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State v. Radford Appellant's Brief Dckt. 48553

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NOS. 48553-2021, 48554-2021, 48555-2021,
Plaintiff-Respondent,	)	48556-2021, & 48557-2021
	)	
v.	)	SHOSHONE COUNTY NOS. CR-2014-2455,
	)	CR-2016-207, CR40-19-218, CR40-20-1411,
STANLEY CLARK RADFORD,	)	& CR40-20-1560
	)	
Defendant-Appellant.	)	APPELLANT'S BRIEF
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a global plea agreement covering five separate cases, Stanley Clark Radford admitted to violating his probation in three of the cases, and he agreed to plead guilty to felony possession of controlled substance charges in the two remaining cases. Rather than retain jurisdiction as Mr. Radford recommended, the district court revoked probation and executed the underlying sentences in the first three cases, and executed the sentences imposed in the latter two cases. In this consolidated appeal, Mr. Radford asserts that the district court abused its discretion when it revoked his probation and executed his underlying sentences in the first three cases, and when it executed his sentences in the latter two cases.

Statement of the Facts & Course of Proceedings

In December 2014, Osburn Police Department officers responded to a reported violent domestic dispute at a residence. (*See* No. 48553 Presentence Investigation Report, Apr. 29, 2015 (*hereinafter,* No. 48553 PSI), p.3.) Brandy Colhoff told officers that she had an argument with her live-in boyfriend, Mr. Radford, where he threw her to the ground, dragged her around the kitchen, chased her around the house with a hammer, and punched holes into the walls. (*See* No. 48553 PSI, p.3.) She reported that he then left the residence in his vehicle, taking her purse, car keys, and other items. (*See* No. 48553 PSI, p.3.) Ms. Colhoff also stated that Mr. Radford had recently returned from a court date in Oregon, and they had used methamphetamine the night before. (*See* No. 48553 PSI, p.3.) A warrant was issued for Mr. Radford not meeting the terms of his release on bail, stemming from a separate pending possession of a controlled substance case. (*See* No. 48553 PSI, pp.3, 5-6.)

Early the next morning, officers responded again to the residence after reports that a male was trying to enter the residence, and they found Mr. Radford in the backyard. (*See* No. 48553 PSI, p.3.) The officers arrested Mr. Radford and searched him, finding marijuana, methamphetamine, and paraphernalia on his person. (*See* No. 48553 PSI, p.3.) Officers later searched the vehicle, finding pills including acetaminophen hydrocodone and acetaminophen hydrocodone bitartrate in a bottle labeled with Mr. Radford's name. (*See* No. 48553 PSI, p.3.)

In Shoshone County No. CR-2014-2455 (*hereinafter*, the 2014 case), the State charged Mr. Radford with felony aggravated assault, possession of methamphetamine, and two counts of possession of a Schedule II controlled substance. (No. 48553 R., pp.61-63.) Pursuant to a plea agreement, Mr. Radford agreed to plead guilty to an amended charge of possession of methamphetamine, and the State agreed to dismiss the other counts and the separate pending

case. (*See* No. 48553 R., pp.65, 108-13.) In June 2015, the district court imposed a unified sentence of four years, with two years fixed, suspended the sentence, and placed Mr. Radford on supervised probation for a period of two years. (No. 48553 R., pp.97-107.)

In February 2016, while at the Shoshone County Prosecuting Attorney's office, a Shoshone County Sheriff's Department lieutenant saw Mr. Radford on the office's closed circuit monitor showing the adjacent lobby of the magistrate courtroom. (*See* No. 48554 Presentence Report, Jan. 9, 2017 (*hereinafter*, No. 48554 PSI), p.3; No. 48554 R., p.27.) A prosecutor's office employee told the lieutenant that Mr. Radford had a warrant for his arrest in a resisting/obstructing officers and assault case. (*See* No. 48554 PSI, pp.3, 6; No. 48554 R., p.27.) The lieutenant handcuffed and searched Mr. Radford. (*See* No. 48554 PSI, p.3.) On Mr. Radford's person, the lieutenant found a glass pipe containing burned black residue. (*See* No. 48554 PSI, p.3.) Officers searched Mr. Radford again at the Shoshone County Public Safety Building, finding items including a plastic bag containing a white crystalline rock. (*See* No. 48554 PSI, p.3.) The white crystalline rock tested presumptively positive for methamphetamine. (*See* No. 48554 R., p.28.)

In Shoshone County No. CR-2016-207 (*hereinafter*, the 2016 case), the State charged Mr. Radford with felony possession of a controlled substance and misdemeanor possession of drug paraphernalia. (No. 48554 R., pp.53-55.) Pursuant to a plea agreement, Mr. Radford agreed to plead guilty to possession of a controlled substance, and the State agreed to dismiss the paraphernalia count. (*See* No. 48554 R., pp.139, 152-57.) The district court imposed a unified sentence of four years, with two years fixed, to be served concurrently with the sentence imposed in the 2014 case, and retained jurisdiction. (No. 48554 R., pp.144-51.)

Meanwhile, in the 2014 case, the State filed a Report of Probation Violation alleging that Mr. Radford had violated the terms and conditions of his probation. (No. 48553 R., pp.125-26.) After finding that Mr. Radford had violated his probation, the district court revoked probation, executed the original sentence, and retained jurisdiction. (No. 48553 R., pp.178-82.)

Mr. Radford participated in a "rider," and in November 2017, the district court suspended the sentences in both cases and placed him on supervised probation for a period of two years. (No. 48553 R., pp.187-97; No. 48554 R., pp.168-76.)

In February 2019, Osburn Police Department and Shoshone County Sheriff's Department officers arrested Mr. Radford on two active felony arrest warrants, after his vehicle struck a vehicle that had been in a rollover accident. (*See* No. 47566 Presentence Report, Oct. 2, 2019 (*hereinafter*, No. 47566 PSI), p.3.)[1] Mr. Radford tried to get away from the officers, both before and after his arrest. (*See* No. 47566 PSI, pp.3-4.) The officers handcuffed Mr. Radford, and one officer found a small, hard cylindrical object in his pocket, but Mr. Radford slapped it out of the officer's hand. (*See* No. 47566 PSI, pp.3-4.) The officer noticed it was a small glass cylinder with a screw-on lid and a white substance inside. (*See* No. 47566 PSI, p.4.) Mr. Radford stomped his foot on the cylinder, covering it up, but the officer pushed Mr. Radford's foot off the cylinder. (*See* No. 47566 PSI, p.4.) The other officer collected the cylinder. (*See* No. 47566 PSI, p.4.) The first officer then searched Mr. Radford again, finding a clear glass pipe with white residue and burnt residue. (*See* No. 47566 PSI, p.4.) While conducting a later inventory search of the vehicle, officers found another pipe with burnt residue. (*See* No. 47566 PSI, p.4.)

In Shoshone County No. CR40-19-218 (*hereinafter*, the 2019 case), the State filed a criminal complaint alleging that Mr. Radford had committed felony destruction or concealment

[1] No. 47566 is Mr. Radford's previous appeal in Shoshone County No. CR40-19-218. (*See* No. 48555 R., p.13.)

of evidence, felony possession of a controlled substance, and misdemeanor possession of drug paraphernalia and resisting or obstructing an officer. (No. 47566 R., pp.9-11.) However, the magistrate court bound Mr. Radford over to the district court for an attempt to destroy evidence, as well as possession of a controlled substance and the misdemeanors. (*See* No. 47566 05/21/19 Tr., p.45, Ls.8-14.) The State then charged Mr. Radford with felony attempted destruction or concealment of evidence, felony possession of a controlled substance, and the two misdemeanor counts. (No. 47566 R., pp.80-82.)

Pursuant to a plea agreement, in the 2019 case, Mr. Radford agreed to plead guilty to attempted destruction of evidence, and the State agreed to dismiss the other charges. (*See* No. 47566 R., pp.115-24; No. 47566 08/19/19 Tr., p.34, L.7 – p.35, L.8.) At the change of plea hearing, the district court told Mr. Radford that the maximum penalty for attempted destruction of evidence was two-and-a-half years imprisonment. (*See* No. 47566 08/19/19 Tr., p.39, L.15–p.40, L.6.)

However, at Mr. Radford's sentencing hearing in the 2019 case, with a new district judge presiding, the district court erroneously expressed that attempted destruction of evidence was the same as destruction of evidence, and the maximum penalty was five years imprisonment. (*See* No. 47566 10/09/19 Tr., p.58, L.21 – p.59, L.7.) Mr. Radford told the district court that he had pleaded guilty to an attempt offense, and he believed the maximum penalty was two-and-a-half years. (No. 47566 10/09/19 Tr., p.54, L.24 – p.55, L.1, p.58, L.20.) The district court nonetheless erroneously imposed a unified sentence of three years, with one year fixed, and retained jurisdiction. (No. 47566 R., pp.126-31; 10/09/19 Tr., p.59, Ls.8-11.)

Mr. Radford filed a timely appeal in the 2019 case. (No. 47566 R., pp.141-44.) The Idaho Court of Appeals held, "Because the district court imposed a sentence for destruction of

evidence rather than attempted destruction of evidence as alleged in the information and the district court's sentence exceeds the maximum penalty for attempted destruction of evidence, we vacate the sentence and remand the case for a new sentencing hearing." *State v. Radford*, No. 47566, at 1 (Idaho Ct. App. Feb. 23, 2021) (unpublished opinion). The Court of Appeals held that "the maximum penalty for attempted destruction of evidence is two and one-half years." *Id.* at 4. It further found, "Because the three-year sentence imposed by the district court exceeded the maximum penalty authorized for attempted destruction of evidence, the district court imposed an illegal sentence."[2] *Id.* at 5.

In the meantime, after an evidentiary hearing, the district court found that Mr. Radford had violated his probation in the 2014 and 2016 cases. (*See* No. 48553 R., pp.275-76; No. 48554 R., pp.236-37.) In both cases, the district court revoked probation, executed the original sentence, and retained jurisdiction. (No. 48553 R., pp.272-74; No. 48554 R., pp.231-33.)

Mr. Radford participated in a rider in all three cases, and the district court in April 2020 suspended the sentence in each case, and placed him on supervised probation for a period of two years. (No. 48553 R., pp.285-92; No. 48554 R., pp.243-50; No. 48555 R., pp.59-66.)[3]

Shoshone County Sheriff's Department officers in September 2020 stopped Mr. Radford after he did not halt at a stop sign while driving. (*See* No. 48556 R., p.11.) Mr. Radford told the officers he was on felony probation and consented to a search of the vehicle. (No. 48556 R., p.11.) Inside the vehicle, officers found a clear bag containing a white crystalline substance, a rubber smoking device, a glass smoking device with burnt residue, and two pills. (*See* No.

[2] As of the current date, the district court has not conducted the new sentencing hearing in the 2019 case (No. CR40-19-218) ordered by the Court of Appeals.

[3] No. 48555 is Mr. Radford's current appeal in the 2019 case. The Idaho Supreme Court ordered the record in No. 48555 to be augmented with the record and transcripts from No. 47566. (No. 48555 R., p.13.)

48556 R., p.11.) The white crystalline substance tested presumptively positive for methamphetamine. (*See* No. 48556 R., p.11.) After the officers handcuffed Mr. Radford and read him his *Miranda* rights, Mr. Radford stated that the substance was likely to be methamphetamine, but he did not know to whom it belonged. (*See* No. 48556 R., p.11.)

In Shoshone County No. CR40-20-1411 (*hereinafter*, the September 2020 case), the State charged Mr. Radford with felony possession of a controlled substance and misdemeanor possession of drug paraphernalia. (No. 48556 R., pp.37-38.) Mr. Radford was released on bond. (*See* No. 48556 R., pp.30-33.)

In October 2020, the State filed a Motion for Probation Violation and Motion for Bench Warrant in the 2014, 2016, and 2019 cases, alleging that Mr. Radford had violated his probation. (*E.g.*, No. 48554, pp.251-52; No. 48555 R., pp.44-45.) In the September 2020 case, the State filed a Motion to Revoke Bond/Release and Motion for Bench Warrant, alleging that Mr. Radford had not appeared for routine urine analysis tests. (*See* No. 48556 R., pp.60-61.) The district court issued the warrants in all four cases. (*See* No. 48557 R., p.13.)

Later in October 2020, an Osburn Police Department lieutenant saw Mr. Radford getting into a vehicle at his residence. (*See* No. 48557 R., p.12.) The lieutenant confirmed with dispatch that Mr. Radford had four active felony warrants for his arrest. (No. 48557 R., p.12.) When the lieutenant told Mr. Radford that he had to take him in on the warrants, Mr. Radford pulled a black scale and a broken glass pipe with burnt residue from his pockets. (*See* No. 48557 R., p.12.) The lieutenant searched Mr. Radford incident to arrest, finding $318.00 in U.S. currency, a clear glass pipe with burnt residue, a piece of a broken glass pipe with burnt residue, three baggies containing a white crystal-like substance, and a fourth baggie containing black

burnt residue. (*See* No. 48557 R., pp.12-13.) The white substance in one of the baggies tested presumptively positive for methamphetamine. (No. 48557 R., p.13.)

In Shoshone County No. CR40-20-1560 (*hereinafter*, the October 2020 case), the State charged Mr. Radford with felony possession of a controlled substance with intent to deliver, and misdemeanor possession of drug paraphernalia. (No. 48557 R., pp.58-60.)

Pursuant to a global plea agreement covering all five cases, Mr. Radford agreed to plead guilty to an amended charge of possession of a controlled substance in the September 2020 case, and to an amended charge of possession of a controlled substance in the October 2020 case. (*See* 11/30/20 Tr., p.5, L.12 – p.6, L.16.) The State agreed to dismiss the remaining counts in both cases. (*See* 11/30/20 Tr., p.6, Ls.17-18.) The parties agreed that "his probation violation imposition recommendation" would run concurrently with the sentence recommended in the September 2020 and October 2020 cases, and sentencing recommendations would be open. (*See* 11/30/20 Tr., p.6, Ls.21-25.) Further, the State agreed to dismiss a separate misdemeanor blight case. (*See* 11/30/20 Tr., p.7, Ls.1-12.)

The written pretrial settlement offer had the docket numbers for the September 2020 and October 2020 cases. (*See* No. 48557 R., p.65.) Mr. Radford, defense counsel, and the prosecutor signed the offer. (No. 48557 R., p.65.) The offer contained "Defendant's agreement to . . . Waive appeal as of right as to conviction and sentence," and the box to the left of that appeal waiver provision was checked. (No. 48557 R., p.65.) However, the offer also contained a provision stating, "I ACCEPT the above pretrial settlement offer and waive the following rights," and listing waived rights including, "The right to appeal as of right as to conviction and sentence." (No. 48557 R., p.65.) The box to the left of that provision was not checked. (No. 48557 R., p.65.)

At the combined change of plea and disposition hearing for all five cases, the district court suggested it had not seen the written pretrial settlement offer that Mr. Radford had e-filed, and the State outlined the global plea agreement for the record. (*See* 11/30/20 Tr., p.5, L.12 – p.7, L.8.) One detail the State explained was that Mr. Radford "will waive his right to a preliminary hearing, which he has done, waive his right to appeal the conviction and the sentence." (11/30/20 Tr., p.6, Ls.18-20.) When asked by the district court if the State's explanation of the plea agreement was his "understanding of the pretrial settlement offer," Mr. Radford's counsel replied, "It is, Your Honor . . . ." (*See* 11/30/20 Tr., p.7, Ls.9-11.) However, when the district court asked Mr. Radford if he understood the "valuable rights" he would be giving up with his plea, the district court did not list the right to appeal among them. (*See* 11/30/20 Tr., p.9, Ls.11-21.)

The district court accepted Mr. Radford's guilty pleas in the September 2020 and October 2020 cases. (11/30/20 Tr., p.11, L.13 – p.12, L.4.) Mr. Radford then admitted to violating the terms of his probation in the 2014, 2016, and 2019 cases, by committing the new felony offenses at issue in the September 2020 and October 2020 cases. (*See* 11/30/20 Tr., p.12, L.5 – p.13, L.16.)

Mr. Radford recommended that the district court retain jurisdiction in all five cases. (*See* 11/30/20 Tr., p.19, Ls.9-10, p.21, Ls.13-17.) The State recommended that the district court execute the sentences in the 2014, 2016, and 2019 cases. (*See* 11/30/20 Tr., p.15, Ls.5-6.) The State also recommended that the district court, in each of the September 2020 and October 2020 cases, impose a unified sentence of seven years, with three years fixed, to run concurrently with each other and the sentences imposed in the other three cases. (*See* 11/30/20 Tr., p.15, Ls.6-11.)

In the September 2020 case, the district court imposed a unified sentence of five years, with two years fixed. (No. 48556 R., pp.73-78.) In the October 2020 case, the district court also imposed a unified sentence of five years, with two years fixed. (No. 48557 R., pp.71-76.) Each judgment had a checked box to indicate that the sentence was "Concurrent." (No. 48556 R., p.75; No. 48557 R., p.73.) However, in both judgments, the blank indicating "Defendant agrees to waive his/her right to appeal as to conviction and sentence," was not checked. (No. 48556 R., p.77; No. 48557 R., p.75.)

The district court revoked probation and executed the sentences in the 2014, 2016, and 2019 cases.[4] (No. 48553 R., pp.306-08; No. 48554 R., pp.284-86; No. 48555 R., pp.25-27.) The written dispositions in those cases did not contain any appeal waiver provisions. (*See* No. 48553 R., pp.306-07; No. 48554 R., pp.284-85; No. 48555 R., pp.25-26.) All five sentences would run concurrently. (*See* 11/30/20 Tr., p.27, L.24 – p.28, L.1.)

Mr. Radford filed a timely Notice of Appeal in each of the five cases. (*E.g.*, No. 48553 R., pp.316-19; No. 48554 R., pp.290-93; No. 48555 R., pp.21-24; No. 48557 R., pp.77-80.) The Idaho Supreme Court ordered the consolidation of the five appeals. (*E.g.*, No. 48553 R., p.324.)

ISSUE

Did the district court abuse its discretion when it revoked Mr. Radford's probation and executed his underlying sentences in the 2014, 2016, and 2019 cases, and when it executed his sentences in the September 2020 and October 2020 cases?

[4] The district court executed the illegal sentence of three years, with one year fixed, in the 2019 case. (No. 48555 R., p.25.) However, at that time the district court did not have the benefit of the Court of Appeals' Opinion in No. 47566.

ARGUMENT

The District Court Abused Its Discretion When It Revoked Mr. Radford's Probation And Executed His Underlying Sentences In The 2014, 2016, And 2019 Cases, And When It Executed His Sentences In The September 2020 And October 2020 Cases

A. Introduction

Mr. Radford asserts that the district court abused its discretion when it revoked his probation and executed his underlying sentences in the 2014, 2016, and 2019 cases, and when it executed his sentences in the September 2020 and October 2020 cases. The district court should have instead followed Mr. Radford's recommendations by retaining jurisdiction in all five cases. (*See* 11/30/20 Tr., p.19, Ls.9-10, p.21, Ls.13-17.)

B. The State Will Not Be Able To Show That A Valid, Enforceable Appeal Waiver Exists In These Cases

As a preliminary matter, Mr. Radford asserts that the State will not be able to show that a valid, enforceable appeal waiver exists in these cases. The right to appeal is purely a statutory right. *State v. Murphy*, 125 Idaho 456, 457 (1994). A defendant may waive the right to appeal as part of a plea agreement. *Id.* An appellate court reviewing the validity of an appeal waiver in a plea agreement will uphold the waiver if the entire record shows the waiver was made voluntarily, knowingly, and intelligently. *Id.* at 456-57. The waiver of the right to appeal is an affirmative defense, and the State has the burden of showing that the appeal waiver is valid and enforceable, because "a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver." *See Garza v. Idaho*, 139 S. Ct. 738, 745 (2019).

Based on the entire record here, the State will not be able to show that a valid, enforceable appeal waiver exists. If anything, the record shows that Mr. Radford's supposed appeal waiver was not knowing, intelligent, or voluntary. For instance, the written pretrial

settlement offer was inconsistent on whether Mr. Radford agreed to waive his right to appeal. The offer contained a provision that the defendant agreed to, "Waive appeal as of right as to conviction and sentence," and the box to the left of that waiver was checked. (No. 48557 R., p.65.) But the offer also contained the following provision:

I ACCEPT the above pretrial settlement offer and waive the following rights:

1. The right to a jury or court trial.
2. The right to be presumed innocent unless proven guilty beyond a reasonable doubt.
3. The right to confront and question the witnesses against me.
4. The right to compel witnesses to come to court and testify for me.
5. The right to appeal as of right as to conviction and sentence.

(No. 48557 R., p.65.) The box to the left of "I ACCEPT" was not checked. (No. 48557 R., p.65.) Thus, the offer was inconsistent on whether Mr. Radford agreed to waive his right to appeal, which helps show that any appeal waiver was not knowing, intelligent, or voluntary.

Additionally, the State told the district court that Mr. Radford, as part of the global plea agreement, "will waive his right to a preliminary hearing, which he has done, waive his right to appeal the conviction and the sentence." (11/30/20 Tr., p.6, Ls.18-20.) However, when the district court asked Mr. Radford if he understood the "valuable rights" he would be giving up with his plea, the district court did not list the right to appeal among them. (*See* 11/30/20 Tr., p.9, Ls.11-21.) Specifically, the district court stated:

> If you plead guilty to either one of these charges, you'll be giving up some valuable rights. You'll be giving up the right to remain silent. You'll be giving up the right to a jury trial. You'll be giving up the right to confront and cross-examine the witnesses who will testify against you at the trial. The State will no longer have to prove your guilt beyond a reasonable doubt, and you give up any chance to present a defense to either one of these charges.

(11/30/20 Tr., p.9, Ls.11-20.) The district court asked Mr. Radford, "Do you understand?", and he replied, "Yes." (11/30/20 Tr., p.9, Ls.20-21.)

Under Idaho Criminal Rule 11, "If the defendant is waiving the right to appeal or other post-conviction proceedings as part of a guilty plea, and the court is aware of this waiver, the court must ask the defendant if defendant is aware of the waiver of appeal or other proceedings." I.C.R. 11(d)(3). The district court must do so "prior to entry of a guilty plea or the making of factual admissions during a plea discussion." I.C.R. 11(d). Here, contrary to Rule 11, the district court did not ask Mr. Radford if he understood he would be giving up the right to appeal with his plea. The district court did ask him if he understood he would be giving up the rights to a jury trial, to confront witnesses, and to be presumed innocent unless the State proved his guilt beyond a reasonable doubt, which were waived rights also listed in the written pretrial settlement offer. (*See* No. 48557 R., p.65; 11/30/20 Tr., p.9, Ls.11-20.) The district court's omission of the right to appeal from its list of waived rights Mr. Radford should understand helps show that any appeal waiver was not knowing, intelligent, or voluntary.

Moreover, the judgments of conviction in the September 2020 and October 2020 cases did not indicate that Mr. Radford was waiving his right to appeal. The judgments in those cases had a provision stating, "Defendant agrees to waive his/right to appeal as to conviction and sentence." (No. 48556 R., p.77; No. 48557 R., p.75.) However, the blanks to the left of that provision, to indicate Mr. Radford's agreement thereto, were not checked. (No. 48556 R., p.77; No. 48557 R., p.75.) The judgments then proceeded to inform Mr. Radford of the following: "YOU, the defendant, ARE HEREBY NOTIFIED that you have the right to appeal this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two (42) days of the entry of the written order in this matter." (No. 48556 R., p.77; No. 48557 R., p.75.) Thus, the judgments of conviction in the September 2020 and October 2020 cases also help show that Mr. Radford's purported appeal waiver was not knowing, intelligent, or voluntary.

Further, the written dispositions in the 2014, 2016, and 2019 cases did not contain any appeal waiver provisions. (*See* No. 48553 R., pp.306-07; No. 48554 R., pp.284-85; No. 48555 R., pp.25-26.) The absence of any appeal waiver provisions in those written dispositions helps show that Mr. Radford's supposed appeal waiver was not knowing, intelligent, or voluntary.

In light of the above, the entire record here demonstrates that any appeal waiver was not knowingly, intelligent, or voluntary. Accordingly, the State will not be able to show that a valid, enforceable appeal waiver exists in these cases.[5]

C. The District Court Abused Its Discretion When It Revoked Mr. Radford's Probation And Executed His Underlying Sentences In The 2014, 2016, And 2019 Cases

Mr. Radford asserts that the district court abused its discretion when it revoked his probation and executed his underlying sentences in the 2014, 2016, and 2019 cases, rather than retain jurisdiction. "The choice of probation, among the available sentencing alternatives, is committed to the sound discretion of the trial court." *State v. Toohill*, 103 Idaho 565, 567 (Ct. App. 1982). "The exercise of this discretion is guided by I.C. § 19-2521, which prescribes criteria for weighing probation against a sentence of confinement." *Id.* "[D]enial of probation will not be deemed a 'clear abuse of discretion' if the decision is consistent with the criteria articulated in I.C. § 19-2521." *Id.*

An appellate court reviewing an alleged abuse of discretion by a trial court considers 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 legal standards applicable to the

[5] Even if the appeal waiver were valid and enforceable, it would pertain only to the September 2020 and October 2020 cases. This is because the written pretrial settlement offer containing an appeal waiver only covers those two cases, as shown by the docket numbers listed on the offer. (*See* No. 48557 R., p.65.) Moreover, the appeal waiver only purports to waive the right to appeal "as of right as to conviction and sentence," not the right to appeal the district court's probation violation dispositions. (*See* No. 48557 R., p.65; 11/30/20 Tr., p.6, Ls.18-20.)

specific choices available to it; and (4) reached its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018).

Idaho Code § 19-2601 authorizes a district court to retain jurisdiction for up to 365 days, to further evaluate a defendant's suitability for probation. I.C. § 19-2601(4); *see State v. Wolfe*, 99 Idaho 382, 385 (1978). "[R]efusal to retain jurisdiction, for further evaluation of a defendant, will not be deemed a 'clear abuse of discretion' if the trial court already has sufficient information to determine that a suspended sentence and probation would be inappropriate under I.C. § 19-2521." *Toohill*, 103 Idaho at 567.

Here, the district court did not act consistently with the applicable legal standards when it revoked probation and executed the sentences rather than retain jurisdiction, because the district court did not have sufficient information to determine that probation would be inappropriate. During the combined hearing, Mr. Radford's counsel advised the district court, "Mr. Radford's primary focus is the idea that he needs to rehabilitate and to look at this as a crime of addiction, not really a crime of criminal thinking." (11/30/20 Tr., p.18, L.25 – p.19, L.3.) Per defense counsel, Mr. Radford was not "committing other theft crimes and he's not committing other crimes that damage property or persons . . . ." (11/30/20 Tr., p.19, Ls.17-19.) Mr. Radford's counsel also stated, "And not everyone is able to battle and overcome addiction with one rider, and some people don't overcome addiction until later in life. And that's what the goal is." (11/30/20 Tr., p.20, Ls.7-10.)

Further, defense counsel told the district court, "Mr. Radford, no matter how long he is in prison, is always going to come back to the Silver Valley and always wants to be a member of the Silver Valley and be a productive member of the community." (11/30/20 Tr., p.20, Ls.10-14.) Defense counsel explained that, after Mr. Radford's arrest, he "made changes in his

residence and his significant other, which both were contributing to him falling off the wagon, and so he's done that on his own and both of which are positive steps." (11/30/20 Tr., p.20, Ls.15-19.)

As for Mr. Radford's experiences on his last rider, defense counsel noted that Mr. Radford had pointed out that it helped him in many ways, but he wanted the more advanced placement rider because he had been an addict for a while and that program would have been more applicable to him. (*See* 11/30/20 Tr., p.20, L.20 – p.21, L.2.) Mr. Radford told the district court, "I believe there is value in the rider program for me at the advanced practice level." (11/30/20 Tr., p.23, Ls.2-3.) According to Mr. Radford, "the advanced practice level may offer me that little bit extra with the increased discipline to bring my values, education and rehabilitative success and victory, which is the ultimate goal of the State, that a prison term too often fails to achieve." (11/30/20 Tr., p.23, Ls.3-8.)

Defense counsel stated that Mr. Radford "wants to actively use his time. He wants to better himself, and he wants to continue to develop the tools that he needs to be a productive member of society." (11/30/20 Tr., p.21, Ls.3-6.) Mr. Radford's counsel told the district court, "What he needs to focus on is his substance abuse. . . . He's never had a problem handling a job and employment. He's always helped other people in the community. He's been very much a giver in that regards. He just has a controlled substance problem." (11/30/20 Tr., p.21, Ls.7-12.) Mr. Radford related that he was "currently employed full time with a living wage with West Valley Contractors out of Kingston working 40 plus hours a week." (11/30/20 Tr., p.21, Ls.20-23.)

In view of the above details, the district court did not have sufficient information to determine that probation would be inappropriate. Thus, the district court did not act consistently

with the applicable legal standards when it revoked probation and executed the sentences. The district court therefore abused its discretion when it revoked Mr. Radford's probation and executed his underlying sentences in the 2014, 2016, and 2019 cases, rather than retain jurisdiction. The district court should have instead followed Mr. Radford's recommendations by retaining jurisdiction in the three cases.

D. The District Court Abused Its Discretion When It Executed Mr. Radford's Sentences In The September 2020 And October 2020 Cases

Mr. Radford asserts that the district court abused its discretion when it executed his concurrent unified sentences of five years, with two years fixed, imposed in the September 2020 and October 2020 cases, rather than retain jurisdiction.

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving "due regard to the nature of the offense, the character of the offender, and the protection of the public interest." *State v. Strand*, 137 Idaho 457, 460 (2002).

The Idaho Supreme Court has held that, "[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence." *State v. Jackson*, 130 Idaho 293, 294 (1997) (internal quotation marks omitted). Mr. Radford does not assert that his sentences exceed the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Radford must show that in light of the governing criteria, the sentences were excessive considering any view of the facts. *Id*. The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id*. An appellate court, "[w]hen reviewing the length of a

sentence . . . consider[s] the defendant's entire sentence." *State v. Oliver*, 144 Idaho 722, 726 (2007). The reviewing court will "presume that the fixed portion of the sentence will be the defendant's probable term of confinement." *Id.*

Mr. Radford asserts that his sentences in the September 2020 and October 2020 cases are excessive considering any view of the facts, because the district court did not adequately consider mitigating factors. Specifically, the district court did not give adequate consideration to the mitigating details discussed in Section C. above, and incorporated herein. Thus, the district court abused its discretion when it executed Mr. Radford's sentences in the September 2020 and October 2020 cases, rather than retain jurisdiction. The district court should have instead followed Mr. Radford's recommendations by retaining jurisdiction in the two cases.

CONCLUSION

For the above reasons, Mr. Radford respectfully requests that this Court reduce his sentences as it deems appropriate.

DATED this 21st day of July, 2021.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of July, 2021, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BPM/eas