sentence the court said it would have imposed, given the facts of her initial crime.

The sentencing court had already determined that Ms. Henning was an appropriate candidate for probation. Nothing precludes the sentencing judge, after considering "the wide range of factors underlying the exercise of his sentencing function" from imposing "the maximum penalty prescribed by law." *Bearden v. Georgia*, 461 U.S. 660, 670 (1983). "The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State's penological interests do not require imprisonment." *Id.* The district court for the disposition hearing was required to determine whether Ms. Henning's probation violation warranted revocation, to determine "whether probation is meeting the objective of rehabilitation while also providing adequate protection for society." *Upton*, 127 Idaho at 275. The considerations for the sentencing court and disposition court are different, and the disposition court cannot take on the role of resentencing the defendant for the initial offense.

Instead, during Ms. Henning's probation violation disposition hearing, the prosecutor discussed the underlying crime, arguing to the court, "I am asking the Court to impose the sentence that was previously given to Ms. Henning, but I'm not doing it because she isn't paying her restitution per se. I'm asking that the Court do that because she embezzled almost $200,000 from [the victim] and that crime deserves prison." (11/26/19 Tr., p.55, Ls.19-24.) The district court agreed, telling Ms. Henning, "You were fortunate that Judge Neville was here the first time, because, frankly, I would have sent you to prison the first time." (11/26/19 Tr., p.63,

Ls.23-25.) The district court told Ms. Henning at disposition, "[the prosecutor]'s right, this isn't about the probation violation. This is a sentence for the original offense." (11/26/19 Tr. p.65, Ls.2-4.)

Instead of considering whether the probation violation warranted revocation, the district court put itself in the place of the sentencing court and concluded that Ms. Henning should have been sentenced to prison from the start. This was an abuse of discretion.

2. The District Court Erred By Revoking Ms. Henning's Probation Without First Considering Alternatives To Address The Violation

Even though the district court's decision to revoke probation is a matter within the court's discretion, *Roy*, 113 Idaho at 392, the court's decision must be consistent with "constitutional standards."[7] *State v. Braaten*, 144 Idaho 606, 607 (Ct. App. 2007). The Equal Protection Clause of the Fourteenth Amendment guarantees "equal protection of the laws," and the Due Process Clause prohibits the State from depriving any person of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Consistent with these constitutional standards, a deprivation of liberty based solely on the individual's indigent status may run contrary to the "fundamental fairness required by the Fourteenth Amendment." *Bearden*, 461 U.S. at 672-73;

[7] In *United States v. Wilson*, the Second Circuit reasoned:

> However, this discretion is not unlimited and revocation of probation solely because of impecunity would not only be of doubtful constitutionality, see *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970); *Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), but would probably be an abuse of discretion, since the result would be to punish for poverty. *See*, e. g., *United States v. Taylor*, 321 F.2d 339 (4th Cir. 1963) (revocation of probation based on good faith inability to pay deemed an abuse of discretion); but cf. *Genet v. United States*, 375 F.2d 960 (10th Cir. 1967) (revocation not an abuse of discretion where reason for making support payments a condition of probation was not rehabilitation but assurance of continuing support for dependents).

469 F.2d 368, 370 (2nd Cir. 1972).

see also Braaten, 144 Idaho at 608. That is so because "there can be no equal justice where the kind of trial"—or sentence—"a man gets depends on the amount of money he has." *Bearden*, 461 U.S. at 664 (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion)).

To determine whether a criminal defendant's indigence may permissibly affect the sentence, the Court applies a balancing test with elements of both the due process and equal protection analyses. *See Braaten*, 144 Idaho at 608. Separately, these two analyses are as follows:

> To determine whether this differential treatment [based on indigency] violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine.

Braaten, 144 Idaho 308-09 (quoting *Bearden*, 461 U.S. at 665–66). In *Bearden*, for example, the U.S. Supreme Court examined whether the defendant's equal protection and due process rights were violated by the revocation of his probation due to his failure to pay the imposed fine and restitution. 461 U.S. at 665-73. The U.S. Supreme Court held that the revocation of probation was "permissible" only if the defendant "did not make sufficient bona fide efforts to pay his fine" or "alternate punishment is not adequate to meet the State's interests in punishment and deterrence." *Id.* at 674; *see also id.* at 672–73. Whether this issue is "analyzed in terms of equal protection or due process," the factors to be considered are: "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose . . . ." *Braaten*, 144 Idaho at 609 (quoting *Bearden*, 461 U.S. at 666 (alterations in original)). Imprisoning a defendant "solely because he lacks funds to pay the fine," without considering the

reasons for the inability to pay or examining alternatives, is constitutionally impermissible. *Bearden*, 461 U.S. at 674.

a. Ms. Henning Made Bona Fide Efforts To Pay Restitution

Ms. Henning did not make all of these payments in full, leaving her approximately $1,200 short over the six-month time period. (State's Exhibit 1.) Ms. Henning continued making monthly payments, even after the State filed a probation violation. (11/26/19 Tr., p.53, L.15 – p.54, L.8.) After the October 17, 2019 probation violation hearing, Ms. Henning made two more payments—one on October 28 for $450, and one in November for $400. (11/26/19 Tr., p.54, Ls.2-14.) At Ms. Henning's disposition hearing, the prosecutor asked for imposition of the prison sentence, not because Ms. Henning failed to make restitution payments in full, but because of his outrage regarding the facts surrounding the initial crime. (11/26/19 Tr., p.55, Ls.2-24.) Defense counsel asked the court to continue Ms. Henning on probation so she could keep making payments to the victim, but to require her to take budget classes and submit a detailed budget, including receipts, to her probation officer monthly. (11/26/19 Tr., p.62, Ls.6-12.) Defense counsel reminded the court that Ms. Henning had not committed new offenses, she simply came up short on her restitution payments. (11/26/19 Tr., p.62, L.22 – p.63, L.1.)

The district court revoked Ms. Henning's probation. (11/26/19 Tr., p.65, Ls.5-12.) The court concluded,

> [Y]our first obligation is to pay back the restitution. It's not to provide yourself with a car. It's not to provide yourself with a cell phone. It's not to pay rent. When – well, at $400 a month, without establishing that there isn't any cheaper alternative out there, if you hadn't bought a car, if you hadn't bought a cell phone, if you showed me that you rented a room in a house for 200 bucks a month or you stayed at the shelter or whatever, you clearly can make almost 1,900 bucks a month, you – this is not impossible for you to pay back.

> The reason it didn't get paid back is because you chose your own comfort and convenience over making your victims whole.

(11/26/19 Tr., p.64, L.12 – p.65, L.1.)

Ms. Henning contends that the district court revoked her probation due to her indigent status. The district court revoked probation because Ms. Henning failed to pay the full amount owed as restitution each month, but the only reason Ms. Henning failed to pay the full amount was due to her inability to pay. Imprisoning Ms. Henning for her poverty is constitutionally impermissible, and the district court abused its discretion by imprisoning Ms. Henning.

b. Alternative Punishment Would Have Been Adequate To Meet The State's Interests

"The next factor to be weighed is the State's interest or purpose and the rationality of the connection between this purpose and the means used to accomplish it." *Braaten.* 144 Idaho at 610. This factor also considers "the existence of alternate means" to effectuate the State's purpose. *Bearden*, 461 U.S. at 666; *see also Sanchez*, 149 Idaho at 105 (discussing the required analysis of alternate means for non-willful violations generally). The U.S. Supreme Court has provided considerable guidance on this factor in the context of a revocation of probation. The U.S. Supreme Court acknowledged, "The State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment." *Bearden*, 461 U.S. at 669. "The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State's penological interests do not require imprisonment." *Id.* at 670. Thus, the State's interests in punishment and deterrence are diminished when the defendant is already determined to be an appropriate candidate for probation. Moreover, a probationer, such as Ms. Henning, who has made "sufficient bona fide efforts" to pay restitution, and who has "complied with the

other conditions of probation,"[8] "has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms." *Id.* This further diminishes the requirement of imprisonment "to satisfy the State's interests." *Id.*

Although the *Braaten* Court held that the district court did not violate defendant's right to equal protection or due process when it considered his indigence in deciding whether probation would be a viable option, that case is distinguishable from Ms. Henning's case:

> Balancing all of the factors identified in *Bearden*, we hold that the district court did not violate Braaten's right to equal protection or due process when it considered his indigence in deciding whether probation would be a tenable option. Braaten was denied probation not because of his lack of resources per se, but because of the effect of that lack of resources on the likelihood that he could be adequately supervised and the community protected if he were placed on probation. There has been no showing of any reasonable alternatives that would have adequately served the State's purpose to protect society.

144 Idaho at 610. As stated in *Bearden*, "Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay." 461 U.S. at 672; *see also id.* ("[T]he court must consider alternate measures of punishment other than imprisonment."); *Sanchez*, 149 Idaho at 106. Ms. Henning submits that the district court abused its discretion by punishing her for her indigency, without considering her bona fide efforts to pay and, most importantly, the alternate means to effectuate the State's interests.

Here, continuing Ms. Henning on probation does not present an undue risk to society. *See Braaten*, 144 Idaho at 610. Ms. Henning demonstrated that she was not willfully withholding money from restitution payments, but she was paying what she could every

[8] Other than the financial issues, Ms. Henning complied with the terms of her probation. (11/26/19 Tr., p.62, Ls.22-25.)

month—she was simply unable to pay the full amount each month. (10/1/19 Tr., p.44, Ls.10-25.) Further, Ms. Henning presented an alternate means to effectuate the State's interests of rehabilitation and protection of society. Ms. Henning, through counsel, suggested that the court continue her on probation so she could keep making payments to the victim, but to require her to take budget classes and submit a detailed budget, including receipts, to her probation officer monthly. (11/26/19 Tr., p.62, Ls.6-12.) Ms. Henning had not committed new offenses, she simply came up short on her restitution payments. (11/26/19 Tr., p.62, L.22 – p.63, L.1.) Ms. Henning recognized her need to pay restitution and tried to pay to the best of her abilities. The district court failed to weigh these factors as required by *Bearden* and *Braaten*.

3. The District Court Abused Its Discretion Where Revocation Does Not Serve The Objective Of Rehabilitation

"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). "[T]he primary purpose of restitution in Idaho is remediation," thus it is not intended to be punitive. *State v. Cottrell*, 152 Idaho 387, 397 (Ct. App. 2012).

Ms. Henning submits that the district court abused its discretion by revoking her probation because the violation did not justify revocation. As explained Ms. Henning's counsel, there was no allegation that Ms. Henning failed to comply with probation for any reason other than her inability to pay in full the restitution owed each month. (11/26/19 Tr., p.62, L.22 – p.63, L.1.) Ms. Henning wanted to pay restitution, and she fully appreciated the need for restitution. But, like many individuals, Ms. Henning struggled to follow a budget and stay up-to-date on all her expenses. (11/26/19 Tr., p.59, L.16 – p.60, L.13; Defendant's Exhibit A; State's Exhibit 1.) In order to succeed on probation, Ms. Henning simply needed instruction and guidance to learn

how to manage her finances, which she requested at the probation violation disposition hearing. (11/26/19 Tr., p.62, Ls.6-12.) Instead of punishing Ms. Henning for her inability to pay with a three to twenty-four-year prison sentence (thereby removing her ability to pay for several years, during which time the amount owed is collecting interest), Ms. Henning should have been given an opportunity to develop these money-management skills while on probation. This alternative to imprisonment would have furthered Ms. Henning's rehabilitation while advancing the State's interest in fully compensating the victim. Ms. Henning submits that the district court abused its discretion by revoking her probation.

CONCLUSION

Ms. Henning respectfully requests that this Court vacate the district court's order revoking probation and reinstate her probation. Alternatively, she requests that this Court remand the case to a different district court for a new probation violation evidentiary hearing and/or disposition hearing.

DATED this 3rd day of June, 2020.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June, 2020, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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

SJC/eas