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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 47680-2019
Plaintiff-Respondent,)	
)	KOOTENAI COUNTY NO.
v.)	CR28-18-11511
)	
ZOE RENEE BARHAM,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

**HONORABLE CYNTHIA K.C. MEYER
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

Zoe Barham appeals from the district court's memorandum decision and order denying her motion to strike a condition of her probation. Ms. Barham argues the district court erred by not striking her condition of probation of consent to searches by law enforcement. She submits this condition was not reasonably related to the goals of probation. Accordingly, she respectfully requests this Court reverse or vacate the district court's order and remand this case for further proceedings.

Statement of Facts and Course of Proceedings

In March 2019, a jury found Ms. Barham guilty of one count of insurance fraud, in violation of I.C. § 41-293(1)(c). (No. 47241 R.,¹ pp.54–55 (information), 111–44 (trial minutes), 177 (verdict).) According to the presentence investigation report (“PSI”),² Ms. Barham's sister-in-law was driving Ms. Barham to a doctor's appointment when her sister-in-law backed into another car. (No. 47241 PSI, pp.3–5.) Ms. Barham purchased a car insurance policy from Progressive shortly after the accident, but she told Progressive that she had bought the policy before the accident. (No. 47241 PSI, p.3.) Progressive investigated and denied the other car owner's claim because it determined Ms. Barham obtained the policy after the accident. (No. 47241 PSI, pp.3–4.) The State charged Ms. Barham with insurance fraud for providing a false statement to Progressive. (No. 47241 R., pp.54–55.)

¹ The Court augmented the record in this appeal with the record and transcript from the prior appeal, No. 47241-2019. Citations to the prior appeal's record, transcript, and confidential exhibits will reference the docket number: “No. 47241.”

² Citations to the PSI refer to 269-page document with the confidential exhibits in No. 47241.

In May 2019, the district court sentenced Ms. Barham to five years, with two years fixed, suspended her sentence, and placed her on probation for three years. (No. 47241 Tr.,³ p.21, Ls.18–23; *see also* No. 47241 R., p.219.) At the sentencing hearing, the district court informed Ms. Barham of the conditions of probation, including a waiver of her Fourth Amendment rights. (No. 47241 Tr., p.30, Ls.11–18.) On the Fourth Amendment waiver, the district court stated:

You must consent to the search of your self, your residence, vehicle, personal property, other real property or structures that are owned or leased by you or that you’re in charge of. Searches may be conducted by the Department of Corrections or law enforcement, and you must waive your rights under the Fourth Amendment and the Idaho Constitution concerning searches.

(No. 47241 Tr., p.30, Ls.11–18.) Ms. Barham agreed to be bound by the conditions and intended to comply with them. (No. 47241 Tr., p.35, Ls.7–11.) Although she agreed to comply, she objected to the part of the Fourth Amendment waiver that required her to submit to searches by law enforcement and wholly waive her Fourth Amendment rights in that respect. (No. 47241 Tr., p.35, Ls.12–19.) She stated she would submit a brief in support of her objection. (No. 47241 Tr., p.35, L.22–p.36, L.5.) The district court responded: “Your objection is noted, and if you have a motion and briefing to make, then you may do so, of course.” (No. 47241 Tr., p.36, Ls.6–8.)

The day after the sentencing hearing, the district court entered a judgment of conviction along with an agreement of supervision. (No. 47241 R., pp.224–27.) Condition 5 of the agreement stated:

³ The document on appeal titled “Trascripts [sic]- Appeal Volume 1 9-12-2019 13.23.9 28449721 3089131B-0157-437B-A555-FECE724A35A8.pdf” contains three transcripts: the preliminary hearing (pages 1 to 58 of the overall document), sentencing hearing (pages 59 to 95), and restitution hearing (pages 96 to 114.) However, each transcript contains its own internal pagination. Citations to “No. 47241 Tr.” will refer to the transcript of sentencing hearing only and reference that transcript’s internal pagination. No other hearings from the transcript in No. 47241 are cited herein.

I consent to the search of my person, residence, vehicle, personal property, and other real property or structures owned or leased by me, or for which I am the controlling authority conducted by any agent of IDOC or a law enforcement officer. I hereby waive my rights under the Fourth Amendment and the Idaho constitution concerning searches.

(No. 47241 R., p.229.)

In October 2019, Ms. Barham filed a brief in support of her motion to strike the Fourth Amendment waiver condition. (R., pp.16–52.) As in the sentencing hearing, Ms. Barham only challenged the portion of that condition that allowed searches by law enforcement without any Fourth Amendment protections. (R., p.38.) Among other arguments, including the constitutionality of the Fourth amendment waiver, Ms. Barham asserted this term was not reasonably related to the goals of probation. (R., pp.40–45.) The State responded and argued, inter alia, Ms. Barham failed to provide facts to support her request. (Aug. R., pp.1–7.) In November 2019, the district court held a hearing, and the parties presented argument. (*See generally* Tr.) The district court took the matter under advisement. (Tr., p.34, Ls.1–2.)

About one month later, the district court issued a memorandum decision and order denying Ms. Barham’s motion to strike the condition of probation. (R., pp.105–29.) Relevant here, the district court ruled Ms. Barham failed to allege or prove facts establishing good cause to modify the Fourth Amendment waiver condition of her probation. (R., pp.110–12.) The district court determined Ms. Barham was required by statute to submit an affidavit or declaration with facts to support her modification. (R., pp.111–12.) The district court further determined that Ms. Barham presented only legal bases and “not facts, circumstances, or conditions personal to her” to demonstrate good cause to strike the condition. (R., p.112.)

Ms. Barham timely appealed from the district court’s memorandum decision and order. (R., pp.100–02.)

ISSUE

Did the district court err by denying Ms. Barham's motion to strike a condition of her probation that allowed warrantless, suspicionless searches by law enforcement?

ARGUMENT

The District Court Erred By Denying Ms. Barham's Motion To Strike A Condition Of Her Probation That Allowed Warrantless, Suspicionless Searches By Law Enforcement

Ms. Barham argues the district court erred by denying her motion to strike the condition of her probation that waived her Fourth Amendment rights with respect to searches by law enforcement. As argued in the district court, Ms. Barham does not take issue with searches by probation officers or by law enforcement at the direction of probation officers. She takes issue, however, with the part of the Fourth Amendment waiver condition that allows warrantless, suspicionless searches by law enforcement officers that are wholly unconnected to a probation officer's request. She asserts this condition is not reasonably related to the goals of probation based on the specific facts of her case.

“The goal of probation is to foster the defendant's rehabilitation while protecting public safety.” *State v. Wardle*, 137 Idaho 808, 810 (Ct. App. 2002) (citing *State v. Gawron*, 112 Idaho 841, 843 (1987); *State v. Breeden*, 129 Idaho 813, 816 (Ct. App. 1997); *State v. Josephson*, 125 Idaho 119, 123 (Ct. App. 1993)). “Toward that end, a trial court is authorized to make probation subject to ‘such terms and conditions as it deems necessary and appropriate.’” *State v. Cheatham*, 159 Idaho 856, 858 (Ct. App. 2016) (quoting I.C. § 19-2601(2)). Although the district court has “broad discretion” to impose restrictive terms, *Wardle*, 137 Idaho at 810, the discretion “is not unbounded,” *State v. Mummert*, 98 Idaho 452, 454 (1977). “[T]he conditions of probation must be reasonably related to the rehabilitative and public safety goals of probation.” *Wardle*, 137 Idaho at 810 (citing *Gawron*, 112 Idaho at 843; *Mummert*, 98 Idaho at 454; *Breeden*, 129 Idaho at 816).

“The ‘reasonable relationship’ is the legal standard by which the validity of a term or condition must be judged.” *State v. Jones*, 123 Idaho 315, 318 (Ct. App. 1993). “If such a

defendant desires to challenge the legality of any proposed conditions of probation, he may do so on appeal from the judgment, or on habeas corpus.” *Gawron*, 112 Idaho at 843; *see also Cheatham*, 159 Idaho at 857–88 (appealing from district court’s denial of motion “to eliminate condition” and amend judgment). As a “legal question,” the Court exercises free review over “[w]hether the terms and conditions of a defendant’s probation are reasonably related to the goals of probation.” *Cheatham*, 159 Idaho at 858 (citing *State v. Brauch*, 133 Idaho 215, 218 (1999); *Jones*, 123 Idaho at 318).

Here, the facts show that the condition allowing suspicionless searches by law enforcement was not reasonably related to the purpose of Ms. Barham’s rehabilitation. Ms. Barham was found guilty of insurance fraud by making a false statement. Nothing about the nature of this offense generates the need for law enforcement to conduct a search of Ms. Barham, her home, or her belongings without reasonable suspicion or the approval of her probation officer. The offense did not involve Ms. Barham possessing, hiding, or destroying contraband or evidence of a crime. Moreover, this was Ms. Barham’s first felony offense. (PSI, p.6.) She had two prior misdemeanor convictions for an invalid license in 2009 and frequenting in 2010. (PSI, pp.5–6.) In fact, Ms. Barham was a low risk to reoffend. (PSI, p.19.) Her only two risk factors were financial and “family/marital.” (PSI, p.19.) Ms. Barham had been sober for over seven years. (PSI, p.18.) She had two children, a stable relationship, and a long-term residence. (PSI, pp.9, 10.) These facts demonstrate that the broad Fourth Amendment waiver condition was not reasonably related to Ms. Barham’s rehabilitation. (*See also R.*, pp.18, 41 (Ms. Barham’s facts and argument on “reasonably related” issue).) Allowing unfettered law enforcement searches does not further Ms. Barham’s rehabilitation, in light of her minimal risk factors and the nature of the offense.

The district court relied on the affidavit requirement in I.C. § 20-221(2) to reject Ms. Barham's request, but Ms. Barham submits the district court's reliance on affidavit requirement was in error. I.C. § 20-221(2) states in relevant part:

Any party or the board of correction may submit to the court a request to modify the terms and conditions of probation for any probationer under the board's supervision at any time during the period of probation. A request to modify the terms and conditions of probation *shall be supported by a statement attested to under oath or signed under penalty of perjury* pursuant to section 9-1406, Idaho Code, *setting forth the facts upon which the request is based.*

I.C. § 20-221(2) (emphasis added). In submitting a request to modify pursuant to this statute, the moving party must establish "good cause" for the modification. *State v. Gibbs*, 162 Idaho 782, 788 (2017). Relying on this statute, the district court determined Ms. Barham provided no "facts" to support her request because her arguments were "legal bases," such as the constitutionality of the condition.⁴ (R., pp.111–12.) Without any facts, the district court held Ms. Barham failed to establish good cause to strike the challenged portion of the Fourth Amendment waiver condition. (R., p.112.)

Ms. Barham maintains the district court erred because, in addition to her legal bases, she also argued this condition was not reasonably related to the goals of her probation. (*See R.*, pp.18–19, 21–25, 40–42, 45.) Moreover, Ms. Barham provided sufficient facts to support her request, even though Ms. Barham's motion did not include an affidavit with facts in support. Ms. Barham argues an affidavit with supporting facts was not necessary because her motion to strike the probation condition was not based on new or additional facts subsequent to the sentencing hearing. In other words, Ms. Barham was not asserting that new or additional facts previously unknown to the district court justified the change in her probation terms. Rather, Ms. Barham was continuing her objection from the sentencing hearing. (No. 47241 Tr., p.35, Ls.12–

⁴ Ms. Barham's trial counsel included an affidavit, but it did not include facts relevant to a "reasonably related" argument. (*See R.*, pp.53–54.)

19.) Ms. Barham based her “reasonably related” argument on the facts presented to the district court at the sentencing hearing and in the sentencing materials. As such, there was no affidavit or declaration to be filed with the facts to support her request. The facts were already before the district court. Therefore, Ms. Barham argues the district court erred by requiring an affidavit to consider Ms. Barham’s motion to strike the condition. She maintains the district court should have considered whether the condition—based on the facts already known to the court—was reasonably related to the goals of her probation. *See State v. Wardle*, 137 Idaho 808, 810–811 (Ct. App. 2002) (no discussion of affidavit requirement on review of the district court’s denial of motions to modify probation conditions with “reasonably related” argument).

In summary, Ms. Barham contends the district court erred by denying her motion to strike the portion of the Fourth Amendment waiver condition that allowed searches by law enforcement without reasonable suspicion or approval by a probation officer. She argues this portion of the Fourth Amendment waiver was not reasonably related to the rehabilitation goal of probation, in light of the facts known to the district court.

CONCLUSION

Ms. Barham respectfully requests this Court reverse or vacate the district court’s memorandum decision and order denying her motion to strike a condition of her probation and remand this case for further proceedings.

DATED this 27th day of April, 2020.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th 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
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

JCS/eas