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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 44865
Plaintiff-Respondent,	)	
	)	Kootenai County Case No.
v.	)	CR-2016-3420
	)	
MATTHEW JOSEPH REED,	)	
	)	
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

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STATEMENT OF THE CASE

Nature of the Case

Matthew Joseph Reed appeals from the judgment of the district court relinquishing jurisdiction after a period of retained jurisdiction. On appeal, Reed argues the district court abused its discretion when it relinquished jurisdiction and abused its discretion when it imposed the initial sentence.

Statement of Facts and Course of Proceedings

The police arrested Reed pursuant to an outstanding warrant. (R., p. 15.) During the search incident to arrest, the police found methamphetamine in Reed's hat. (Id.) The state charged Reed with possession of a controlled substance: methamphetamine. (R., pp. 31-32.) Reed pled guilty. (R., p. 33.)

At the sentencing hearing Reed argued for probation. (5/24/16 Tr., p. 16, L. 18 – p. 19, L. 9.) Reed informed the district court that he made contact with the Good Samaritan program and asked the court to include the program as a requirement of his probation. (Id.)

The district court had several questions regarding Reed's lengthy criminal history as reported in his Presentence Report ("PSI"). (5/24/16 Tr., p. 19, L. 24 – p. 25, L. 13.) Reed's PSI indicated that he had been found guilty of the following charges: Minor in possession of alcohol (2002); Disorderly Conduct (2006); Battery (2006); a hit and run charge for which he was sentenced to two years in prison (2007); Obstruct Public Officer (2009); "CHRG 261, 5C PC" for which was sentence to 30 days in jail (2010); Battery: Spouse (2012); Obstruct Public Officer (2012); Driving without privileges (2014). (See

PSI, pp. 6-13.) The PSI also reported that the following offenses had been charged, but their dispositions were unknown: Obstruct/Resisted Public Officer (2004); Sex with minor (2006); Oral Copulation with person under 16 (2006); Sexual Penetration with a Foreign Object (2006); Battery (2006); Probation Violation (2007); Probation Violation (2007); DUI Alcohol (2007); Sex with Minor (2007); Violation of Parole (2008); Violation of Parole (2008); Violation of Parole (2008); Violation of Parole (2008); Probation Violation (2009); Probation Violation (2009); False Info – Police (2010); Local Ordinance Violation (2010); Violation of Parole (2010); Sexual Intercourse with Minor under 18 (2010); Inflict Corporal Injury on Spouse (2012); Violation of Parole (2012); Violation of Parole (2012); Battery on Spouse (2012); Violation of Parole (2012); Inflict Corporal Injury on Spouse (2013); "CHRG 13700 PC" (2013); Inflict Corporal Injury on Spouse (2013). In addition, the PSI noted several dismissals, including several charges of possession of a controlled substance, willful cruelty to child and sex with minors. (See id.)

The district court asked Reed about his criminal history and asked him about the cases for which the outcome was not listed on the PSI. (5/24/16 Tr., p. 19, L. 24 – p. 25, L. 13 ("Ordinarily I don't put a whole of importance in things in a pre-sentence report's prior criminal record reiteration that aren't – where I don't know the outcome...").) The district court asked about the background of some of these charges and information regarding the ultimate outcome of the charges. (See id.) The district court then asked Reed about the tattoo on his neck that reads, "Trust no bitch." (5/24/16 Tr., p. 25, Ls. 14-22.) The district court also inquired about Reed's affiliation with the "White Boy Gang," which was referenced in his PSI. (5/24/16 Tr., p. 25, L. 23 – p. 26, L. 7.)

The district court then imposed a sentence "for possession of a controlled substance for events that happened February 2nd, 2016." (5/24/16 Tr., p. 26, L. 11 – p. 28, L. 15.) The district court imposed a sentence of seven years fixed with zero indeterminate. (Id.) The district court retained jurisdiction and recommended a "CAPP/CRP" rider to deal both with Reed's addictions and his past violence. (Id.) The district court explained that it was "not overly optimistic about granting [Reed] probation sometime in the future" but stated it would consider doing so if Reed completed some specific tasks. (Id.) The district court advised Reed that, before it would consider probation, Reed would need to get a polygraph regarding his account of "his past sexual offenses and past violence towards women." (Id.) If Reed got the polygraph and was able to get into the Good Samaritan program for 10 months, then the district court would consider him for probation. (Id.) Reed also needed to not have any disciplinary problems while he was on the rider. (Id.) However, the district court was not optimistic about Reed getting probation after the rider. (Id.) The district court was concerned about protecting the public because of Reed's history. (Id.) The district court asked Reed if he had any questions, and Reed said that he did not. (Id.)

Reed had a number of informal sanctions while he was on his rider, but he did not have any formal sanctions. (1/10/17 Tr., p. 31, Ls. 8-21.) The parties agreed with the rider recommendation that Reed be placed on probation. (1/10/17 Tr., p. 31, L. 8 – p. 33, L. 7.) However, Reed had failed to get a polygraph and had failed to get into the Good Samaritan program. (See 1/10/17 Tr., p. 33, L. 8 – p. 34, L. 22.) Therefore, consistent with its comments at the sentencing hearing, the district court relinquished jurisdiction. (Id.; R., pp. 47-48.) However the district court, *sua sponte*, reduced Reed's sentence from

seven years fixed to six years fixed and one year indeterminate. (1/10/17 Tr., p. 33, L. 23 – p. 34, L. 22.)

Reed moved for re-disposition regarding the court's decision to relinquish jurisdiction. (R., pp. 45-46.) Reed requested a "new jurisdictional review hearing so that the record can be made clear that Reed was asserting "his 5th Amendment right in regards to the Court's request that [Reed] participate in a polygraph examination." (R., pp. 45-46.) Reed also timely appealed from the order relinquishing jurisdiction. (R., pp. 49-52.)

The district court held a hearing on the motion for re-disposition. (R., p. 64.) During the hearing, Reed argued that he did not participate in a polygraph examination because he was asserting his Fifth Amendment rights. (2/27/17 Tr., p. 3, L. 3 – p. 4, L. 8.) Reed argued that the assertion of his Fifth Amendment rights should not be the basis for a decision to relinquish jurisdiction. (Id.) Reed's motion was based upon State v. Van Komen, 160 Idaho 534, 376 P.3d 738 (2010). (See id.) The district court re-read Van Komen and denied the motion because Reed's case was distinguishable from Van Komen. (2/27/17 Tr., p. 5, L. 20 – p. 8, L. 12.) The district court also noted at no time prior to this hearing had Reed invoked his Fifth Amendment rights. (See id.) The district court also entered a written order denying the motion for re-disposition. (R., pp. 72-73.)

Reed filed a motion for reconsideration of sentence pursuant to I.C.R. 35 on March 14, 2017. (R., pp. 70-71.) At the hearing on the motion for reconsideration, Reed testified that he did not get into the Good Samaritan program because he did not have the money and he had a "sex case" in his criminal history. (5/1/17 Tr., p. 9, L. 18 – p. 10, L. 4.)

The district court denied the motion for reconsideration. (5/1/17 Tr., p. 16, L. 25 – p. 20, L. 22.) The district court stated that it had already reduced Reed's sentence from seven years fixed to six years fixed and that Reed had failed to do the things necessary to demonstrate that he is not a danger to the community. (See id.)

ISSUES

Reed states the issues on appeal as:

> I. Did the district court abuse its discretion by relinquishing jurisdiction and denying Mr. Reed's motion for redisposition because Mr. Reed could not afford the Good Samaritan program and asserted his Fifth Amendment rights with respect to the polygraph?
>
> II. Did the district court abuse its discretion by sentencing Mr. Reed largely based on his alleged prior sex crimes, rather than the methamphetamine possession conviction at issue?

(Appellant's brief, p. 9.)

The state rephrases the issues as:

1. Has Reed failed to show the district court abused its discretion when it relinquished jurisdiction because Reed failed to meet the requirements necessary for probation?

2. Has Reed failed to show the district abused its discretion when it considered Reed's criminal history when it sentenced him?

ARGUMENT

I.
The District Court Did Not Abuse Its Discretion When It Relinquished Jurisdiction

A. Introduction

When the district court sentenced Reed and retained jurisdiction, the district court indicated that it was concerned about Reed's history and was "not overly optimistic" about granting Reed probation after his rider but that it would consider probation if Reed completed some specific tasks, including taking a polygraph regarding some past offenses and getting into the Good Samaritan program. (5/24/16 Tr., p. 26, L. 11 – p. 28, L. 15.) Reed failed to do either and the district court relinquished jurisdiction. (See 1/10/17 Tr., p. 33, L. 8 – p. 34, L. 22.)

Reed challenges the district court's decision to relinquish jurisdiction, arguing the district court failed to exercise reason when it relinquished jurisdiction based in part on Reed's failure to be admitting into the Good Samaritan program, despite Reed's claimed inability to afford the program. (See Appellant's brief, pp. 10-12.) He also argues the court violated his Fifth Amendment rights by relinquishing jurisdiction, in part, because Reed failed to take a polygraph regarding his past offenses. (See Appellant's brief, pp. 13-16.) Reed's arguments fail.

Application of the law to the facts of this case shows the district court neither abused its discretion nor violated Reed's Fifth Amendment rights when it relinquished jurisdiction based on Reed's failure to satisfy the requirements that he be admitted to the Good Samaritan program and take the polygraph.

B. Standard Of Review

A district court's decision to relinquish jurisdiction is reviewed by the appellate court for an abuse of discretion. State v. Statton, 136 Idaho 135, 137, 30 P.3d 290, 292 (2001) (citing State v. Hood, 102 Idaho 711, 712, 639 P.2d 9, 10 (1981)). To determine whether the district court abused its discretion, the appellate court examines "whether the district court: (1) correctly perceived the issue as discretionary; (2) acted within the outer boundaries of its discretion and consistently with relevant legal standards; and (3) reached its decision by an exercise of reason." State v. Flores, 162 Idaho 298, 396 P.3d 1180, 1182 (2017) (citation omitted).

"The requirements of the Idaho and U.S. Constitutions are questions of law, over which this Court has free review." State v. Abdullah, 158 Idaho 386, 455, 348 P.3d 1, 70 (2015) (quoting State v. Draper, 151 Idaho 576, 598, 261 P.3d 853, 875 (2011)).

C. The District Court Did Not Abuse Its Discretion When It Relinquished Jurisdiction Based, In Part, On Reed's Failure To Be Admitted Into The Good Samaritan Program Because Reed Was A Danger To The Community

At Reed's sentencing, the district court imposed a sentence of seven years fixed with zero indeterminate, but retained jurisdiction. (5/24/16 Tr., p. 26, L. 11 – p. 28, L. 15.) The district court was concerned about protecting the public because of Reed's criminal history. (Id.) The district court indicated that it was "not overly optimistic" about granting Reed probation after his rider but stated it would consider probation if Reed completed some specific tasks, including getting into the Good Samaritan program, as suggested by Reed. (Id.) The district court asked Reed if he had any questions, and Reed said that he did not. (Id.)

Reed had a number of informal sanctions while he was on his rider, but he did not have any formal sanctions. (1/10/17 Tr., p. 31, Ls. 8-21.) However, Reed had failed to get into the Good Samaritan program. (See 1/10/17 Tr., p. 33, L. 8 – p. 34, L. 22.) Therefore, consistent with its comments at the sentencing hearing, the district court relinquished jurisdiction. (Id.; R., pp. 47-48.)

Reed argues the district court failed to reach its decision to relinquish jurisdiction by an exercise of reason because Reed told the court he could not afford the Good Samaritan program. (See Appellant's brief, pp. 10-12.) Reed concedes that he may have been ineligible for the Good Samaritan program because he had a past conviction for a sex offense. (See 5/1/17 Tr., p. 9, L. 15 – p. 10, L. 4; see also Appellant's brief, p. 11, n. 3.) He contends, however, "[t]hat does not change the fact that, knowing what it knew at the time, the district court abused its discretion by relinquishing jurisdiction." (Appellant's brief, p. 11, n. 3.) Reed has failed to show the district court abused its discretion.

"The decision to relinquish jurisdiction or grant probation is committed to the district judge's discretion." State v. Coassolo, 136 Idaho 138, 143, 30 P.3d 293, 298 (2001) (citing State v. Merwin, 131 Idaho 642, 648, 962 P.2d 1026, 1032 (1998)). The rider program's recommendation are "purely advisory" and are not binding on the court's decision. Id. (citing Merwin, 131 Idaho at 648, 962 P.2d at 1032). A defendant has no liberty interest in being placed on probation following a period of retained jurisdiction.

See State v. Dabney, 159 Idaho 790, ___, 367 P.3d 185, 191-192 (2016)[1]; see also Coassolo, 136 Idaho at 142-143, 30 P.3d at 297-298.

As outlined in the sentencing hearing, the district court had sufficient information and serious concerns regarding whether Reed was an appropriate candidate for probation. (See 5/24/16 Tr., p. 26, L. 11 – p. 28, L. 15.) Reed suggested at sentencing that he may be able to get into the Good Samaritan program, and Reed asked the court that the Good Samaritan program be a condition of his probation. (5/24/16 Tr., p. 18, Ls. 3-17 ("[S]o we'll ask the Court to consider fashioning it so that should he be accepted into the Good Samaritan program, that be a requirement of his probation.") The district court determined that, given the nature and extent of Reed's criminal record, Reed's acceptance into that program would be a condition precedent to his placement on probation. (5/24/16 Tr., p. 18, Ls. 3-17, p. 26, L. 11 – p. 28, L. 9.)

For apparently a number of reasons, Reed was unable to get accepted into that program. Based upon Reed's criminal record, and Reed's inability to get into the necessary program, it was an exercise of reason for the district court to relinquish jurisdiction. At the rider review hearing the district court recognized its discretion, acted within the boundaries of its discretion and consistently with relevant legal standard, and

---

[1] In a footnote Reed asserts that the holding in Dabney was "incorrect" and that his due process and equal protection rights were violated. (See Appellant's brief, p. 11, n. 2.) This issue was not raised below and is thus not preserved for appeal. State v. Garcia-Rodriguez, 162 Idaho 271, ___, 396 P.3d 700, 704 (2017) (citations omitted) ("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.") Nor does Reed argue fundamental error on appeal regarding this issue. See State v. Perry, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010).

reached its decision by an exercise of reason. Reed has failed to show the district court abused its discretion.

D. Reed Has Failed To Show The District Court Violated His Fifth Amendment Right Against Self-Incrimination When The District Court Relinquished Jurisdiction

1. The Fifth Amendment Issue Was Raised Below And Is Preserved For Appeal

Reed did not assert, or mention, his Fifth Amendment rights when the district court informed him that in order for the court to consider probation he had to take a polygraph regarding some of his past crimes. (5/24/16 Tr., p. 19, L. 22 – p. 28, L. 15.) Nor did Reed assert his Fifth Amendment rights when the district court determined, during Reed's rider review, that Reed failed to get the polygraph. (1/10/17 Tr., p. 32, L. 23 – p. 34, L. 25; see also R., pp. 72-73 (district court's finding "that neither at the time of sentencing on May 24, 2016 or at the time of the jurisdictional review hearing on January 10, 2017, did the Defendant claim that the reason that he had failed to participate in the court ordered polygraph examination was due to an assertion of his 5th Amendment rights against self-incrimination.").)

Only after the district court relinquished jurisdiction, when Reed moved for a "re-disposition," did Reed reference his Fifth Amendment Rights. (R., pp. 45-46; 2/27/17 Tr., p. 5, Ls. 10-19.) At that point the district court ruled that the decision to relinquish jurisdiction did not violate Reed's Fifth Amendment rights. (R., pp. 72-73; 2/27/17 Tr., p. 6, L. 2 – p. 8, L. 12.) However, because the Fifth Amendment issue was raised below and there was an adverse ruling regarding that issue, which forms the basis for the assignment of error, the issue is likely preserved for appeal. See Ada Cty. Highway Dist.

v. Brooke View, Inc., 162 Idaho 138, ___ n.2, 395 P.3d 357, 361 n.2 (2017) (issue preserved for appeal so long as the relevant issue is raised before the district court); State v. Kelley, 161 Idaho 686, 689 n.1, 390 P.3d 412, 415 n.1 (2017) (citing State v. Fisher, 123 Idaho 481, 485, 849 P.2d 942, 946 (1993) ("We will not review a trial court's alleged error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error.")).

2. The District Court Did Not Violate Reed's Fifth Amendment Rights Because Requiring Reed To Take A Polygraph Regarding Previously Adjudicated Offenses Does Not Violate Reed's Fifth Amendment Rights And His Refusal To Take The Polygraph Was Not The Sole Reason The District Court Relinquished Jurisdiction

Reed argues that the district court's indication that it would only consider probation if Reed took a polygraph regarding past sexual offenses and violence against women violated his Fifth Amendment right against self-incrimination. (Appellant's brief, pp. 13-16.) Reed's argument primarily rests on the holding in State v. Van Komen, 160 Idaho 534, 376 P.3d 738 (2016). (See id.) Van Komen is distinguishable.

The district court sentenced Van Komen for felony possession of marijuana with the intent to deliver and retained jurisdiction. Van Komen, 160 Idaho at 536, 376 P.3d at 740. After the period of retained jurisdiction the district court held a rider review hearing. Id. at 536-537, 376 P.3d at 740-741. The district court placed Van Komen on probation. Id. Van Komen's probation officer then filed a report alleging that Van Komen violated probation, in part, by having a romantic relationship with a 16-year-old-girl. Id. at 537, 376 P.3d at 741. Van Komen admitted some of the probation violations, and the district court revoked probation and again retained jurisdiction. Id. The district court then

ordered Van Komen to take a polygraph examination to determine whether he had used drugs or alcohol and whether he had engaged in sexual activity with the 16-year-old girl. Id. At the next rider review hearing the district court inquired why Van Komen had not taken the polygraph examination and Van Komen indicated that he would invoke his Fifth Amendment rights. Id. The district court relinquished jurisdiction because Van Komen had not gotten the polygraph. Id.

On appeal Van Komen argued that the district court's decision to not place him on probation because he refused to take a polygraph regarding his sexual relationship with a 16-year-old girl violated his Fifth Amendment rights. Id. at 538, 376 P.3d at 742. The Idaho Supreme Court held that the district court could have "elected not to hold a rider review hearing for [Van Komen], and it could have elected to relinquish jurisdiction based upon [Van Komen's] prior history and apparent attempt to communicate with the sixteen-year-old while on his rider." Id. at 540, 376 P.3d at 744. However, the district court violated Van Komen's Fifth Amendment rights because it relinquished jurisdiction "solely because [Van Komen] refused to waive his Fifth Amendment rights and answer questions that could incriminate him and result in new felony charges." Id. at 540, 376 P.3d at 744. Van Komen is distinguished from the present case for two reasons.

First, unlike in Van Komen, the district court here did not relinquish jurisdiction "solely" for Reed's failure to participate in the polygraph examination. (1/10/17 Tr., p. 32, L. 23 – p. 34, L. 25.) The district court also relinquished jurisdiction based upon Reed's failure to get into the required Good Samaritan program. (See id.) The district court made this explicit and distinguished Van Komen. (2/27/17 Tr., p. 6, L. 2 – p. 8, L. 12.) Further, as outlined in the original sentencing hearing, the district court was unlikely

to put Reed on probation – regardless of how he did on the rider – because of Reed's criminal history. (See 5/24/16 Tr., p. 19, L. 22 – p. 28, L. 15.) As the Court in Van Komen acknowledged, the district court could have relinquished jurisdiction over Van Komen for any number of reasons, so long as the "sole" reasons was not based upon the refusal to take a polygraph that could expose him to additional criminal penalties. Here, the district court's decision was not based solely on Reed's failure to get a polygraph.

Second, unlike the polygraph in Van Komen, the polygraph ordered by the district court in this case did not infringe on Reed's Fifth Amendment rights because Reed would not have been required to answer questions that posed a realistic threat of incrimination. A polygraph requirement is a lawful pre-condition of probation. The Fifth Amendment to the United States Constitution protects against compelled self-incrimination. Estrada v. State, 143 Idaho 558, 563, 149 P.3d 833, 838 (2006). However, as part of probation the state may validly demand "(1) answers to questions that pose no realistic threat of incrimination; and (2) incriminating answers so long as the State recognizes the statements will be unavailable in future criminal proceedings, such as through providing immunity." State v. Widmyer, 155 Idaho 442, 446-447, 313 P.3d 770, 774-775 (Ct. App. 2013) (citations omitted).

Here, the district court wanted Reed to take a polygraph regarding his "past sexual offenses" and "past violence towards women." (5/24/16 Tr., p. 26, L. 11 – p. 28, L. 9.) The district court was concerned about the previous charges for sex crimes and violence against women as set forth in Reed's PSI. (See 5/24/16 Tr., p. 19, L. 22 – p. 26, L. 7; PSI, pp. 6-13.) Unlike the sexual contact in Van Komen, the subject of Reed's polygraph examination would have been about crimes that had already been adjudicated or

dismissed. (See id.) Double jeopardy protections prevent statements made by Reed regarding past offenses from being used against him for those crimes that had already been adjudicated. See Madison v. Craven, 144 Idaho 696, 701-702, 169 P.3d 284, 289-290 (Ct. App. 2007) (Madison's admissions, even if compelled, that he was sexually attracted to his daughter did not violate his Fifth Amendment Rights, because he had already been convicted of molesting his daughter). In Van Komen, the polygraph examination was in reference to an uncharged crime, and thus Van Komen's statements could be incriminating because they could be used to charge and prosecute that crime. Here, Reed's crimes have already been adjudicated or dismissed. (See PSI, pp. 6-13.)

Even if some of Reed's prior crimes were not fully adjudicated such that he was not entitled to double jeopardy protections, his Fifth Amendment rights still would not have been violated because he was not actually asked any questions that could implicate him. See Widmyer, 155 Idaho at 447, 313 P.3d at 775.

This case is analogous to Widmyer, supra, in which the Idaho Court of Appeals held that a district court can, as a condition of probation, require that the prospective probationer take a psychosexual evaluation, and if the prospective probationer rejects that condition the district court can impose an appropriate sentence. See Widmyer, 155 Idaho at 447, 313 P.3d at 775. In Widmyer, the district court explained that it would put Widmyer on probation if Widmyer agreed to participate in a psychosexual evaluation with a polygraph exam. See id. at 445, 313 P.3d at 773. Widmyer rejected the psychosexual evaluation, asserting his Fifth Amendment right to remain silent. Id. The district court imposed sentence and Widmyer appealed. See id. The Idaho Court of Appeals affirmed, holding, in part, that Widmyer's Fifth Amendment rights were not

violated because Widmyer was not actually asked any questions that would incriminate him and he rejected a lawful condition of probation. See id. at 447, 313 P.3d at 775.

> If a defendant chooses to accept the terms of probation that may lead to incriminating questions, the defendant does not, by virtue of accepting the terms, waive the right to assert the Fifth Amendment when the questions are presented. Though a prospective probationer may choose to reject the psychosexual evaluation as a probationary term, rejecting the condition does not restrict a court's discretion to then impose an appropriate sentence.

Id. (internal citation omitted).

The Court noted that prospective probationers often face the difficult decision of whether to accept the lawful conditions of probation. Id. (citations omitted). And while a prospective probationer may reject the psychosexual evaluation, such does not restrict a court's discretion to impose an appropriate sentence. Id. ("Though a prospective probationer may choose to reject the psychosexual evaluation as a probationary term, rejecting the condition does not restrict a court's discretion to then impose an appropriate sentence.").

Here, the district court explained that if it was going to put Reed on probation Reed would need to take a polygraph test. (5/24/16 Tr., p. 26, L. 11 – p. 28, L. 9.) Reed declined, based on what he later asserted was an assertion of his Fifth Amendment rights, before he was asked any incriminating questions. Thus, like the court in Widmyer, the district court's discretion here to execute Reed's sentence was not restricted. Reed has failed to show the district court abused its discretion when it relinquished jurisdiction.

II. The District Court Did Not Abuse Its Discretion By Considering Reed's Criminal History When It Sentenced Him

A. Introduction

Contrary to Reed's argument on appeal, the district court properly considered Reed's criminal history when it sentenced Reed.

B. Standard Of Review

"Where a sentence is within statutory limits, it will not be reversed on appeal absent an abuse of the sentencing court's discretion." State v. Findeisen, 133 Idaho 228, 229, 984 P.2d 716, 717 (Ct. App. 1999) (citing State v. Brown, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992); State v. Toohill, 103 Idaho 565, 650 P.2d 707 (Ct.App.1982)). When examining a trial court's exercise of discretion, an appellate court inquires whether: (1) the lower court rightly perceived the issue as one of discretion; (2) the court acted within the outer boundaries of such discretion and consistently with the applicable legal standards; and (3) the court reached its decision by an exercise of reason. Id. (citations omitted).

C. The District Court Did Not Abuse Its Discretion When It Properly Considered Reed's History, Gang Affiliation And Substance Abuse Issues During Sentencing

Reed's sentence was within statutory limits, and on appeal, he does not argue otherwise. When crafting his sentence, the district court considered a wide range of information including Reed's criminal history, gang affiliation and substance abuse issues before it sentenced Reed. (See 5/24/16 Tr., p. 19, L. 22 – p. 28, L. 15.) "It is well established that a sentencing court may properly consider a wide range of information in determining the appropriate sentence for a defendant." Findeisen, 133 Idaho at 229, 984

P.2d at 717 (citing State v. Barnes, 121 Idaho 409, 411, 825 P.2d 506, 508 (Ct. App. 1992); State v. Paz, 112 Idaho 407, 408-09, 732 P.2d 376, 377-378 (Ct. App. 1987)). "Thus, it is entirely appropriate for the court to consider a spectrum of evidence bearing upon the defendant's character, including the defendant's history of criminal offenses other than the one for which he appears at sentencing." Id. (citing State v. Couch, 103 Idaho 496, 498, 650 P.2d 638, 640 (1982); Barnes, 121 Idaho at 411, 825 P.2d at 508).

On appeal Reed argues the district court abused its discretion because he claims the district court sentenced him for prior offenses and allegations and not the present offense. (See Appellant's brief, pp. 16-18[2] (citing Findeisen, 133 Idaho at 229, 984 P.2d at 717).) Unlike the district court in Findeisen, the district court here did not sentence Reed for a crime other than the one for which he was being punished. Findeisen, 133 Idaho at 230, 984 P.2d at 718. The district court here properly considered Reed's criminal history, gang affiliation and substance abuse issues when it originally sentenced him. Reed's PSI provided a long list of criminal offenses, many with the dispositions unknown. (See PSI, pp. 6-13.) The district court properly asked Reed several questions in an effort to clear up the dispositions and nature of the offenses listed. (See 5/24/16 Tr., p. 19, L. 24 – p. 25, L. 13.) The district court also asked about Reed's gang affiliation:

THE COURT: What's the White Boy Gang?

THE DEFENDANT: What's that?

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[2] On appeal Reed requests, that in the event the case is remanded for a new rider review, that his case be reassigned to a different judge. (See Appellant's brief, p. 18.) While respondent is aware that was the remedy in Van Komen, here Reed has failed to cite to any authority or present any argument that his case should be reassigned to a different judge and thus has failed to demonstrate reassignment is an appropriate remedy.

> THE COURT: Page 13, what's the White Boy Gang? You told the pre-sentence investigator that you were affiliated with the White Boy Gang.
>
> THE DEFENDANT: Oh, I was affiliated with – it was called Bad Boys on my neck.
>
> THE COURT: What is it?
>
> THE DEFENDANT: It's just a white boy clique that we had – I had with in prison.

(5/26/16 Tr., p. 25, L. 23 – p. 26, L. 7.) The district court then expressed concern about Reed's chemical dependency and Reed's anger and crafted a rider placement recommendation based upon those factors. (5/26/16 Tr., p. 26, L. 11 – p. 28, L. 15.)

> You need to know you've got 42 days from today's date to appeal this decision. The reason for the sentence is your criminal record, and while I realize that there were dismissals on the sex crimes that I asked you about, I have severe concerns about your explanation given the fact that there are three different events over the course of four different years – five different years. There's violence to women on multiple occasions. You've got a huge drug problem. You've been to prison. You've joined a gang.
>
> I'm not overly optimistic about granting you probation sometime in the future, but those are the things you need to do. You need to get anger treatment while you're in the penitentiary, chemical dependency while in the penitentiary, come back with the polygraph, and commit to going to Good Samaritan for ten months. If you're a disciplinary problem in the penitentiary on a rider, I'll impose sentence and I'll do it telephonically. I won't even bring you back up here.

(5/26/16 Tr., p. 27, Ls. 6-24.) The district court properly considered the relevant sentencing factors and Reed's history when it imposed the sentence for possession of methamphetamine. The district court did not abuse its discretion.

CONCLUSION

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

DATED this 11th day of January, 2018.

/s/ Ted S. Tollefson_________________
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of January, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

MAYA P. WALDRON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Ted S. Tollefson__________________
TED S. TOLLEFSON
Deputy Attorney General

TST/dd