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### State v. Malubeki Respondent's Brief Dckt. 48447

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NOS. 48447-2020 & 48448-2020
Plaintiff-Respondent,	)	
	)	Ada County Case Nos.
v.	)	CR01-17-6225 & CR-FE-2016-2412
	)	
ELIE MALUBEKI,	)	
	)	
Defendant-Appellant.	)	RESPONDENT’S BRIEF
_____	)	

Has Elie Malubeki failed to show that the district court abused its discretion when it revoked Malubeki’s probation and declined to commute his sentence to time served?

ARGUMENT

Malubeki Has Failed To Show That The District Court Abused Its Discretion

A. Introduction

On or about September 6, 2015, Malubeki and two other individuals used stolen credit cards to make purchases at retail stores and restaurants. (Conf. Docs. 48448, pp. 172-73.) The state charged Malubeki with (1) burglary in violation of Idaho Code § 18-1401, (2) grand theft by possession of stolen property in violation of Idaho Code §§ 18-2403(4), 18-2407(1), and 18-2409;

and (3) criminal possession of a financial transaction card in violation of Idaho Code §§ 18-3125, 18-3128. (R. 48448, pp. 58-59.) Malubeki pled guilty to burglary. (R. 48448, p. 89.)

At some point between November 15, 2016 and December 13, 2016, Malubeki stole several pieces of jewelry from his girlfriend's grandmother and pawned them. (Conf. Docs. 48447, pp. 5-6.) The state charged Malubeki with (1) grand theft in violation of Idaho Code §§ 18-2403(1), 18-2407(1)(b), 18-2409; (2) burglary in violation of Idaho Code § 18-1401 arising from his transaction at Pawn 1 on Chinden Boulevard; and (3) burglary in violation of Idaho Code § 18-1401 arising from his transaction at Pawn 1 on Vista Avenue. (R. 48447, pp. 35-36.) Malubeki pled guilty to one count of burglary. (R. 48447, p. 52.)

During the pre-sentencing process, Malubeki's counsel moved for a mental evaluation, which the court ordered. (R. 48448, pp. 73-80.) The psychological evaluation stated that Malubeki appeared to suffer from Posttraumatic Stress Disorder ("PTSD") and that Malubeki reported having been diagnosed with Bipolar Disorder. (Conf. Docs. 48448, p. 203.) Malubeki also reported almost-daily marijuana and cocaine use and that he drank alcohol "heavily" on weekends. (Conf. Docs. 48448, p. 204.) The PSI included further mental health records, for the sentencing court's consideration. (Conf. Docs. 48448, pp. 154-59, 199-201.)

On October 6, 2017, the court sentenced Malubeki in both cases. (R. 48447, pp. 52-55; R. 48448, pp. 89-92.) The court imposed an eight-year sentence with two years determinate in each case, to run concurrently. (R. 48447, p. 53; R. 48448, p. 90.) The court retained jurisdiction in both cases so that Malubeki could participate in the rider program. (Id.)

On or about May 24, 2018, after Malubeki had completed his rider, the court suspended his sentences for eight years' probation. (R. 48447, pp. 59-60; R. 48448, pp. 96-97.)

On September 9, 2019, the state filed a motion for probation violation in each case (R. 48447, p. 76; R. 48448, p. 113), amending the motions to add further violations in succeeding months (see R. 48447, pp. 102-03, 113-14, 123-24; R. 48448, pp. 132-33, 142-43, 152-53.) The motions in each case arose from the same conduct: (1) absconding from supervision; (2) failing to pay court-ordered fines, fees, funds, surcharges and/or costs; (3) failing to pay court-ordered restitution; (4) committing the crime of misdemeanor disturbing the peace on September 27, 2019; (5) committing the crime of misdemeanor possession of a controlled substance on September 27, 2019; (6) committing the crime of grand theft on or about June 29, 2019; (7) committing the crime of grand theft on or about August 25, 2019; (8) committing the crime of grand theft on September 22, 2019; and (9) failing to pay the cost of supervision fee. (R. 48447, p. 124; R. 48448, p. 153.)

The court heard the motions in both cases concurrently on September 23, 2020. (9/23/20 Tr., p. 5, Ls. 4-12.) At the admit/deny hearing, Malubeki admitted to willfully committing grand theft on or about September 22, 2019, to which he had pled guilty in another criminal proceeding. (9/23/20 Tr., p. 10, Ls. 1-16, 20-23.)

At defense counsel's request, the court submitted a referral to mental health court. (9/23/20 Tr., p. 5, L. 24 – p. 6, L. 7; 11/18/20 Tr., p. 7, Ls. 20-23.) However, upon screening, “it was determined that [Malubeki was] not appropriate” for mental health court. (11/18/20 Tr., p. 7, Ls. 20-23.)

At the disposition hearing, after argument from counsel and a statement from Malubeki, the court revoked probation and imposed his sentences. (11/18/20 Tr., p. 9, L. 8 – p. 16, L. 14.) In its orders in the two cases, the court specifically “recommend[ed] that the Idaho Department of Correction . . . allow the defendant to participate in the following programs: Mental Health Counseling for PTSD diagnosis [and] [a]ny other programming deemed appropriate by IDOC[.]”

(R. 48447, p. 140 (emphasis omitted); R. 48448, p. 163 (emphasis omitted).) Further, the court stated that it “strongly encourages Defendant to stay on any prescribed medications to help manage his PTSD diagnosis.” (R. 48447, p. 140 (emphasis omitted); R. 48448, p. 163 (emphasis omitted).)

Malubeki timely appealed in each case. (See R. 48447, pp. 139-46; R. 48448, pp. 162-69.)

The court consolidated his appeals. (R. 48447, p. 151.)

## B. Standard Of Review

“Review of a probation revocation proceeding involves a two-step analysis. First, it is determined whether the terms of probation have been violated. If they have, it is then determined whether the violation justifies revocation of the probation.” State v. Garner, 161 Idaho 708, 710, 390 P.3d 434, 436 (2017) (citations omitted). As to the first step, 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.” State v. Knutsen, 138 Idaho 918, 923, 71 P.3d 1065, 1070 (Ct. App. 2003) (citations omitted). “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.” Id. (citations omitted).<sup>1</sup>

The court also reviews for abuse of discretion the district court’s decision not to reduce a sentence upon revoking probation. See State v. Cornelison, 154 Idaho 793, 799, 302 P.3d 1066, 1072 (Ct. App. 2013) (applying abuse of discretion standard to a challenge to the district court’s order declining to commute defendant’s sentence to county jail time with work release).

In evaluating whether a lower court abused its discretion, the appellate court conducts a four-part inquiry, which asks “whether 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

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<sup>1</sup> Malubeki admits that he violated the terms of his probation. (Appellant’s brief, p. 5.) Accordingly, this Court need only consider the second step of the probation revocation review.

legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.” State v. Herrera, 164 Idaho 261, 272, 429 P.3d 149, 160 (2018) (citing Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

C. Malubeki Has Shown No Abuse Of The District Court’s Discretion

1. The District Court Did Not Abuse Its Discretion When It Revoked Malubeki’s Probation

“In determining whether to revoke probation a court must examine whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society.” State v. Hanson, 150 Idaho 729, 733, 249 P.3d 1184, 1188 (Ct. App. 2011). Courts act within their discretion to revoke a defendant’s probation when the defendant’s violations demonstrate that probation is not serving its rehabilitative purpose. See, e.g., Cornelison, 154 Idaho at 798-99, 302 P.3d at 1071-72 (affirming probation revocation due to defendant’s use of alcohol and marijuana and failure to report because probation was not serving the goal of rehabilitation); Hanson, 150 Idaho at 733, 249 P.3d at 1188 (affirming probation revocation because the violations demonstrated probation was not achieving rehabilitation and that defendant’s heavy drinking posed a risk to society).

For instance, in Kerr, the Court of Appeals affirmed probation revocation when the defendant violated his probation by breaking the law in Utah. State v. Kerr, 115 Idaho 725, 726, 769 P.2d 602, 603 (Ct. App. 1989).

While mental health issues may be a factor in the court’s decision, they are not, in and of themselves, controlling. See, e.g., State v. Calley, 140 Idaho 663, 666, 99 P.3d 616, 619 (2004) (holding that district court had appropriately considered the information in the psychological report, which indicated that defendant who had committed forgery suffered from untreated, severe

depression, but that defendant posed a high risk to reoffend, so imposing consecutive sentence was within the court's discretion); State v. Fife, 115 Idaho 879, 881, 771 P.2d 543, 545 (Ct. App. 1989) (affirming probation revocation despite mental health issues because probation was not rehabilitating defendant, and defendant posed a threat to society).<sup>2</sup>

The district court's decision to revoke probation was reasonable. Malubeki had committed another felony while on probation, grand theft, demonstrating that probation was not turning him from his pattern of theft and that society would continue to be at risk from potential further re-offenses. See Kerr, 115 Idaho at 726, 769 P.2d at 603 (affirming probation revocation when defendant violated the law in Utah while on probation); Cornelison, 154 Idaho at 798-99, 302 P.3d at 1071-72 (affirming probation revocation because violations demonstrated probation was not serving the goal of rehabilitation); Hanson, 150 Idaho at 733, 249 P.3d at 1188 (affirming probation revocation because the violations demonstrated probation was not achieving rehabilitation and that defendant posed a risk to society). As the court noted, it had already given him a rider. (11/18/20 Tr., p. 15, Ls. 10-11.) But Malubeki's completion of the rider program had not prevented his recent criminal conduct. The district court had referred Malubeki to mental health court, but the mental health court was not set up to support his diagnosis. (11/18/20 Tr., p. 15, Ls. 2-4.) And in a separate grand theft prosecution, a court had then-recently imposed a seven-year sentence, with two years fixed. (11/18/20 Tr., p. 9, Ls. 9-11.)

Malubeki appears to argue that the district court abused its discretion by revoking probation in light of Malubeki's mental health and substance abuse issues. (Appellant's brief, pp. 6-9.)

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<sup>2</sup> While the opinion does not identify what Fife's mental health issues were, the Ninth Circuit opinion it cites regarding Fife's Social Security disability appeal discusses Fife's diagnoses, which included "paranoid personality disorder" and "high depression." Fife, 115 Idaho at 881, 771 P.2d at 545 (citing Fife v. Heckler, 767 F.2d 1427 (9th Cir. 1985)); Fife v. Heckler, 767 F.2d at 1429 (discussing diagnoses).

Malubeki is mistaken. First, mental health issues are not controlling. See Calley, 140 Idaho at 666, 99 P.3d at 619 (affirming imposition of consecutive sentences over defendant’s mental health argument); Fife, 115 Idaho at 881, 771 P.2d at 545 (affirming probation revocation despite mental health issues). And as explained above, the court addressed Malubeki’s mental health issues, referring him to mental health court (11/18/20 Tr., p. 7, Ls. 20-23), considering the record information on Malubeki’s mental health (Conf. Docs. 48448, pp. 154-59, 199-208) of which some was the result of the court ordering a mental health evaluation (R. 47448 pp. 78-79), and making specific mental health recommendations in its order of revocation (R. 48447, p. 140; R. 48448, p. 163.)

Second, the court was aware of and had considered Malubeki’s substance abuse issues. (See, e.g., R. 48447, p. 56 (Malubeki’s rider would include program Cognitive Behavior Interventions for Substance Abuse); Conf. Docs. 48448, p. 204 (summarizing Malubeki’s reported substance abuse), p. 208 (noting that “drug abuse appears to be a significant influence in his life”); see also State v. Marks, 116 Idaho 976, 977-78, 783 P.2d 315, 316-17 (Ct. App. 1989) (affirming probation revocation when the record indicated the court was “painfully aware” of the defendant’s substance abuse issue).

Malubeki has demonstrated no abuse of discretion in the district court’s decision to revoke his probation.

2. The District Court Did Not Abuse Its Discretion When It Declined To Commute Malubeki’s Sentence To Time Served

Upon revoking probation, the district court may “order that the suspended sentence be executed or, in the alternative, the court is authorized under Idaho Criminal Rule 35 to reduce the sentence.” State v. Morgan, 153 Idaho 618, 288 P.3d 835 (Ct. App. 2012) (affirming order

executing defendant's original sentence when defendant's probation violations demonstrated defendant posed a risk to society). The court applies "the same criteria to examine a decision made upon a request for sentence reduction as those applied in determining whether the original sentence was reasonable." State v. Martin, 122 Idaho 423, 425, 835 P.2d 658, 660 (Ct. App. 1992); see also State v. Bailey, 161 Idaho 887, 895-96, 392 P.3d 1228, 1236-37 (2017) (reviewing the reasonableness of a sentence involves considering the goals of protecting society, deterrence, rehabilitation, and retribution).

For instance, in State v. Adams, the court affirmed execution of the defendant's original seven-year sentence with one-and-a-half years determinate upon probation revocation. 115 Idaho 1053, 1056, 772 P.2d 260, 263 (Ct. App. 1989). The defendant had violated his probation by making profane statements to a custodial officer. Id. at 1055, 772 P.2d at 262. The district court had appropriately considered its decision to impose the original sentence, giving credit for time served in jail. Id. Accordingly, with less than a year to serve until completion of the minimum period of confinement, the defendant could "obtain parole relatively soon, depending on his behavior in prison." Id.

Here, Malubeki has not demonstrated that the district court abused its discretion by declining to commute his sentence to time served. As explained above, Malubeki's conduct while on probation showed that rehabilitation was not being achieved and that he continued to pose a risk for future property crimes. It would not make sense to commute his sentence to time served, essentially rewarding the probation violations. And like the court in Adams, 115 Idaho at 1055, 772 P.2d at 262, the district court here appropriately considered its decision to impose the original sentence and credited Malubeki with all time served (see Tr., p. 14, L. 20 – p. 16, L. 14.)

Malubeki has shown no abuse of the district court's discretion.

CONCLUSION

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

DATED this 10th day of June, 2021.

/s/ Jennifer Jensen  
JENNIFER JENSEN  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of June, 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/ Jennifer Jensen  
JENNIFER JENSEN  
Deputy Attorney General

JJ/dd