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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 48173-2020
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-FE-2016-3336
)	
DEAN P. DRINKARD,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Has Drinkard failed to show that the district court abused its sentencing discretion when it revoked probation and executed a sentence of five years with two years determinate for felony eluding?

ARGUMENT

Drinkard Has Failed To Show That The District Court Abused Its Sentencing Discretion

A. Introduction

When an officer attempted to stop Drinkard, who was driving a motorcycle, Drinkard accelerated, reached speed of up to 100 mph, and weaved in and out of traffic, successfully eluding the officer. (PSI, p. 3.) The state charged Drinkard with felony eluding a police officer. (R., pp.

38-39.) Drinkard pled guilty pursuant to a plea agreement capping the state's sentencing recommendation. (R., p. 48.) The district court withheld judgment. (R., pp. 58-61.)

About six months later the state file a probation violation for committing new crimes (two counts of driving without privileges), consuming alcohol, and failing to pay fines and fees. (R., pp. 67, 78-85.) Drinkard admitted violating his probation by committing two misdemeanors. (R., p. 90.) The district court revoked the withheld judgment, imposed a sentence of five years with two years fixed and retained jurisdiction. (R., pp. 93-95.) The district court later suspended the sentence and granted probation. (R., pp. 103-05.)

About two years later the state filed a probation violation by committing the new crime of misdemeanor malicious injury to property, changing addresses without permission, failing to either maintain or seek employment, consuming alcohol on four occasions, using marijuana, and failing to complete a victims' impact panel. (R., pp. 108-09, 119-45.) Drinkard admitted violating his probation by consuming alcohol. (R., p. 151.) The district court revoked probation and executed the sentence. (R., pp. 154-55.) Drinkard filed a motion for reconsideration. (R., p. 157.) The district court denied the motion. (R., pp. 158-59.) Drinkard filed a timely notice of appeal. (R., pp. 161-62.)

Drinkard asserts the district court abused its discretion by failing to exercise reason when it revoked his probation "because his probation was achieving its rehabilitative objective." (Appellant's brief, pp. 4-7.) He further contends that the district court abused its discretion in denying his Rule 35 motion "because the sentence was unreasonable in light of all of the new information that arose following Mr. Drinkard's original sentencing." (Appellant's brief, pp. 7-8.)

B. Standard Of Review

“Once a probation violation has been proven, the decision of whether to revoke probation is within the sound discretion of the court.” State v. Le Veque, 164 Idaho 110, 113, 426 P.3d 461, 464 (2018) (quotation marks omitted). “A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court.” State v. Burggraf, 160 Idaho 177, 180, 369 P.3d 955, 958 (Ct. App. 2016). “In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the court in support of the motion.” State v. Golden, 167 Idaho 509, 473 P.3d 377, 382 (Ct. App. 2020). When reviewing a claim of abuse of discretion, the four essential elements are “[w]hether 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. Drinkard Has Shown No Abuse Of The District Court’s Discretion

In revoking probation the district court focused primarily on the protection of society. (6/5/20 Tr., p. 18, L. 20 – p. 19, L. 17.) The judge acknowledged that Drinkard had “done some good things” while on probation, but had also “repeatedly violated his probation over and over and over and drank alcohol and got speeding tickets and got an inattentive driving charge” (6/5/20 Tr., p. 18, L. 20 – p. 19, L. 12.) The district court noted that with credit for time served Drinkard would be eligible for rehabilitative programs from the Department of Correction and would likely be released in a little over a year. (6/5/20 Tr., p. 21, L. 24 – p. 22, L. 9; p. 22, L. 25 – p. 23, L. 9.)

“In deciding whether revocation of probation is the appropriate response to a violation, the court considers whether the probation is achieving the goal of rehabilitation and whether continued

probation is consistent with the protection of society.” Knutsen v. State, 144 Idaho 433, 441-42, 163 P.3d 222, 230-31 (Ct. App. 2007). The record supports the district court’s determination that probation was not fulfilling these goals.

The district court withheld judgment and placed Drinkard on probation on December 13, 2016. (R., pp. 58-61.) On April 25, 2017, Drinkard admitted drinking beers and hard alcohol. (R., p. 81.) The probation officer had information that Drinkard had been driving under the influence, but Drinkard denied driving. (R., p. 81.) Drinkard committed the offense of driving without privileges on June 15, 2017. (R., p. 84.) Drinkard committed the offense of driving without privileges (third offense) on July 11, 2017. (R., pp. 81, 83.) By July 25, 2017, Drinkard had not paid anything on his outstanding fines and fees. (R., p. 85.)

After he completed a rider, the district court placed Drinkard back on probation on February 14, 2018. (R., pp. 103-05.) Drinkard obtained restricted driving privileges on March 25, 2018. (R., p. 126.) The record contains evidence that thereafter Drinkard committed the traffic offenses of failing to obey a traffic signal on August 8, 2018, and speeding on November 5, 2018, November 7, 2018, and January 28, 2019. (R., p. 123.) He was involved in a domestic dispute on March 3, 2020, when he punched his car window, breaking it and shattering glass on his two-month-old son. (R., p. 123.) On September 26, 2018, his probation officer attempted to contact Drinkard at his residence to be informed he had moved without informing probation. (R., p. 123.) Drinkard’s probation officer reported seeing liquor bottles, beer cans (empty and full) in home visits on March 22, 2018, December 13, 2018, and November 10, 2019. (R., p. 124.) The police reported that Drinkard had been drinking in relation to the March 3, 2020, domestic dispute incident. (R., p. 124.) On March 2, 2020, Drinkard tested positive for marijuana consumption.

(R., pp. 124-25.) Drinkard had not paid his fines, fees or costs of supervision and had not verified his completion of a victims' impact panel as instructed by his probation officer. (R., p. 125.)

The probation officer recommended Drinkard's probation be revoked. (R., p. 126.) The recommendation was based on Drinkard abusing the "opportunity" of having driving privileges by committing several traffic offenses; because Drinkard did not maintain stable employment, putting him behind on several financial obligations; and Drinkard's continued "reckless" use of alcohol which had also affected his rehabilitation. (R., p. 126.)

Drinkard's abuse of his driving privileges, and his reckless use of alcohol justified the district court's concern that the community was not being protected by probation. Drinkard was on probation for eluding an officer by driving a motorcycle up to 100 mph while weaving through traffic. His at-best casual attitudes toward alcohol and safe driving belie any claim he was serious about rehabilitation and that the community was protected.

On appeal Drinkard challenges only the fourth element of discretion: the exercise of reason. (Appellant's brief, pp. 5, 7-8 ("Mr. Drinkard maintains the district court did not exercise reason and therefore abused its discretion").) In support of this argument he cites to "facts" that were unsupported claims made in the disposition hearing. He claimed both that he owned a home and, through counsel, that he would live with his "mom or even a friend." (Appellant's brief, p. 6; 6/5/20 Tr., p. 10, L. 25 – p. 11, L. 2; p. 14, Ls. 2-5.) Drinkard denied that the alcohol and beer cans the probation officer saw in his residence, including in his bedroom, were his. (6/5/20 Tr., p. 15, Ls. 2-18.) This claim does not make his violation "technical in nature." (Appellant's brief, p. 6.)

As Drinkard points out (Appellant’s brief, p. 6¹), the district court did believe Drinkard had done “some good things” and that Drinkard was “maturing” (6/5/20 Tr., p. 18, L. 20 – p. 19, L. 1). However, Drinkard was “not maturing fast enough to keep our community safe.” (6/5/20 Tr., p. 19, Ls. 2-17.) Therefore further training in a controlled environment was necessary. (6/5/20 Tr., p. 19, L. 18 – p. 20, L. 10; p. 21, L. 24 – p. 22, L. 9.) The district court’s reasoning is apparent on the record.

Drinkard has not shown the district court failed to exercise reason when it revoked probation, did not retain jurisdiction, and did not reduce the sentence. He has therefore failed to show any abuse of discretion.

CONCLUSION

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

DATED this 20th day of January, 2021.

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

¹ Drinkard’s claim that the district court “acknowledged probation was achieving its rehabilitative objective” (Appellant’s brief, p. 6) is a gross overstatement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of January, 2021, served a true and correct copy of the foregoing RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

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/s/ Kenneth K. Jorgensen
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KKJ/dd