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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 44545
Plaintiff-Respondent,	)	
	)	Kootenai County Case No.
v.	)	CR-2014-15649
	)	
NICHOLAS SHANE CLAUSEN,	)	
	)	
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 RICHARD S. 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 probation.

Statement Of The Facts And Course Of The Proceedings

The state charged Clausen with grand theft and burglary. (R., pp. 49-50.) Pursuant to a plea agreement, Clausen pled guilty to grand theft and the state dismissed the burglary charge. (R., pp. 83-86.) The district court sentenced Clausen to serve five years with two years determinate, but suspended the sentence and placed Clausen on probation for two and one-half years. (R., pp. 97-100.) The conditions of probation included attending and completing any treatment programs as directed by the probation department and performing 100 hours of community service. (R., pp. 99-100.)

The district court later ordered that Clausen "comply with and successfully complete Mental Health Court" as a condition of probation. (R., p. 162.) His performance in mental health court was problematic, however, resulting in his termination from the program after about four months. (R., pp. 164-79.)

The state filed a motion to show cause why Clausen's probation should not be revoked because he had been terminated from mental health court. (R., pp. 190-97.) The attached reports showed Clausen had been "verbally abusive," had been "kicked out of transitional housing several times," and was abusing drugs. (R., pp. 192-93; see also R., pp. 195-96, 198-200.) Clausen admitted violating his probation. (9/2/16 Tr., p. 5, L. 9 – p. 7, L. 16.) The district court

revoked Clausen's probation, ordered the sentence executed, and retained jurisdiction. (9/2/16 Tr., p. 26, L. 25 – p. 28, L. 4; R., pp. 220-21.) Clausen filed a timely notice of appeal. (R., pp. 225-26.)

ISSUE

Clausen states the issue on appeal as:

> 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"?

(Appellant's brief, p. 4.)

The state rephrases the issue as:

Clausen did not claim below his probation violation was not the result of his choices or was otherwise not "willful." Nor did he request a specific factual finding regarding willfulness or object to its absence. Has Clausen failed to show that the lack of an express finding or admission that Clausen's probation violation was willful is fundamental error?

ARGUMENT

Clausen Has Failed To Show Fundamental Error

A. Introduction

The district court made no express finding that Clausen's probation violation was willful. (9/2/16 Tr., p. 26, L. 25 – p. 28, L. 4; R., pp. 220-21.) Nor did Clausen provide an express admission that his probation violation was willful. (9/2/16 Tr., p. 5, L. 9 – p. 7, L. 16.) For the first time on appeal, Clausen argues that the lack of an express finding regarding willfulness was error, and requests remand for a "new disposition hearing" so he can litigate that previously unraised issue. (Appellant's brief, pp. 5-8.) Clausen has failed, however, to claim, much less show, fundamental error.

B. Standard Of Review

"[A]ll claims of unobjected-to error in criminal cases are now subject to the fundamental error test set forth in [State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010)]." State v. Carter, 155 Idaho 170, 173, 307 P.3d 187, 190 (2013). To show fundamental error, Clausen has the burden of establishing that the error he alleges "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record ...), and (3) was not harmless." Perry, 150 Idaho at 228, 245 P.3d at 980.

If the Court concludes this issue was preserved for appellate review, the standard of review is as follows: "In reviewing a probation revocation proceeding, [this Court] use[s] a two-step analysis." State v. Sanchez, 149 Idaho

102, 105, 233 P.3d 33, 36 (2009) (citing State v. Knutsen, 138 Idaho 918, 923, 71 P.3d 1065, 1070 (Ct. App. 2003)). The first step "ask[s] whether the defendant violated the terms of his probation." Id. "For the first step, a district court's finding of a probation violation will be upheld on appeal if there is substantial evidence in the record to support the finding." Id. (citations omitted). "In the event of conflicting evidence, [this Court] will defer to the district court's determinations regarding the credibility of witnesses." Id. If the Court determines the defendant did violate his probation, the second step asks "what should be the consequences of that violation." Id. (citing Knutsen, 138 Idaho at 923, 71 P.3d at 1070). "A district court's decision to revoke probation will not be overturned on appeal absent a showing that the district court abused its discretion." Id. (citing State v. Lafferty, 125 Idaho 378, 381, 381 P.2d 1337, 1340 (Ct. App. 1994)).

C. Clausen Has Neither Claimed Nor Shown Fundamental Error

"'Issues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court.'" State v. Garcia-Rodriguez, No. 44443, 2017 WL 2569786, at *3 (Idaho June 14, 2017) (quoting Heckman Ranches, Inc. v. State, By & Through Dep't of Pub. Lands, 99 Idaho 793, 799–800, 589 P.2d 540, 546–47 (1979)). Review of the record shows that at no point did Clausen raise the theory that his violations were not willful or ask the district court for a specific finding on whether his violation was willful. Thus, any claims that his actions were not willful or that the district court should have addressed the unraised claim were not preserved for appellate review.

The record shows that whether Clausen's probation violation was the result of his willful actions was not preserved. Clausen was terminated from mental health court for "noncompliance with its rules." (R., p. 192.) The case notes indicate Clausen tested positive for drugs on 3/6/16, initially denied any drug use but later admitted drug use, and served 11 days in jail as an intermediate sanction. (R., p. 198.)

The 4/7/16 note indicates Clausen missed an appointment with a doctor. (Id.) Clausen claimed it was because he forgot to enter the appointment in his planner, and he was warned that future missed appointments would not be tolerated. (Id.) He later admitted that the real reason he missed the appointment was that he overslept. (R., p. 199.)

The 4/14/16 entry notes that Clausen was kicked out of his housing and did not show for mental health court, so a warrant for his arrest was issued. (R., p. 198.) The warrant was later quashed when Clausen notified his case manager where he was, and he was instructed to write an apology letter and an essay on how he should have handled the situation. (Id.)

On 4/28/16 Clausen "verbally threatened another client in treatment group." (R., p. 199.) He also revealed he had stopped taking his medication. (Id.) He was taken into custody until his medication levels were restored. (Id.)

The 5/19/16 entry states Clausen did not "pick up his medication as he was told to do," "missed group" because he "refused to walk" and had not arranged medical transport through Medicaid (see 4/21/16 entry). (Id.) He was ordered to serve 7 days in custody as a sanction. (Id.)

On 5/26/16, upon being notified that he was not being released from custody, Clausen "punched wall with closed fist, and gave Bailiff quite a bit of attitude." (Id.)

The 6/9/16 entry states that Clausen admitted using a controlled substance "about a month [into the] program," missed his appointment because he "overslept" (not because he failed to enter the time in his planner), had been around people using edible marijuana, and "overusing his melatonin." (Id.) He was late to court that day because he "overslept." (Id.)

On 6/30/16 the entry is that Clausen "failed to attend treatment last week," failed to show for a scheduled urinalysis, and was "very rude to front desk employees" at his therapist's office and "threatening to sue them." (R., p. 200.) Clausen did not have his completed medical paperwork and "threatened" his caseworker and probation officer. (Id.) He was shortly thereafter terminated from the program. (Id.)

At the hearing on the probation violation, Clausen, through counsel, represented he had not done well in mental health court because he "did it against his will." (9/2/16 Tr., p. 6, Ls. 8-22.) He stated Clausen did not engage in "real egregious conduct" and did not "think he did anything wrong," although counsel acknowledged that "the Mental Health Court people have a different perspective on it." (9/2/16 Tr., p. 6, Ls. 21-25.) At no point did Clausen claim that his actions, which resulted in his termination from mental health court, were not willful. (See generally 9/2/16 Tr.) Rather, he presented the theory that he had performed sufficiently well, and had enough rehabilitative potential, to be

placed back on probation on a different program with different treatment providers. (9/2/16 Tr., p. 16, L. 14 – p. 17, L. 15; p. 21, L. 14 – p. 24, L. 16.) Because Clausen never claimed that his actions were not willful, but instead presented a theory other than lack of willfulness, he cannot claim for the first time on appeal that he should have a new hearing so he can litigate the previously unraised issue of willfulness.

Even if the issue of willfulness were properly raised for the first time on appeal, Clausen has failed to show error due to a lack of an express finding of willfulness. When a district court finds a defendant violated his probation, unless the district court finds otherwise, the presumption is that the violation was willful. See State v. Peterson, 123 Idaho 49, 844 P.2d 31 (Ct. App. 1992) (noting the district court "implicitly determined that Peterson's disregard of the reporting obligation was willful"). Application of this standard is consistent with the general principle that even in the absence of express factual findings, the appellate court will uphold any implicit findings by the district court that are supported by substantial evidence. See State v. Kirkwood, 111 Idaho 623, 625, 726 P.2d 735, 737 (1986) ("The implicit findings of the trial court, (i.e., that statements of the defendant made to the police were voluntary and should not be suppressed) should be overturned only if not supported by substantial evidence."); State v. DuValt, 131 Idaho 550, 553, 961 P.2d 641, 644 (Ct. App. 1998) ("[A]ny implicit findings of the trial court supported by substantial evidence should be given due deference."). As shown above, Clausen was not terminated from mental health court due to an inability to comply with its rules because of poverty or some other

reason outside his control; he was terminated because he repeatedly failed to comply with the rules, missed appointments, misused drugs, and, when confronted about his failure to comply, lied or got belligerent and aggressive. The implied finding of willfulness is supported by the record, and there is no evidence that Clausen was terminated from mental health court for any reason other than his voluntary and willful actions.

Finally, any failure of the district court to articulate its finding of willfulness is harmless. Error is harmless if, beyond a reasonable doubt, it is not prejudicial. State v. Lopez, 141 Idaho 575, 578, 114 P.3d 133, 136 (Ct. App. 2005). Clausen admitted that he violated his probation as alleged. (9/2/16 Tr., p. 5, L. 9 – p. 7, L. 16.) The allegations were that Clausen was terminated from drug court because he missed appointments, abused drugs, and was abusive to care providers and others in the program. (R., pp. 190-200.) Clausen presented neither a claim nor evidence that he was terminated from drug court for non-willful conduct. (9/2/16 Tr., p. 5, L. 15 – p. 7, L. 10; p. 16, L. 3 – p. 17, L. 15; p. 18, L. 13 – p. 26, L. 24.) Because nothing in the record suggests the violation was anything but willful, the absence of an express finding of willfulness is harmless.

Clausen claims the district court erred by failing to make an express finding of willfulness, and therefore seeks remand to present a theory and evidence not presented in the probation violation proceedings. He has failed to show reversible error.

CONCLUSION

The state respectfully requests this Court to affirm the order revoking Clausen's probation.

DATED this 19th day of July, 2017.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of July, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

KIMBERLY A. COSTER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd