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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44545**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY**
	)	**NO. CR 2014-15649**
v.	)	
	)	
NICHOLAS SHANE CLAUSEN,	)	**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 RICH CHRISTENSEN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Nicholas Shane Clausen appeals from the district court's order revoking his probation after being terminated from the Kootenai County Mental Health Court program. He contends that the court's decision to revoke probation, in the absence of any finding or admission that his violation was *willful*, is inconsistent with the applicable legal standards set forth in Idaho Criminal Rule 33(f), as confirmed by the Idaho Supreme Court in *State v. Garner*, 161 Idaho 708, 390 P.3d 434 (2017), and represents an abuse of the district court's discretion.

Statement of the Facts and Course of Proceedings

In July of 2014, Mr. Clausen was accused of stealing a small pistol while visiting a friend, and taking it to a pawn shop to sell. (R., pp.14, 19.) Mr. Clausen claimed the pistol had been given to him, while the friend insisted that was not the case. (R., p.14.) Pursuant to an agreement, Mr. Clausen pled guilty[1] to grand theft, and in exchange, the State recommended probation. (R., pp.86, 97.) The district court judge, the Honorable Rich Christensen, followed that recommendation and gave Mr. Clausen a suspended five-year sentence, with two years fixed, and placed him on probation. (R., p.97.)

Mr. Clausen was later accepted into the Kootenai County Mental Health Court ("MHC") program, and in February of 2016, Judge Christensen transferred jurisdiction over Mr. Clausen to the MHC, and ordered Mr. Clausen to successfully complete that program as a special term of his probation. (R., pp.158, 162). Mr. Clausen began reporting to the MHC on a weekly basis to review his progress and problems with the program. (R., pp.156, 157,159, 164, 171, 173, 174,

---

[1] Mr. Clausen entered an *Alford* plea. *See North Carolina v. Alford*, 400 U.S. 25 (1970). (R., p.86.)

176.) Mr. Clausen had notably good weeks and made positive strides. (R., pp.161, 167, 175, 188.) On several occasions, however, he was sanctioned for missing appointments or misusing his prescriptions, and had to write essays, or spend days in jail. (R., pp.161, 164, 171, 174, 176.) Notwithstanding these problems and sanctions, each week the court ordered that Mr. Clausen be continued in the MHC program. (R., pp.156, 157,159, 164, 171, 173, 174, 176.)

Then, on July 21, 2016, Mr. Clausen's mental health court team[2] "voted" to terminate Mr. Clausen, and he was removed from the MHC program. (R., pp.179, 189.) His probation officer, Greg Willey, later explained:

> [T]he Mental Health Court team just felt like it was – you know, he was really kind of still in the pre-contemplation stage of change and we felt that Mental Health Court could certainly benefit him … but he's just not ready for that change. . . . .
>
> *So we felt that a rider would certainly be more appropriate*. He could obtain the skills for cognitive behavioral therapy, and then with those skills come back into Mental Health Court and then he would be able to successfully complete that program and then when done with that program he should definitely have the skills to really control his mental health issues and substance abuse issues. ...

(Tr., 9/2/16, p.11, Ls.3-5.) (Emphasis added.)

At Mr. Clausen's request, jurisdiction was transferred back to Judge Christensen to conduct the probation violation proceedings. (R., p.28; Tr., 7/28/16, p.3, Ls.3-25.)[3] The State filed a written report of probation violation that alleged Mr. Clausen had failed to comply with

[2] The MCH "team" appears to include the MHC judge, a correctional officer, a treatment provider, and a prosecutor.
See http://www.kcgov.us/departments/districtcourt/trialcourt/mentalhealth.asp, last visited June 22, 2017.

[3] As framed by the MHC presiding judge, "we are here on a probation violation admit/deny hearing, really an order to show cause, the allegation being that Mr. Clausen violated his probation *by being terminated from the Mental Health Court program*." (Tr., 7/28/16, p.3, Ls.6-10.) (Emphasis added.

the conditions of his probation, in that he "was terminated from the Mental Health Court Program due to noncompliance with its rules."[4] (R., p.192.)

At the subsequent probation violation hearing, held before Judge Christensen on September 2, 2016, Mr. Clausen admitted he had failed to complete Mental Health Court, as alleged in the probation violation report. (Tr., 9/2/16, p.5., Ls.15-17.) Based on this admission,[5] the district court found "Mr. Clausen in violation of the terms and conditions of his probation for failing to complete Mental Health Court." (Tr., 9/2/16, p.7, Ls.11-16.)

The State asked the district court to revoke probation and retain jurisdiction with a rider. (Tr., 9/2/16, p.14, Ls.20-24.) Mr. Clausen asked for continued probation, and proposed a plan that included community-based treatment for his chemical dependency, along with group therapy, community service hours, and a restitution payment plan. (Tr., 9/2/16, p.21, L.14 – p.24, L.16.) At the conclusion of the hearing, the district court revoked Mr. Clausen's probation and executed the previously-suspended sentence of five years, with two years fixed, and retained jurisdiction. (R., p.220.) Mr. Clausen filed a timely notice of appeal from that order. (R., p.225.)

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[4] The report of probation violation contains documents relating to completion of community service hours, but those items appear to relate to a former incident, and do not relate to the probation violations at issue in this case. (*See*, R., pp.207-210.)

[5] The district court found Mr. Clausen had made a knowing and voluntary *admission* (Tr., p.7, Ls.11-16); but the court made no finding that Mr. Clausen's *violation* had been *willful*.

ISSUE

Did the district court abuse its discretion by revoking Mr. Clausen's probation in the absence of any finding or admission that Mr. Clausen's probation violation had been "willful"?

ARGUMENT

The District Court Abused Its Discretion By Revoking Mr. Clausen's Probation In The Absence Of Any Finding Or Admission That The Violation Was "Willful"

A. Introduction

Mr. Clausen asserts that the district court's order revoking his probation should be vacated, because the court failed to act in accordance with the applicable legal standard, contained in Idaho Criminal Rule 33(f) and recently confirmed in *State v. Garner,* that prohibits a trial court from revoking probation absent a finding or admission that the probation violation was "willful." In this case, the district court did not articulate any finding that the violation was "willful," nor did Mr. Clausen admit to a willful violation when he admitted the State's allegations that he had violated probation.

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. *Id.* 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, _, 390 P.3d 434, 436 (2017) (emphasis added) (internal citations omitted).

C. The District Court's Decision To Revoke Probation, Absent A Finding Or Admission That Mr. Clausen's Violation Was Willful, Is Inconsistent With The Requirements Set Forth In Rule 33(f), And Represents An Abuse Of Discretion

Idaho Criminal Rule 33(f), as amended in 2012, limits the grounds upon which a trial court may revoke probation, and 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.

(Emphasis added.)

The Idaho Supreme Court recently addressed this limitation in *State v. Garner*, which holding that "probation may *only* be revoked if the defendant's violation was willful." 161 Idaho 708, _, 390 P.2d 434, 438 (2017) (emphasis added). Prior to the 2012 amendment of Rule 33(f), Idaho's trial courts were permitted to revoke for non-willful violations, so long as they considered alternative methods to address the violation. *State v. Sanchez*, 149 Idaho 102, 107 (2009); *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001). The Court in *Garner* made clear that, since the amendment of Rule 33(f), probation may *only* be revoked if the violation was found willful. 161 Idaho at _, 390 P.3d at 438.

In *Garner*, the Idaho Supreme Court upheld the decision to revoke probation where the trial court had made "an express finding that Garner was in willful violation of [the] terms of his probation." 161 Idaho at __, 390 P.3d at 438. In sharp contrast to the situation in *Garner*, the district court in the present case made no express finding that Mr. Clausen's violation was "willful." At no point in the probation violation proceedings – not at the hearing, and not in its

subsequent written order (R., p.222) – did the district court make any finding that Mr. Clausen's probation violation was "willful."

Rather, Judge Christensen's stated finding, made at the outset of the probation violation hearing and following Mr. Clausen's admission, was this: "the Court does find Mr. Clausen in violation of the terms and conditions of his probation for failing to complete Mental Health Court." (Tr., 9/2/16, p.7, Ls.14-16.) And again, just prior to revoking probation, Judge Christensen repeated: "The Court, as stated, finds Mr. Clausen in violation of the terms and conditions of his probation, which was to complete – successfully complete Mental Health Court." (Tr., 9/2/16, p.26, L.26 – p.27, L.3.) Conspicuously absent is any finding of "willfulness."

Nor did Mr. Clausen make any admission that his probation violation was willful. He simply admitted to the allegation, in the probation violation report, that he had violated probation. (Tr., 9/2/16, p.5, Ls.15-16.) But the probation violation report did not allege that the violation had been willful. (R., p.192.) Thus, by admitting to the alleged violation, Mr. Clausen admitted simply to being in violation of his probation; he did not admit that his violation was *willful*.

Under these circumstances, the district court's decision to revoke Mr. Clausen's probation is inconsistent with applicable legal standards, and represents an abuse of discretion. The decision should be vacated.

CONCLUSION

Mr. Clausen respectfully requests that this Court vacate the order revoking his probation and executing sentence, and remand his case to the district court for a new disposition hearing, with directions that his probation be continued.

DATED this 22nd day of June, 2017.

__________/s/________________
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of June, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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RICH CHRISTENSEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

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E-MAILED BRIEF

_________/s/_________________
EVAN A. SMITH
Administrative Assistant

KAC/eas