

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 40797

STATE OF IDAHO,)	2014 Unpublished Opinion No. 578
)	
Plaintiff-Respondent,)	Filed: June 23, 2014
)	
v.)	Stephen W. Kenyon, Clerk
)	
JEREMIAH DALE SPICER,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Order revoking probation and executing underlying sentence, affirmed.

Sara B. Thomas, State Appellate Public Defender; Brian R. Dickson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent.

Before GUTIERREZ, Chief Judge; LANSING, Judge;
and GRATTON, Judge

PER CURIAM

Jeremiah Dale Spicer pled guilty to rape, Idaho Code § 18-6101(1). The district court sentenced Spicer to a unified term of fifteen years, with six years determinate, but suspended the sentence and placed Spicer on probation. Subsequently, Spicer admitted to violating terms of his probation. The district court revoked probation, executed the underlying sentence, and retained jurisdiction. Upon review of Spicer’s period of retained jurisdiction, the district court suspended the sentence and placed Spicer back on probation. Spicer later admitted to violating terms of his probation again. The district court consequently revoked probation and executed the underlying sentence without reduction.

After filing this appeal, and before assignment to this Court, Spicer filed a motion to augment the record with additional transcripts. The Idaho Supreme Court entered an order

denying Spicer's motion. Spicer then filed a renewed motion to augment the record with the denied transcripts, which the Idaho Supreme Court also denied.

On appeal Spicer argues that the Idaho Supreme Court denied him due process, equal protection, and effective assistance of counsel by denying his motions to augment the record. Spicer also contends that the district court abused its discretion by revoking probation and executing his sentence without reduction.

A. Denial of Motions to Augment Record

Spicer asks this Court to hold that the Idaho Supreme Court deprived him of due process,¹ equal protection, and effective assistance of counsel when it denied his motions to augment the record. We do not, however, have the authority to review and, in effect, reverse an Idaho Supreme Court decision on a motion made prior to assignment of the case to this Court on the ground that the Supreme Court decision was contrary to the state or federal constitutions or other law. *See State v. Morgan*, 153 Idaho 618, 620, 288 P.3d 835, 837 (Ct. App. 2012). Such an undertaking would be tantamount to the Court of Appeals entertaining an appeal from an Idaho Supreme Court decision and is plainly beyond the purview of this Court. *Id.* If a motion is renewed by the movant and new information or a new or expanded basis for the motion is presented to this Court that was not presented to the Supreme Court, we deem it within the authority of this Court to evaluate and rule on the renewed motion in the exercise of our responsibility to address all aspects of an appeal from the time of assignment to this Court. *Id.* Such may occur if the appellant's or respondent's briefs have refined, clarified, or expanded issues on appeal in such a way as to demonstrate the need for additional records or transcripts, or where new evidence is presented to support a renewed motion. *Id.*

¹ For the first time on appeal, Spicer argues in his reply brief that the order assigning his case to the Court of Appeals, following the Idaho Supreme Court's denial of his motions to augment the record, violated his state and federal due process rights. Specifically, Spicer contends that the Idaho Supreme Court did not afford him a meaningful opportunity to be heard when it "assign[ed] this case to the Court of Appeals knowing it was without authority to resolve the issues presented." This Court will not consider arguments raised for the first time in the appellant's reply brief. *State v. Raudebaugh*, 124 Idaho 758, 763, 864 P.2d 596, 601 (1993). A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief. *See Suits v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

Spicer has not filed with this Court a renewed motion to augment the record or presented to this Court in his briefing any significant new facts or a new justification for augmentation beyond that already advanced in his motion to the Supreme Court. In essence, Spicer asks us to determine that the Idaho Supreme Court violated constitutional law by denying his motions.

We adhere to our conclusion in *Morgan* that reviewing the denial of a motion to augment the record by the Supreme Court is beyond the scope of our authority. If a party files a renewed motion after the case assignment to this Court and presents new information or justification for the motion, we have the authority to rule on the motion. Spicer had an opportunity to present his constitutional arguments to the Supreme Court and that Court denied his motions. He has no right to appeal those denials to the Idaho Court of Appeals, and we have no authority to consider such an appeal.

B. Revocation of Probation and Review of Sentence

It is within the trial court's discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2603, 20-222; *State v. Beckett*, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); *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 Idaho Criminal Rule 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). A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. *Beckett*, 122 Idaho at 325, 834 P.2d at 327. 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. *Morgan*, 153 Idaho at 621, 288 P.3d at 838. Thus, this Court will consider the elements of the record before the trial court relevant to the revocation of probation issues that are properly made part of the record on appeal. *Id.*

Sentencing is also a matter for the trial court's discretion. Both our standard of review and the factors to be considered in evaluating the reasonableness of a sentence are well

established and need not be repeated here. See *State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

When we review a sentence that is ordered into execution following a period of probation, we examine the entire record encompassing events before and after the original judgment. *State v. Hanington*, 148 Idaho 26, 29, 218 P.3d 5, 8 (Ct. App. 2009). We base our review upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of the probation. *Id.* Thus, this Court will consider the elements of the record before the trial court that are properly made part of the record on appeal and are relevant to the defendant's contention that the trial court should have reduced the sentence sua sponte upon revocation of probation. *Morgan*, 153 Idaho at 621, 288 P.3d at 838.

Applying the foregoing standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion in revoking probation. Assuming Spicer can challenge the district court's failure to sua sponte reduce his sentence, we also conclude that the district court did not err in ordering execution of Spicer's underlying sentence without reduction. Therefore, the order revoking probation and executing Spicer's underlying sentence is affirmed.