

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 47461/47462

STATE OF IDAHO, )  
 )  
 ) **Filed: June 2, 2020**  
 )  
 ) **Plaintiff-Respondent,** )  
 ) **Karel A. Lehrman, Clerk**  
 )  
 ) **v.** )  
 ) **THIS IS AN UNPUBLISHED**  
 ) **KANE LEE SIMONS,** ) **OPINION AND SHALL NOT**  
 ) **BE CITED AS AUTHORITY**  
 ) **Defendant-Appellant.** )  
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Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Rick Carnaroli, District Judge.

Order revoking probation and requiring execution of unified four-year sentence with two-year determinate term for burglary, affirmed; judgment of conviction and consecutive unified five-year sentence with three-year determinate term for accessory to aggravated battery, affirmed; I.C.R. 35 motions for reduction of sentence, granted in part, affirmed.

Eric D. Fredericksen, State Appellate Public Defender; Jenny C. Swinford, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kacey L. Jones, Deputy Attorney General, Boise, for respondent.

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Before GRATTON, Judge; LORELLO, Judge;  
and BRAILSFORD, Judge

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PER CURIAM

Kane Lee Simons pled guilty to burglary in docket number 47461. I.C. § 18-1401. The district court sentenced Simons to a unified term of four years with two years determinate, suspended the sentence and placed Simons on probation for a period of three years. While on probation, Simons was charged with conspiracy to commit robbery in docket number 47462. The district court addressed the probation violation and the new felony case together. Simons pled guilty in docket number 47462 to an amended charge of accessory to aggravated battery,

I.C. § 18-907, and Simons admitted to violating probation. The district court revoked Simons' probation and executed the underlying sentence; the district court sentenced Simons to a unified sentence of five years with three years determinate in docket number 47462 to run consecutively with the sentence in docket number 47461.

Simons filed Idaho Criminal Rule 35 motions for reduction of sentence in each case. In the burglary case, Simons requested the district court retain jurisdiction for one year. In the accessory case, Simons requested that the district court retain jurisdiction, reduce the determinate time from three years to one year, and run the sentence concurrently with his burglary case. The district court granted Simons' motions, in part, by retaining jurisdiction in both cases. The district court declined to reduce the amount of determinate time on Simons' accessory case and declined to run the sentences concurrently. Simons appeals, contending that the district court abused its discretion in its sentencing, probation revocation, and Rule 35 decisions.

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.*

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 will 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 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.

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 a Rule 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 Simons' Rule 35 motion, we conclude no abuse of discretion has been shown. Therefore, the district court's orders granting, in part, Simons' Rule 35 motions are affirmed.

Applying the foregoing standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion by revoking probation or in ordering execution of Simons' sentence in docket number 47461, imposing the consecutive sentence in docket number 47462, or in partially denying Simons' Rule 35 motions in both cases. Therefore, the order revoking probation and directing execution of Simons' previously suspended sentence is

affirmed; Simons' judgment of conviction and sentence for accessory to aggravated battery is affirmed; and, the order granting, in part, Simons' Rule 35 motions are affirmed.