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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 47680-2019**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR28-18-11511**
	)	
ZOE RENEE BARHAM,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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 Renee Barham appeals from the district court's determination not to strike a probation condition under Idaho Code § 20-221.

Statement Of The Facts And Course Of The Proceedings

Zoe Renee Barham was not insured when she was involved in a car accident, immediately thereafter purchased an insurance policy from Progressive Insurance, and then represented to Progressive that she purchased the policy before the accident. (No. 47241 PSI, pp. 3-4.[1]) She was convicted by a jury of felony insurance fraud under I.C. § 41-293(1)(c). (No. 47241 R., p. 177.) The district court sentenced Barham to a unified term of five years, with two years fixed, but suspended the sentence in favor of three years of probation. (No. 47241 R., pp. 224-28.) At the sentencing hearing, the district court judge articulated the terms and conditions of probation, including the fifth condition in the Idaho Department of Correction Agreement of Supervision, (No. 47241 5/21/19 Tr., p. 29, L. 13 – p. 32, L. 17), which states:

> 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). Barham accepted the terms and conditions of probation, but registered an objection to the condition quoted above, at least to the extent it would require her "to submit

[1] Barham previously appealed in this case in Docket No. 47241-2019 and that appeal was resolved in State v. Barham, __ Idaho __, 464 P.3d 314 (Idaho Ct. App., May 13 2020). This Court augmented the record in this appeal with the record from Docket No. 47241-2019. (R., p. 104.)

to searches by any law enforcement officer. Not probation officer, but law enforcement officer." (No. 47241 5/21/19 Tr., p. 35, Ls. 6-19.) The district court entered the judgment on May 22, 2019. (No. 47241 R., pp. 224-27.)

The district court then ordered restitution to the Idaho Department of Insurance in May of 2019 (No. 47241 R., pp. 234-35), and entered ordered restitution to Progressive Insurance in July of 2019 (No. 47241 R., pp. 260-61). Barham timely appealed from the order of restitution to Progressive Insurance and that appeal was resolved in State v. Barham, __ Idaho __, 464 P.3d 314 (Idaho Ct. App., May 13 2020).

In October of 2019, Barham filed a Brief in Support of Defendant's Motion to Strike Condition of Probation (R., pp. 16-52), along with an affidavit from counsel attaching the judgment of conviction, the agreement of supervision, and a partial transcript from a motion to suppress in an entirely unrelated criminal case (R., pp. 53-94).[2] Barham asked the court to strike the condition of probation related to searches, arguing that it violates both the Fourth Amendment of the U.S. Constitution, as well as Article I, § 17 of the Idaho Constitution. (R., p. 38.) She argued that it violates the "nondelegation doctrines because it delegates powers rightfully reserved to the Board of Corrections under Article X, § 5, to all law enforcement officers in general" (R., p. 38); that it is "not reasonably related to the goals of probation" and is "overbroad and vague" (R., p. 40); that "the special needs exception . . . does not apply to condition 5 as it relates to searches conducted purely by police officers" (R., p. 45); and that the consent provided by Barham "cannot be considered free or voluntary and it violates the unconstitutional conditions doctrine" (R., p. 47). Barham clarified, however, that she did "not

[2] As the district court later noted, though the brief was styled as in support of a motion, a motion was never filed. (R., p. 111 n. 2.)

challenge this condition of probation as it relates to searches and seizures by, or at the request or direction of, an agent of IDOC," but was challenging the condition only "as it relates to searches, seizures, and waivers of constitutional rights vis-a-vis law enforcement officers." (R., p. 38.)

The state responded that Barham was making a legal argument based on a purely hypothetical possibility that the probation condition would be used by police officers without any connection to the supervision of her probation, not a factually based motion to alter the terms of probation as permitted by Idaho Code § 20-221(2). (Aug. R., pp. 2-3.[3]) Further, the state noted that Idaho case law permits officers to assist with searches related to the supervision of probation and Barham could address the propriety of any search that was allegedly unrelated to the supervision of probation should such a search occur. (Aug. R., pp. 4-7.)

In a hearing on the motion, Barham again emphasized that she was "not objecting to searches conducted by or at the direction of a probation officer," but was instead objecting only to searches conducted "by police officers . . . with Probation and Parole not involved in any form or fashion." (Tr., p. 30, L. 21 – p. 31, L. 8.) "[W]e're not objecting to waiver of Fourth Amendment rights in regards to probation officers, searches conducted by probation officers, only those searches conducted purely by police officers without any input or approval from probation officers." (Tr., p. 31, Ls. 12-19.)

The district court denied Barham's motion in a written order. (R., pp. 105-29.) The court held first that Barham failed to provide "*facts* constituting good cause for the modification of probation under section 20-221," as required by that statute, instead providing a purely legal

[3] In an order dated April 28, 2020, this Court granted a motion to augment the record on appeal with the State's Response to Defendant's Motion to Strike Condition of Probation, filed November 1, 2019.

argument regarding a hypothetical search unconnected to the supervision of her probation. (R., pp. 110-12 (emphasis original).) Second, after extensively reviewing Idaho's case law addressing Fourth Amendment waivers and consents to search included as conditions of probation, the court recognized that Idaho's appellate courts have repeatedly considered and enforced probation conditions relevantly similar to the one at issue here. (R., pp. 112-28.) The court recognized that such a condition does not prevent a probationer from challenging a particular search as beyond the scope of what is permissible for the supervision of probation, that Barham could do so through a motion to suppress, and that Barham's concern about the mere possibility of such a search was not good cause to modify her terms of probation. (R., pp. 112-28.)

Barham timely appealed from the district court's order denying her motion. (R., pp. 100-03.)

ISSUES

Barham states the issues on appeal as:

> 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?

(Appellant's brief, p. 4.)

The state rephrases the issues as:

Has Barham failed to show that district court abused its discretion by declining to strike a Fourth Amendment waiver?

ARGUMENT

Barham Has Not Shown That The District Court Abused Its Discretion By Declining To Strike The Relevant Probation Condition

A. Introduction

On appeal, as below, Barham argues that the district court abused its discretion by refusing "to strike the condition of her probation that waived her Fourth Amendment rights with respect to searches by law enforcement," but not with respect to "searches by probation officers or by law enforcement at the direction of probation officers." (Appellant's brief, p. 8.) That is, though no such search had occurred, she objected to the possibility of "searches conducted purely by police officers without any input or approval from probation officers." (Tr., p. 31, Ls. 12-19.) According to Barham, that mere possibility implies that the probation condition is not reasonably related to the goals of probation.[4] (Appellant's brief, pp. 5-8.) In an thorough, well-reasoned order, the district court correctly rejected that argument for two reasons. (R., pp. 105-29.) First, Barham did not support her request with an affidavit stating facts showing that the probation condition should be stricken as she was required to do by Idaho Code § 20-221(2). (R., pp. 110-12.) Second, Idaho courts have repeatedly upheld virtually identical probation conditions as furthering the purposes of probation and, if a particular search was unreasonable in light of those purposes, she could and should address those concerns through a motion to suppress. (R., pp. 112-29.)

[4] She made other arguments below, including, for example, that the condition violated the separation of powers and was not voluntarily consented to (R., pp. 38-52), but has apparently abandoned them on appeal.

B. Standard Of Review

The district court's determination whether to modify a condition of probation under Idaho Code § 20-221(2) is reviewed for an abuse of discretion. State v. Gibbs, 162 Idaho 782, 788-89, 405 P.3d 567, 573-74 (2017). Under an abuse of discretion standard, this Court determines 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, 421 P.3d 187, 194 (2018).

C. Barham Did Not Properly Support Her Motion Under Idaho Code § 20-221 (2)

Idaho Code § 20-221(2) permits a probationer to "request to modify the terms and conditions of probation" and provides that such a request "shall be supported by a statement attested to under oath or signed under penalty of perjury pursuant to section 9-1406, Idaho Code, setting for the facts upon which the request is based." Barham did not submit such a statement.[5] While her attorney did attach an affidavit to the brief, the affidavit merely attached the judgment, probation agreement, and a portion of a transcript from the motion to suppress in an unrelated criminal case. (R., pp. 53-54.) Barham concedes on appeal that this affidavit did not "include facts relevant" to her argument that the probation condition was not reasonably related to the purpose of probation. (Appellant's brief, p. 7 n. 4.) The district court recognized that "[t]here were no 'facts upon which the request was based' set forth in the Affidavit," and denied the request in part on that basis. (R., pp. 110-12 (quoting I.C. § 20-221(2)).)

[5] Indeed, as the district court noted, she did not even file a motion. (R., p. 111 n. 2.)

On appeal, Barham argues that the district court erred because she "was not asserting that new or additional facts previously unknown to the district court justified the change in her probation terms," but was instead "continuing her objection from the sentencing hearing." (Appellant's brief, pp. 7-8.) But that contention illustrates the problem with her motion below, it does not resolve or mitigate that problem. Barham was attempting to use Idaho Code § 20-221 (2) to press a purely legal challenge to the condition of probation, a challenge that was available and could have been pursued at sentencing, when the provision is intended to permit the modification of the terms of probation in light of new or changed facts. Barham could and should have made her argument regarding the condition of probation at sentencing and, if necessary, then on timely appeal from the entry of the judgment. See State v. Gawron, 112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987) ("If such a defendant [who believes that a condition of probation is unreasonable] desires to challenge the legality of any proposed conditions of probation, he may do so on appeal from the judgment, or on habeas corpus."). Instead, she registered an objection at sentencing but did not press the issue, did not appeal from the judgment, and attempted to shoe-horn her argument into a motion under Idaho Code § 20-221(2).

Regardless, Idaho Code § 20-221(2) states a requirement for a request for a modification of probation conditions. The term 'shall' unambiguously indicates a mandatory requirement. State v. Tribe, 123 Idaho 721, 726, 852 P.2d 87, 92 (1993); State v. Peregrina, 151 Idaho 538, 540, 261 P.3d 815, 817 (2011). Barham does not dispute that she failed to satisfy that requirement. The only case she cites for the proposition that the district court erred by denying a request that did not satisfy a statutory requirement is State v. Wardle, 137 Idaho 808, 53 P.3d 1227 (Ct. App. 2002). (Appellant's brief, p. 9.) But that case provides no support at all. In fact, she cites it only because it includes "no discussion of [the] affidavit requirement." (Appellant's

brief, p. 9.) A case that does not address the requirement at all is hardly support for the proposition that a district court errs by denying requests that do not comply with it.

The district court did not err by denying a request to modify her probation because that request did not satisfy the requirements of the statute.

D. Even On The Merits, Barham Has Not Shown That The District Court Abused Its Discretion

Even setting aside her failure to comply with the requirements of the statute, the district court denied Barham's request on the merits after recognizing its decision as discretionary, citing and correctly applying the appropriate legal standards, and engaging in an extensive and well-reasoned analysis to reach the determination that there was no good cause to modify Barham's probation conditions. (R., pp. 109-10, 112-28.) Barham does not identify which prong of the abuse of discretion standard the district court allegedly failed to satisfy. (Appellant's brief, pp. 5-8.) That fact alone is sufficient to conclude that she has failed to show that the district court abused its discretion. See State v. Kralovec, 161 Idaho 569, 575 n.2, 388 P.3d 583, 589 n.2 (2017) (warning that it is inadequate to cite the abuse of discretion standard and allege an abuse of discretion without identifying how precisely the district court abused its discretion).

Though she does not identify the prong of the abuse of discretion standard at issue, she claims that "the facts show that the condition allowing suspicionless searches by law enforcement was not reasonably related to the purpose of Ms. Barham's rehabilitation." (Appellant's brief, p. 6.) Barham cites the following facts as allegedly showing as much: her conviction was her first felony and was for an offense that did not involve "possessing, hiding, or destroying contraband or evidence of a crime"; she was determined by the presentence

investigator to be a low risk to reoffend; she had been sober for over seven years;[6] and she had children, a stable relationship, and a long-term residence. (Appellant's brief, p. 6.) Of course, the district court was aware of all of this information at sentencing and granted Barham probation because of it. (No. 47241 5/21/19 Tr., p. 19, L. 9 – p. 22, L. 7.) The district court then considered it again in the context of Barham's motion to modify her probation conditions and reasonably determined that it did not provide good cause to do so.

As the district court recognized, it is important to note that Barham "is not suggesting or requesting that she be free of searches while she is on supervised probation." (R., p. 112.) Barham was explicit that she was not objecting to searches by probation officers, or by law enforcement with "input or approval from probation officers." (Tr., p. 30, L. 21 – p. 31, L. 23; see also Appellant's brief, p. 8 ("Ms. Barham does not take issue with searches by probation officers or by law enforcement at the direction of probation officers").) So, Barham acknowledges that the Fourth Amendment waiver is reasonably related to the purposes of probation to the extent that it authorizes searches performed by or in consultation with a probation officer, even given the facts cited above—e.g., her lack of prior felonies, the fact that she has children, etc. But she argues that the mere possibility that law enforcement might attempt to use the condition to justify a search not performed in consultation with a probation officer implies that it is not reasonably relate to the purposes of probation. Thus, while Barham frames her argument in terms of the facts cited above, they play no substantial role in it. She is effectively arguing that the condition, as a per se matter, is not reasonably related to the goals of

[6] Barham reported not using heroin in over seven years, but was currently in treatment for "Opioid Use Disorder, severe," for abuse of prescription opioids. (No. 47241 PSI, pp. 17-18, 159-60.)

probation because it might license searches that are not appropriately connected to her probation officer.

The district court correctly rejected that position.

First, on Barham's view, the distinction between an acceptable search by a police officer and an unacceptable one hinges on whether the police officer received "input" from a probation officer. (Tr., p. 30, L. 21 – p. 31, L. 23.) According to Barham, it furthers the purposes of probation to permit a police officer to conduct a search if the police officer first briefly talks by phone with her probation officer, but it does not serve the purpose of probation if the same officer is aware of her status as a probationer, has the same information, conducts the search with the intent of enforcing her probation conditions, but does not make that brief phone call first. Barham provides no explanation why that would be so.

Second, the district court recognized that Idaho's appellate courts have repeatedly enforced probation conditions that extend authority to "any law enforcement officer" to conduct searches or to seize the probationer. (R., pp. 112-28.) In State v. Gawron, 112 Idaho 841, 736 P.2d 1295 (1987), for example, the Court considered a virtually identical probation condition authorizing searches "by any law enforcement officer," and appellant argued that the condition constituted "an unreasonable invasion of his fourth amendment rights." Id. at 842-43, 736 P.2d at 1296-97. The Court recognized that district courts have broad discretion to impose probation conditions, that the condition is necessary to ensure compliance with the other probation conditions, that a defendant "who considers the conditions of probation too harsh" may reject them, and that probationers have a reduced expectation of privacy. Id. The Court then enforced the probation condition. Id. See also State v. Purdum, 147 Idaho 206, 208-10, 207 P.3d 182, 184-86 (2009) (holding that probation condition that extended to "any law enforcement officer"

permitted police officer to seize probationer without suspicion); Samson v. California, 547 U.S. 843, 846-56 (2006) (holding that parole condition consenting to searches by "parole officer or other peace offer" did not violate Fourth Amendment).

Second, though, the district court recognized that the mere possibility that officers might at some point attempt to justify an unreasonable search by reference to this probation condition does not imply that there is good cause to strike the condition. (R., pp. 112, 127-28.) Instead, if officers conduct a search that is not reasonable, Barham could press the issue in a motion to suppress that would permit the district court to address the issue in the context of the facts surrounding that search. The Idaho Supreme Court has recognized that Fourth Amendment waivers like the one at issue here "do not eviscerate Fourth Amendment rights, they only tip the scales of the reasonableness analysis." State v. Maxim, 165 Idaho 901, 907, 454 P.3d 543, 549 (2019). As a result, and notwithstanding a waiver like that here, a court may find that a search was unreasonable and so may suppress the fruits of the search, just as did the Court in Maxim. Id. at 908, 454 P.3d at 550 (suppressing evidence and holding "that a Fourth Amendment waiver cannot salvage an otherwise unreasonable entry into a home under the Fourth Amendment if the police officers were unaware of the waiver at the time of the unconstitutional search"). Barham does not contend that she was in fact subject to an unreasonable search. If she does so in the future, she can press the issue in a motion to suppress. The mere possibility that officers might in the future rely on the probation condition in an attempt to justify an unreasonable search does not imply that the condition is now not reasonably related to the purposes of probation.

Even setting aside her procedural failing below, the district court reasonably concluded that Barham did not provide good cause to strike the relevant probation condition. She has not shown that the district court abused its discretion.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 17th day of July, 2020.

/s/ Andrew V. Wake
ANDREW V. WAKE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of July, 2020, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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