8-23-2017

State v. Clausen Appellant's Reply Brief Dckt. 44545

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	**NO. 44545**
	)	
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY**
v.	)	**NO. CR 2014-15649**
	)	
	)	
NICHOLAS SHANE CLAUSEN,	)	
	)	
Defendant-Appellant.	)	
_____	)	

_____

REPLY 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 probation after he was terminated from the Kootenai County Mental Health Court Program. Mr. Clausen admitted being in violation of the probation condition that required him to successfully complete the program. He contends, however, that the district court exceeded its discretionary authority, as restricted by Idaho Criminal Rule 33(f), when it revoked his probation absent any admission by him or finding by the court that he had *willfully* violated the condition of probation.

Idaho Criminal Rule 33(f), as amended in 2012, explicitly limits the court's discretion to revoke probation, providing that:

> 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 State acknowledges there was no express admission by Mr. Clausen or articulated finding by the court that Mr. Clausen *willfully* violated his probation. But the State does not concede reversible error. Instead, the State presents arguments seeking to avoid addressing the error, or else to excuse it. This Reply Brief is necessary to address the State's arguments.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Clausen's Appellant's Brief and are incorporated herein by reference.

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 It's Discretion By Revoking Probation Absent An Admission Or Finding That Mr. Clausen Had Willfully Violated His Probation.

A. Introduction

The State acknowledges there was no express admission by Mr. Clausen, nor any finding articulated by the district court, that Mr. Clausen had *willfully* violated his probation. (Respondent's Brief, p.4.) Yet the State refuses to concede that the court's decision to revoke probation constitutes reversible error. Instead, the State argues that any error should be ignored, asserting that Mr. Clausen was required to argue *non*-willfulness in the district court to preserve the error for review. (Respondent's Brief, p.5.) Alternatively, the State argues that the error should be excused, asserting that willfulness is presumed or else can be implied. (Respondent's Brief, pp.8-9.) These arguments should be rejected. As set forth below, Mr. Clausen had no obligation to allege or establish, in the district court, that his violation was *non*-willful; that burden rests at all times with the State. Moreover, Idaho's appellate courts have not required a contemporaneous objection to a district court's decision revoking probation in order to challenge that decision as an abuse of discretion on appeal.

Additionally, there is no presumption willfulness. There is no admission by Mr. Clausen or finding by the court that Mr. Clausen willfully violated his probation, and the record lacks evidence that would support a finding, if an implicit finding were otherwise to be permitted.

B. The District Court's Decision To Revoke Mr. Clausen's Probation Is Properly Before This Court For Review; Fundamental Error Need Not Be Demonstrated

Contrary to the State's argument, Mr. Clausen is not required to demonstrate fundamental error. The issue of "willfulness," and the necessity of a willfulness finding before revoking probation, was necessarily at issue, if not *the* issue, in the probation revocation proceedings. This

is so because the legal standard the district court must *always* apply in determining whether it may revoke probation is whether the violation was willful or non-willful. *See State v. Sanchez*, 149 Idaho 102, 106 (2005) (stating "the applicable legal standard the district court must utilize in determination whether to revoke probation is based upon whether the violation was willful or non-willful"); I.C.R. 33(f) (the court "*shall not revoke* probation *unless* there is an admission … or a finding … that the defendant *willfully* violated a condition of probation"); *State v. Garner*, 161 Idaho 434, 436 (2017) (recognizing that, since the adoption of Rule 33(f), probation may *only* be revoked *if* the probation violation was willful.) Thus, the court's determination of whether Mr. Clausen's violation was "willful" was at issue in the district court's probation violation disposition proceedings, and therefore properly preserved for appellate review. The fundamental error doctrine does not apply.

Moreover, this Court has not previously required a defendant to object to the district court's pronouncement of its decision revoking probation in order to preserve his ability to challenge the revocation decision on appeal. The purpose of the probation revocation proceeding is to determine whether sufficient grounds exist for revocation, and, like an appeal that challenges the sufficiency of evidence to support a jury verdict, or an appeal that challenges the appropriateness of a sentence, no further objection or request is necessary to appeal the disposition. *See State v. Clontz*, 156 Idaho 787, 331 P.3d 529 (Ct. App. 2014) (observing that "the defendant has not been required to object upon entry of the jury's verdict to the insufficiency of the evidence in order to appeal that issue. Likewise, the defendant has not been required to object to the sentence pronounced immediately after its pronouncement in order to challenge on appeal the appropriateness of the sentence.")

Contrary to the position advanced by the State (Respondent's Brief, p.5), the Supreme Court's recent decision in *State v. Garcia-Rodriquez*, 162 Idaho 271 (2017) cannot be applied to require Mr. Clausen to allege, present and argue a theory to establish *non*-willfulness in the district court. As discussed below, the burden of establishing that a defendant's probation violation was "willful" rests at all times with the State; willfulness is never presumed, and the burden never shifts to the defendant to prove that his violation was not willful. I.C.R. 33(f); *State v. Sanchez*, 149 Idaho at 106.

C. Willfulness Is Not Presumed By Or Implied In Mr. Clausen's Admission

Willfulness is not presumed by, nor implied in, Mr. Clausen's admission to the probation violation. The State argues, incorrectly, that, "when a district court finds a probation violation, unless it specifically finds otherwise, the violation *is presumed willful*." (Respondent's Brief, p.8.) (Emphasis added.) The State cites *State v. Peterson*, 123 Idaho 49 (Ct. App. 1992) as supporting this presumption. However, *Peterson* holds only that when the probationer admits a violation, he cannot argue on appeal that there was insufficient evidence to support the violation. *Peterson* does *not* hold whenever probationer admits a violation, the violation is presumed to have been willful.

1. Resort To Implicit Findings Is Incompatible With The Plain Language Of The Rule

By adopting Idaho Criminal Rule 33(f), the Supreme Court could not have been more emphatic or clear in its requirement that there be an actual admission or finding that the defendant willfully violated a condition of probation. This requirement cannot be satisfied by an after-the-fact gleaning of the record for evidence that *could* support a finding, had a finding been made. A construction of the Rule that permits the admission or finding to be presumed or implied would circumvent and undermine the plain language and intent of the Rule, that the

court "shall not revoke probation *unless there is an admission* by the defendant or *a finding* by the court *that* the defendant willfully violated a condition of probation." I.C.R. 33(f) (emphasis added). Allowing the finding to be implied or presumed, after the fact, would allow the Rule to be disregarded and the court's compliance with it, excused.

2. Resort To Implicit Findings Is Incompatible With Mr. Clausen's Due Process Rights

The State's position that Rule 33(f) does not require an express admission or finding on the record is also incompatible with Mr. Clausen's due process rights as a probationer. *Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S.Ct. 2593, 2600 (1972) (setting forth minimum procedural protections and safeguards, to which a parolee is entitled before parole may be revoked, including "a written statement by the factfinders of the evidence relied on and the reasons for revoking"); *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 1759 (1973) (applying same procedural safeguards to probationers); *see also State v. Rogers*, 144 Idaho 738, 742 (2007). These minimum protections include "a written statement by the factfinders as to the evidence relied on and reasons for revoking" probation. While the district court need not enter written findings, the requisite findings must be *stated on the record. See State v. Chapman*, 111 Idaho 149, 153 (1983).

D. Even If An Implicit Finding Of Willfulness Were Allowed, The Evidence In The Record Is Insufficient To Support A Finding That Mr. Clausen Willfully Violated His Probation

Even if this Court were to construe Rule 33(f) to permit implicit findings of willfulness, the evidence in this case is insufficient to support such a finding.

1. The Documents Cited In The State's Brief Were Not Offered Or Admitted As Evidence And Cannot Be Relied Upon To Support An Implicit Finding Of Willfulness

Contrary to the State's assertion (Respondent's Brief, pp.8-9), the record fails to contain substantial evidence to support a finding that Mr. Clausen willfully violated his probation. The State's description of Mr. Clausen's mental health court performance is derived almost exclusively from the attachments to the Motion to Show Cause that was filed in the district court. (R., pp.190, 198-200.) However, neither the Motion, nor any of its attached documents (report of probation violation, progress reports, and conference notes), were offered or admitted as evidence at Mr. Clausen's hearing. (*See generally* Tr. 9/2/16, p.4, L.4 – p.28, L.4.) Consequently, these documents cannot provide substantial evidence to support an implied finding of willfulness. *See Loveland v. State,* 141 Idaho 933, 936 (Ct. App. 2005) ("Unless introduced into evidence, pleadings [including sworn affidavits attached thereto] are not evidence"); *Singh v. INS*, 213 F.3d 1050, 1054 n.8 (9th Cir. 2000) ("[S]tatements in motions are not evidence and are therefore not entitled to evidentiary weight.")

2. The Record Lacks Substantial Evidence To Support An Implied Admission Or Implied Finding That Mr. Clausen *Willfully* Violated The Conditions Of His Probation

Mr. Clausen's probation violation hearing was conducted in two phases: an "admit/deny" phase (Tr. 9/2/16, p.4, L.8 – p.7, L.17), followed by a "disposition" phase (Tr. 9/2/16, p.7, L.17 – p.28, L.5). There was not substantial evidence presented at either hearing phase to support an implied finding that Mr. Clausen "willfully" violated a condition of his probation.

At the admit/deny phase, the district court informed Mr. Clausen of the specific allegation of probation violation:

> THE COURT: Looking at the report of probation violation of July 28th. No. 1 states on February 25, 2016, Mr. Clausen began participating in the Kootenai County Mental Health Court program. On July 21, 2016, Mr. Clausen was terminated from the Mental Health Court program due to noncompliance with its rules.
>
> Do you admit or deny *those* allegations?
>
> THE DEFENDANT: We admit, sir. …

(Tr. 9/2/16, p.5, Ls.9-17.) (Emphasis added.)

Nothing in his admission to the allegation states that Mr. Clausen's violation of his probation condition was willful. Nor is there any statement that his termination from mental health court for noncompliance with rules was willful.

Following his admission, Mr. Clausen offered, through counsel, that "[h]e didn't think he did anything wrong there, but I'm sure the Mental Health Court people have a different perspective on it." (Tr. 9/2/16, p.6, Ls.23-26.) And after accepting his admission, the district court found Mr. Clausen to be "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.) There is absolutely nothing in this colloquy that states or implies Mr. Clausen had *willfully* violated his probation.

Nor was there any evidence presented at the subsequent disposition phase of the hearing support a finding that Mr. Clausen willfully violated his probation. The State called the probation officer, Greg Willey, to testify. (Tr. 9/2/16, p.7, L.22 – p.8, L.10.) Although he was asked by the prosecutor to describe Mr. Clausen's behavior (Tr. 9/2/16, p.9, Ls.9-11), the probation officer offered no evidence that Mr. Clausen willfully violated his probation (Tr. 9/2/16, p.9, L.12 – p.14, L.9).

The probation officer testified that Mr. Clausen "struggled a little bit" and became "a little bit confrontational sometimes." (Tr. 9/2/16, p.10, Ls.5-16.) But the probation officer

identified no "program rule" with which Mr. Clausen had not complied, and thus, no basis to support a finding that Mr. Clausen's noncompliance with the program rules was "willful." (*See* Tr. 9/2/16, p.9, L.12 – p.14, L.9.) Additionally, the probation officer made it clear that Mr. Clausen *wanted* to stay in the mental health court program (Tr. 9/2/16, p.17, L.16 – p.18, L.3), and there was no evidence or argument that Mr. Clausen intended to have himself terminated from the program. According to the probation officer, the Mental Health Court "Team" felt Mr. Clausen was "just not ready" for mental health court (Tr. 9/2/16, p.10, Ls.16-24); but that with new tools and skills obtained through a Rider program, Mr. Clausen "could come back into Mental Health Court *and then be able to successfully complete that program*" (Tr. 9/2/16, p.13, Ls.14-16).

Far from demonstrating that Mr. Clausen had been terminated from the program for *willful* noncompliance with program rules, this evidence – which was the only evidence offered to explain the termination from the Mental Health Court Program – shows the Team voted to terminate him because it felt he was *unable* to complete the program. More significantly, the record contains *no* evidence to support a finding that Mr. Clausen was terminated for a *willful* noncompliance with any program rule, and no evidence to support a finding, even an implied one, that Mr. Clausen willfully violated the condition of his probation.

E. The State Has Failed To Demonstrate Harmless Error

Mr. Clausen has demonstrated that the district court abused its discretion when it revoked his probation in the absence of an admission, finding – or substantial evidence that could support a finding – that he willfully violated a condition of his probation. Contrary to the State's argument, the State has failed to show that the district court's error was harmless. (Respondent's Brief, p.9.)

F. The State Is Not Entitled To Another Opportunity To Allege, Argue Or Prove "Willfulness"

In his Appellant's Brief, Mr. Clausen asked this Court to remand his case to the district court "with instructions that his probation be continued." (Appellant's Brief, p.8.) Contrary to the State's assertion (Respondent's Brief, p.4), Mr. Clausen did *not* ask that the issue of willfulness be re-litigated. The State, having had its chance to allege, argue, and to prove that Mr. Clausen willfully violated his probation, is not entitled to another opportunity to establish its case in the district court. Rather, the purpose of remand is for the district court to determine the terms and conditions of Mr. Clausen's continued probation. *See State v. Prelwitz*, 132 Idaho 191, 194 (1998) (where order revoking probation cannot be sustained, case must be remanded and probation reinstated). The proceedings on remand should be limited to that purpose.

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CONCLUSION

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

DATED this 23rd day of August, 2017.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of August, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF OF APPELLANT, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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