

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 46791/46792

STATE OF IDAHO,)
)
) **Filed: November 1, 2019**
)
) **Plaintiff-Respondent,**)
) **Karel A. Lehrman, Clerk**
)
) **v.**)
) **THIS IS AN UNPUBLISHED**
) **TIMOTHY GARDNER KELLY, JR.,**) **OPINION AND SHALL NOT**
) **BE CITED AS AUTHORITY**
) **Defendant-Appellant.**)
)
)

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Lynn G. Norton, District Judge.

Order revoking probation and directing execution of Kelly's previously suspended sentences, judgment of conviction, and orders denying Idaho Criminal Rule 35 motions, affirmed.

Eric D. Fredericksen, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

Before GRATTON, Chief Judge; HUSKEY, Judge;
and LORELLO, Judge

PER CURIAM

Timothy Gardner Kelly, Jr. pleaded guilty to burglary, Idaho Code § 18-1401, and grand theft, I.C. §§ 18-2403(1), -2407(1)(b), -2409. The district court sentenced Kelly to concurrent, unified sentences of eight years, with four years determinate, suspended the sentences, and placed Kelly on probation. Subsequently, Kelly admitted to violating the terms of the probation and he pleaded guilty to a new charge of possession of a controlled substance, I.C. § 37-2732(c). The district court consequently revoked probation and ordered execution of the original sentences. On the new possession charge, the district court imposed a concurrent, unified seven-

year sentence, with three years determinate, to run concurrently with his first sentences. Kelly filed an Idaho Criminal Rule 35 motion in each case, which the district court denied. Kelly appeals, contending the district court abused its discretion by failing to allow Kelly a second chance at probation for the burglary and grand theft case, by failing to allow Kelly probation for his possession of controlled substance charge, and by denying his Idaho Criminal Rule 35 motions.

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 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). The court may also order a period of retained jurisdiction. I.C. § 19-2601. 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. *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.* Applying the foregoing standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion either in revoking probation for the burglary and grand theft case.

Next, sentencing is a matter for the trial court's discretion. Both our standard of review and the factors to be considered in evaluating the reasonableness of the 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).

That discretion includes the trial court's decision regarding whether a defendant should be placed on probation and whether to retain jurisdiction. I.C. § 19-2601(3); *State v. Reber*, 138 Idaho 275, 278, 61 P.3d 632, 635 (Ct. App. 2002); *State v. Lee*, 117 Idaho 203, 205-06, 786 P.2d 596-97 (Ct. App. 1990). The record in this case shows that the district court properly considered the information before it and determined that probation was not appropriate. We hold that Kelly has failed to show that the district court abused its discretion when imposing sentence for the possession of a controlled substance case.

Last, we review whether the district court erred in denying Kelly's I.C.R. 35 motions. A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting an I.C.R. 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). Upon review of the record, including any new information submitted with Kelly's Rule 35 motions, we conclude no abuse of discretion has been shown.

Therefore, the order revoking probation and directing execution of Kelly's previously suspended sentence, the judgment of conviction, and the orders denying Kelly's I.C.R. 35 motions are affirmed.