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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45925-2018**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR-2008-11895**
	)	
ROBERT DEL CRITCHFIELD,	)	
	)	
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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District Judge

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Nature of the Case

Robert Del Critchfield appeals from the district court's order revoking his probation and ordering the originally imposed sentence to be executed, and from the district court's order denying his I.C.R. 35(b) motion for reduction of sentence.

Statement of Facts and Course of Proceedings

A jury convicted Critchfield of one count of lewd conduct with a minor and one count of sex abuse of a minor. See State v. Critchfield, 153 Idaho 680, 682, 290 P.3d 1272, 1274 (Ct. App. 2012). The jury acquitted Critchfield on four other counts and were unable to reach a unanimous verdict on three other counts. See id. However, the district court granted Critchfield's motion for a new trial on the ground that it should have allowed a proposed defense expert witness to testify concerning proper interview techniques, the purpose behind those techniques, and how improper techniques were allegedly used in interviews conducted in context of the officers' investigation. (R., Vol. I, pp.669-671.) The Idaho Court of Appeals affirmed the district court's order granting a new trial. Critchfield, 153 Idaho at 683-685, 290 P.3d at 1275-1277.

Upon remand, pursuant to an agreement with the state, Critchfield entered an *Alford* plea[1] to an amended charge of felony injury to child for "having sexual contact with said children." (R., Vol. I, pp.733-737.) The district court imposed a unified 10-year sentence with three years fixed

[1] Critchfield pled guilty to three counts of felony injury to child, but the state dismissed two of these charges after certain conditions were met pursuant to the plea agreement. (See R., Vol. I, pp.735-737, 748-762.)

but suspended the sentence and placed Critchfield on supervised probation for three year upon his completion of 180 days local jail incarceration. (R., Vol. I, pp.748-760.)

Approximately a year-and-a-half after the district court imposed judgment, the state filed a report of probation violation in Critchfield's case. (R., Vol. I, pp.786-788.) Specifically, the state asserted that Critchfield violated his probation by: (1) making unwanted romantic advances towards the secretary of the Wellness Enhancement Center where Critchfield was undergoing sex offender treatment (R., Vol. I, pp.786, 789-790); (2) getting terminated from sex offender treatment due to his harassment of that secretary and others at the Wellness Enhancement Center (R., Vol I, pp.787, 789-790); and (3) failing to provide truthful information on two polygraph examinations (R., Vol. I, pp.787, 795-802). Critchfield admitted violating his probation by getting terminated from sex offender treatment and the state withdrew the remaining allegations. (R., Vol. I, p.804.)

While the disposition on this violation was still pending, the state filed an addendum alleging additional probation violations. (R., Vol. I, pp.805-806.) Specifically, the state alleged that Critchfield violated his probation by initiating and maintaining inappropriate contact with a minor at a fitness facility, and by consuming alcohol. (Id.) The state also submitted to the court a letter from another individual who asserted that she had been the subject of unwanted romantic advances from Critchfield at another fitness facility. (R., Vol. I, pp.808-809.) Critchfield admitted violating his probation by consuming alcohol, and then, after an evidentiary hearing, the district court concluded that Critchfield additionally violated his probation by initiating and maintaining contact with the minor. (R., Vol. I, pp.824-825.) The district court revoked Critchfield's probation, imposed the original sentence, but retained jurisdiction. (R., Vol. I, pp.825-828.) At the

conclusion of the period of retained jurisdiction, the district court placed Critchfield back on supervised probation for two years. (R., Vol. I, pp.834-844.) Approximately four months later, Critchfield was ordered to serve discretionary jail time for consuming alcohol, and then again for accessing dating and gambling websites on the internet without permission. (R., Vol. I, pp.846-847.)

Approximately two months after Critchfield completed the discretionary jail time, the state filed another report of probation violation. (R., Vol. I, pp.852-858.) Specifically, the state alleged that Critchfield violated his probation by: (1) possessing an unauthorized cell phone; (2) maintaining unauthorized email, social media, and online dating accounts; (3) consuming alcohol; (4) pursuing a romantic relationship with an individual who was non-compliant with her own felony probation, despite his probation officer forbidding him from doing so; (5) pursuing a romantic relationship with an individual who had a minor child; (6) having contact with a minor child without permission; (7) failing to take a polygraph examination as requested by his probation officer; and (8) possessing sexually explicit photos and videos. (Id.) The state further noted that it appeared that Critchfield had conspired with another individual to tamper with some of the evidence supporting these violations. (R., Vol. I, p.857.) Critchfield admitted to violating his probation in all of the manners alleged by the state, with the exception of the allegation regarding the requested polygraph examinations. (R., Vol. I, p.884.) The state subsequently withdrew that allegation. (R., Vol. I, p.885; 2/5/18 Tr., p.4, L.27 – p.9, L.10.)

At the probation disposition hearing, the state called Marla Howard, the supervisor of Critchfield's probation officer, to testify. (2/22/18 Tr., p.7, L.25 – p.11, L.5.) Howard testified

that Critchfield's girlfriend's sister forwarded her sexually explicit photographs depicting Critchfield and several female individuals.[2] (2/22/18 Tr., p.11, L.18 – p.13, L.21.) One of the female individuals was identified as a [redacted] woman who, according to Howard's testimony, "would have been barely [redacted]" at the time Critchfield would later admit that he took the photos. (2/22/18 Tr., p.13, L.22 – p.15, L.6.) The photos were admitted into evidence at the hearing. (2/22/18 Tr., p.15, Ls.18-20.) Critchfield objected to Howard's testimony about the photos and their admission into evidence on the ground that they violated his right to confront adverse witnesses, but the district court denied each of these objections without comment. (2/22/18 Tr., p.12, Ls.9-15; p.13, Ls.13-15; p.15, Ls.11-20.)

At the conclusion of the hearing, the district court revoked Critchfield's probation and ordered the originally imposed sentence to be executed. (2/22/18 Tr., p.34, L.12 – p.37, L.25; R., Vol. I, pp.887-889.) The court subsequently denied, after a hearing (4/2/18 Tr.), Critchfield's I.C.R. 35(b) motion for reduction of sentence (R., Vol. I, pp.890-891; Vol. II, pp.904-905). Critchfield timely appealed. (R., Vol. I, pp.892-895.)

[2] Howard's testimony regarding how Critchfield's girlfriend's sister obtained the photos, and how many, if any, of the photos were later found on Critchfield's phone upon his arrest is somewhat unclear. (See 2/22/18 Tr., p.12, L.1 – p.15, L.3.)

ISSUES

Critchfield states the issues on appeal as:

I. Did the district court violate Mr. Critchfield's constitutional right to due process when it denied him the right to confront witnesses against him?

II. Did the district court abuse its discretion when it revoked Mr. Critchfield's probation?

III. Did the district court abuse its discretion by denying Mr. Critchfield's Rule 35 Motion?

(Appellant's brief, p.4.)

The state rephrases the issues on appeal as:

1. Has Critchfield failed to show that the district court erred by overruling his objections, made during the probation violation disposition hearing, that the probation officer's testimony violated his constitutional due process right to confront adverse witnesses?

2. Has Critchfield failed to show that the district court abused its discretion by revoking his probation and ordering the originally imposed sentence to be executed?

3. Has Critchfield failed to show that the district court abused its discretion by denying his I.C.R. 35(b) motion for reduction of sentence?

ARGUMENT

I.
Critchfield Has Failed To Show That The District Court Erred By Overruling His Objections, Made During The Probation Violation Disposition Hearing, That The Probation Officer's Testimony Violated His Constitutional Due Process Right To Confront Adverse Witnesses

A. Introduction

Critchfield contends that the district court violated his constitutional due process right to confront adverse witnesses when it overruled his objections, made at his probation violation disposition hearing, to testimony and exhibits relating to sexually explicit photographs of Critchfield and other individuals that the testifying probation officer obtained. (Appellant's brief, pp.5-11.) Critchfield's claim fails because a review of the applicable law reveals that there is no constitutional due process right to confront witnesses at a probation disposition hearing.

B. Standard Of Review

The determination whether constitutional requirements have been satisfied is subject to free review. State v. Klingler, 143 Idaho 494, 496, 148 P.3d 1242 (2006).

C. The District Court Did Not Err By Overruling Critchfield's Objections Because There Is No Constitutional Due Process Right To Confront Adverse Witnesses At Probation Violation Disposition Hearings

Parolees and probationers do not enjoy the full panoply of constitutional protections afforded criminal defendants. Morrissey v. Brewer, 408 U.S. 471, 480 (1972); State v. Scraggins, 153 Idaho 867, 871, 292 P.3d 258, 262 (2012); see also Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973). A motion to revoke probation is not a criminal prosecution. Gagnon, 411 U.S. at 782.

State v. Crowe, 131 Idaho 109, 112, 952 P.2d 1245, 1248 (1998). Consequently, the Sixth Amendment's Confrontation Clause, which grants to criminal defendants the right to confront adverse witnesses, does not apply to probationers. United States v. Hall, 419 F.3d 980, 985 (9th Cir. 2005) (citing Morrissey, 408 U.S. at 480). Likewise, the Idaho Rules of Evidence, including the rule against hearsay, do not apply to probation revocation proceedings. I.R.E. 101(e)(3); State v. Tracy, 119 Idaho 1027, 1028 n. 1, 812 P.2d 741, 742 n. 1. (1991).

However, a probationer has a protected liberty interest in continuing probation, and is therefore entitled to due process before probation may be revoked. State v. Blake, 133 Idaho 237, 243, 985 P.2d 117, 123 (1999); State v. Kelsey, 115 Idaho 311, 314, 766 P.2d 781, 784 (1988). In Morrissey, the United States Supreme Court established minimum due process requirements for parole revocation proceedings under the Fourteenth Amendment. 408 U.S. at 488-489; see also Gagnon, 411 U.S. at 782 (applying Morrissey to probationers).

In Morrissey, the parolees[3] were arrested and incarcerated for violating their parole. Morrissey, 408 U.S. at 472-473. The parolees asserted that their parole was subsequently revoked without a hearing. Id. The Eighth Circuit Court of Appeals held that due process did not require a hearing prior to the revocations. Id. at 474-475. Later, in briefing before the United States Supreme Court, the state alleged that both parolees *were*, in fact, granted hearings. Id. at 475-476. The Supreme Court however, treated the case "in the posture and on the record respondents elected

[3] The United States Supreme Court's opinion in Morrissey concerned the federal district court's habeas denials of two similarly situated habeas petitioners, Morrissey and Brewer. Morrissey, 408 U.S. at 472-473.

to rely on" in the lower courts, and presumed that neither parolee was granted a hearing. Id. at 477.

Addressing the issue of what due process a parolee was entitled to in a revocation proceeding, the Supreme Court recognized that there were two stages in such a proceeding: (1) the arrest of the parolee and preliminary hearing; and (2) "the revocation hearing," at which it is determined whether the parolee actually violated the terms of his parole, and then, what the consequence of such a violation should be. Id. at 484-488. Therefore, this "second stage" of a parole revocation proceeding, as contemplated by the Supreme Court, contained both what Idaho would identify (in a probation revocation proceeding), as the evidentiary hearing and the disposition hearing. In such a consolidated stage of the proceeding, the Court found that, among other due process rights, a parolee had the limited right to confront and cross-examine adverse witnesses – unless the hearing officer specifically found good cause for not allowing the confrontation. Id. at 488-489. The Court did not hold, or indicate, that such a right exists in a *separate* disposition hearing after the violation has been already admitted. See id.; see also Gagnon, 411 U.S. at 779-782 (holding that the due process rights identified in Morrissey apply to probationers as well as to parolees, and likewise not expressly holding or indicating that any of these identified due process rights apply in a separate disposition hearing).

In light of the factual dispute over whether the two parolees in Morrissey were granted a hearing in the parole revocation process, the Supreme Court remanded the case for a determination of these disputed facts to then be applied in the context of its holding concerning due process rights. Morrissey, 408 U.S. at 490. The Court provided that "[i]f it is determined that petitioners

admitted parole violations to the Parole Board, as respondents contend, and if those violations are found to be reasonable grounds for revoking parole under state standards, that would end the matter." Id. This is essentially the situation in the present case (except in the context of probation, rather than parole). Morrissey therefore does not support Critchfield's proposition that he had a constitutional due process right to confront adverse witnesses in his *disposition* hearing after he already admitted violating his probation.

Likewise, each of the Idaho cases which have applied Morrissey and Gagnon, and which Critchfield has relied upon on appeal, have concerned challenges regarding the constitutional due process rights of parolees and probationers to confront adverse witnesses at evidentiary hearings – as opposed to at disposition hearings.

In State v. White, 158 Idaho 827, 828-832, 353 P.3d 448, 449-453 (Ct. App. 2015), the case specifically cited by Critchfield at the disposition hearing (2/22/18 Tr., p.12, Ls.9-12), the Idaho Court of Appeals vacated the district court's probation revocation order after concluding that White's due process right to confront adverse witnesses was violated at an *evidentiary hearing* when the state relied solely upon a prior case file to prove the truth of the alleged probation violations. In State v. Farmer, 131 Idaho 803, 805-807, 964 P.2d 670, 672-674 (Ct. App. 1998), the Court of Appeals recognized Farmer's limited due process confrontation rights where the district court admitted a urinalysis report at an evidentiary hearing to prove that Farmer violated the terms of his probation.

In State v. Chapman, 111 Idaho 149, 152, 721 P.2d 1248, 1251 (1986), the Idaho Supreme Court further recognized:

> The teachings of *Morrissey*, *Gagnon*, [State v. Edelblute, 91 Idaho 469, 424 P.2d 739 (1967)], and [State v. Moore, 93 Idaho 14, 454 P.2d 51 (1969)] are clear. They unequivocably [sic] state that the *reason* for the attachment of due process protection to proceedings such as we have here is "to assure that the finding of a parole [or probation] violation will be based on *verified* facts and that the exercise of discretion will be informed by an *accurate* knowledge of the parolee's behavior."

(quoting Morrissey, 408 U.S. at 484 (emphasis in original).

In other words, the Idaho Supreme Court recognized that the due process rights recognized in Morrissey, Gagnon, and related cases are intended to assure that the *finding of a violation* in the evidentiary hearing portion of a probation revocation proceeding utilizes a process fair to probationers. These cases do not stand for the proposition that this right exists after the probationer admits to the violation, or after the court or hearing officer determines that the probation has been violated.

Critchfield has failed to show that the due process confrontation right recognized in Morrissey in the context of probation violation proceedings applies in a separate probation disposition hearing. The state notes that there is no such confrontation right at a criminal sentencing – the equivalent "penalty phase" of a criminal proceeding, where the trial court is permitted to, for example, rely upon statements made in a presentence investigation report. State v. Martinez, 154 Idaho 940, 942-947, 303 P.3d 627, 629-634 (Ct. App. 2013) (declining to recognize a confrontation right at a sentencing hearing under either the confrontation clause or the due process clause). In Martinez, the Idaho Court of Appeals recognized that, "Idaho courts, as well as nearly all other jurisdictions, have consistently held this right to confrontation does not require a criminal defendant be allowed to confront and cross-examine witnesses at sentencing

proceedings." Id. at 942-943, 303 P.3d at 629-630. The Court then described how the Idaho Supreme Court had explained its reasoning for this in Sivak v. State, 112 Idaho 197, 214-216, 731 P.2d 192, 209-211 (1986), where the defendant argued that the trial court violated his confrontation rights by considering statements of his co-defendant included in the PSI report:

> The Idaho Supreme Court rejected his claim, stating it would continue to adhere to the holding of the United State Supreme Court in Williams v. New York, 337 U.S. 241 [] (1949), the only case in which the United States Supreme Court directly addressed a defendant's right to confront witnesses during sentencing. In *Williams,* a death penalty case, the defendant argued the sentencing court's reliance on evidence from witnesses who Williams had not had the opportunity to confront violated his due process right to confrontation. The United States Supreme Court rejected this contention based, in part, on both the historical roots of allowing a sentencing judge "wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment" and the belief that modern penological policies, which favor sentencing based on the maximum amount of information about the defendant, would be thwarted by restrictive procedural and evidentiary rules. The Court also explained that requiring "open court testimony with cross-examination" would be "totally impractical if not impossible" in the sentencing context. *Accord Williams v. Oklahoma,* 358 U.S. 576, 584 [] (1959) ("[O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court....").

Martinez, 154 Idaho at 943, 300 P.3d at 630 (some citations omitted).[4]

[4] In Martinez, the Idaho Court of Appeals, noting that the federal appellate courts have uniformly held similarly, also rejected Martinez's argument that Crawford v. Washington, 541 U.S. 36 (2004) extended the protections of the confrontation clause to sentencing. Martinez, 154 Idaho at 943-945, 303 P.3d at 630-632. Additionally, the Court of Appeals rejected Martinez's argument that "there must be a due process right to confrontation at sentencing in Idaho because it is well-settled that due process protections apply to sentencing proceedings." Id. at 945-947, 303 P.3d at 632-634.

The same rationale is true in probation disposition hearings. In fact, it is reasonable to presume that a probationer's due process rights in a disposition hearing are even more limited than those of a defendant in a criminal sentencing hearing in light of the well-established principle that a probationer does not enjoy the same rights as a criminal defendant. See Morrissey, 408 U.S. at 480; Scraggins, 153 Idaho at 871, 292 P.3d at 262.

Because Critchfield has failed to prove the existence of a due process right in this context, he cannot show that the district court violated such a right. See Scraggins, 153 Idaho at 870-872, 292 P.3d at 261-263 (holding that probationer failed to prove a due process claim in a probation revocation proceeding where neither Morrissey, Gagnon, nor any other binding case established any such right, and quoting with approval the state's argument that "fundamental fairness…is not a freestanding claim that allows a defendant to avoid proving a violation of a recognized due process right.")

Critchfield was entitled to an evidentiary hearing at which he possessed the limited due process right to confront adverse witnesses. However, he waived that right when he admitted to violating his probation, just as a defendant waives his or her right to confront witnesses by pleading guilty. See State v. Kelchner, 130 Idaho 37, 39, 936 P.2d 680, 682 (1997) ("The entry of a valid guilty plea ordinarily constitutes a waiver of all non-jurisdictional defects.") (citations omitted).)

Because he possessed no such right at the probation violation disposition hearing, Critchfield has failed to demonstrate that the district court violated his due process rights when it overruled his objections to testimony and exhibits relating to sexually explicit photographs that

were obtained by the testifying probation officer. Therefore, this Court must affirm the district court's order revoking Critchfield's probation.

D. Any Error Was Harmless

Even to the extent that the district court erred by overruling Critchfield's objections to the probationer officer's testimony and the submitted exhibits, any such error was harmless. See I.C.R. 52 ("Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded."); see also Chapman v. California, 386 U.S. 18, 24 (1967) (objected-to constitutional error may be held harmless if the reviewing court can declare a belief that the error was harmless beyond a reasonable doubt).

The court's rationale for revoking probation – which it explained in detail at the conclusion of the disposition hearing – was clearly not based upon the photographs admitted at the hearing or Howard's testimony. The court did not mention the photographs or Howard's testimony in imposing its judgment. (See 2/22/18 Tr., p.34, L.12 – p.37, L.25.) The court's revocation decision was based upon Critchfield's failure to comply with the terms of probation, as evidenced by his numerous probation violations. (Id.) The court stated, "[i]n this case, based on your own admissions, you have not succeeded on probation so I no longer feel and I don't think the evidence supports a finding that probation is appropriate in your case anymore." (2/22/18 Tr., p.36, Ls.5-8.) In declining Critchfield's request to simply commute the sentence and close the case out, the court stated, "[i]f I terminate the case, I close it out when a person hasn't successfully completed probation, the Court is basically rewarding someone for not successfully completing probation so

I don't think that is a very viable option." (2/22/18 Tr., p.36, Ls.15-20.) In light of the district court's comments and Critchfield's documented poor performance on probation (as summarized in the Statement of Facts and Course of Proceedings section of this brief), it is difficult to envision a scenario in which Critchfield was placed back on probation, or in which the case was simply closed, had Howard had not testified at the disposition hearing. This is particularly true considering Howard's unclear testimony regarding how exactly the photographs came into Critchfield's girlfriend's sister's possession.

Because it is clear, beyond a reasonable doubt, that the district court would have revoked Critchfield's probation and imposed the original sentence regardless of whether Howard testified at the disposition hearing, any error in the district court's decision to overrule Critchfield's objections to Howard's testimony and to the admission of the photograph was harmless.

II.
Critchfield Has Failed To Show That The District Court Abused Its Discretion By Revoking His Probation

A. Introduction

Critchfield contends that the district court abused its discretion by revoking his probation and executing the sentence previously imposed upon his conviction for felony injury to child. (Appellant's brief, pp.11-14.) However, a review of the record and the applicable law reveals that Critchfield has failed to demonstrate that the district court abused its discretion in light of Critchfield's repeated failure to abide by the terms of probation, even after obtaining a second opportunity at probation after a period of retained jurisdiction.

B. Standard Of Review

A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. State v. Beckett, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992). In reviewing the propriety of a probation revocation, the focus of the inquiry is the conduct underlying the trial court's decision to revoke probation. State v. Morgan, 153 Idaho 618, 621, 288 P.3d 835, 838 (Ct. App. 2012). Thus, this Court will consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal. Id.

C. The District Court Acted Well Within Its Discretion To Revoke Critchfield's Probation

A trial court has discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2603, 20-222; Beckett, 122 Idaho at 325, 834 P.2d at 327; State v. Adams, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989); State v. Hass, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct. App. 1988). 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. Upton, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); Beckett, 122 Idaho at 325, 834 P.2d at 327; Hass, 114 Idaho at 558, 758 P.2d at 717. The court may, after a probation violation has been established, order that the suspended sentence be executed or, in the alternative, the court is authorized under I.C.R. 35 to reduce the sentence. Beckett, 122 Idaho at 325, 834 P.2d at 327; State v. Marks, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989).

In this case, consistent with the recommendation of Critchfield's current and former supervising probation officers, the state recommended that the district court revoke Critchfield's probation and impose its original sentence. (2/22/18 Tr., p.26, L.15 – p.29, L.22.) The state's recommendation was based upon Critchfield's poor performance on probation. (Id.) Critchfield, through counsel, recommended that the district court simply "close this case." (2/22/18 Tr., p.30, L.25.)

Before entering judgment, the district court recited the goals of sentencing and stated that it had reviewed the history of the underlying case. (2/22/18 Tr., p.34, Ls.12-25.) The court then methodically and rationally described its options and decision-making process. (2/22/18 Tr., p.36, L.9 – p.37, L.14.) The court stated that it could simply close out the case, but that it would then be "basically rewarding someone for not successfully completing probation," and it did not "think that is a very viable option." (2/22/18 Tr., p.36, Ls.15-20.) The court next stated that it could impose the sentence and retain jurisdiction, but that this would not be appropriate either because "one of the purposes [of the retained jurisdiction program] is to determine whether a person is amendable to probation," and Critchfield has "demonstrated an inability to comply with the probation." (2/22/18 Tr., p.36, L.21 – p.37, L.2.) The court also stated that it could impose a period of jail and then terminate probation, but that this likewise would not be appropriate "given the nature of the offense and the nature of the violations here." (2/22/18 Tr., p.37, Ls.3-8.) Therefore, the court elected to revoke Critchfield's probation and impose the original sentence. (2/22/18 Tr., p.37, Ls.9-14.)

The district court's determination is supported by the record. As summarized in some detail in the Statement of Facts and Course of Proceedings section of this brief, Critchfield was consistently unable to abide by the terms of his probation, even after he was granted a second chance to do so after the period of retained jurisdiction. In all, Critchfield admitted to seven probation violations, and the district court found an eighth after an evidentiary hearing. (R., Vol. I, pp.804, 824-825, 884-885.) Several other probation violation allegations were withdrawn after Critchfield's admissions. (Id.) Perhaps most egregiously, Critchfield was removed from sex offender treatment after harassing the secretary at the treatment facility[5] (R., Vol I, pp.786, 789-790), and then made advances towards a minor at a fitness facility (R., Vol. I, pp.805, 824-825). While Critchfield, through counsel, attempted to portray himself at the disposition hearing as a "gregarious, flirty guy" who "wants to talk to women" (2/22/18 Tr., p.31, Ls.15-17), these instances demonstrate an absurd lack of appropriate boundaries and complete inability to conform his behavior in a manner which does not endanger the community. In light of his performance on probation, and the fact that Critchfield requested not that he be placed back upon probation, but simply that the case be closed, the district court acted well within its discretion in making its disposition determination and denying Critchfield's request.

[5] Critchfield admitted to being removed from sex offender treatment, but denied that this removal was due to harassment of the secretary. (R., pp.786-787, 804.) The state withdrew the latter allegation after Critchfield admitted to the former allegation. (R., p.804.)

Critchfield has failed to show that the district court abused its discretion by revoking his probation and imposing the original sentence. This Court must therefore affirm the district court's order.

III.
Critchfield Failed To Show That The District Court Abused Its Discretion By Denying His I.C.R. 35(b) Motion For Reduction Of Sentence

A. Introduction

Critchfield contends that the district court abused its discretion by denying his I.C.R. 35(b) motion for reduction of sentence. (Appellant's brief, pp.14-15.) However, a review of Critchfield's motion and the transcript of the hearing on the motion reveals that Critchfield failed to set forth any information that required the district court to reduce the imposed sentence. Critchfield therefore failed to demonstrate that the district court erred in denying his motion.

B. Standard Of Review

If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and the Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Critchfield must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id.

C. The District Court Acted Well Within Its Discretion To Deny Critchfield's I.C.R. 35(b) Motion For Reduction Of Sentence

Idaho Criminal Rule 35(b) permits the district court to, upon motion from the defendant, "reduce a sentence on revocation of probation…within 14 days after the filing of the order revoking probation." An appellate court applies the well-established standards governing whether a sentence is excessive to a district court's refusal to apply Rule 35 and reduce a previously imposed sentence at the time of a probation revocation. See State v. Hanington, 148 Idaho 26, 27, 218 P.3d 5, 7 (Ct. App. 2009).

Critchfield filed his I.C.R. 35(b) motion for reduction of sentence four days after the district court revoked his probation. (R., Vol. I, pp.890-891.) The motion did not contain any information or argument regarding why the court should reduce his sentence. (See id.) The district court granted Critchfield a hearing on the motion, at which Critchfield appeared by telephone. (See generally 4/2/18 Tr.) At the time of the hearing, Critchfield had been at the correctional facility in Orofino for one week and had not yet met with his case manager to initiate any treatment plans. (4/2/18 Tr., p.46, L.18 – p.47, L.4.) The only information Critchfield provided to the court relevant to his request for a reduced sentence was that if he was released, he could probably obtain employment at the Idaho Fence Company; and that he planned to get into an alcohol treatment program, continue his counseling, and take probation more seriously. (4/2/18 Tr., p.47, Ls.7-25.) The state requested that the court deny the motion. (4/2/18 Tr., p.48, Ls.15-17.)

The district court denied Critchfield's I.C.R. 35(b) motion. (4/2/18 Tr., p.49, L.1 – p.50, L.10; R. Vol. II, pp.904-905.) The court expressly recognized its discretionary authority to grant

or deny the motion, reviewed the history of the case, and summarized the information provided by Critchfield at the hearing. (4/2/18 Tr., p.49, L.5 – p.50, L.8.) Ultimately, the court cited Critchfield's failure to comply with the terms of his probation and concluded that Critchfield failed to provide any information which justified modifying the previously-imposed sentence. (4/2/18 Tr., p.49, L.17 – p.50, L.10.)

A review of the record supports the district court's determination. The arguments made and information provided by Critchfield about potential employment and his alcoholism were similar to those provided at his disposition hearing and in the addendum to his presentence investigation report prepared after he completed his rider. (See PSI, pp.136-151; 2/22/18 Tr., p.29, L.24 – p.34, L.11.) Because Critchfield provided no new information, the district court's decision to deny the I.C.R. 35(b) motion was justified for the same reasons, as discussed above, that it based its initial disposition determination on.

The district court did not abuse its discretion by denying Critchfield's I.C.R. 35(b) motion to reduce his sentence under the circumstances of this case. This Court must therefore affirm the district court's order denying Critchfield's motion.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order revoking Critchfield's probation and ordering the originally imposed sentence to be executed, and its order denying Critchfield's I.C.R. 35(b) motion for reduction of sentence.

DATED this 8th day of October, 2019.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of October, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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MWO/dd