

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 47626/47627

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) **Filed: August 19, 2020**
)
 v.) **Melanie Gagnepain, Clerk**
)
 MICHAEL LYNN GIBSON,) **THIS IS AN UNPUBLISHED**
) **OPINION AND SHALL NOT**
) **BE CITED AS AUTHORITY**
 Defendant-Appellant.)
)
)

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. Roger B. Harris, District Judge.

Judgment of conviction and unified sentence of nine years with five years determinate for possession or manufacture of drug paraphernalia with intent to deliver, affirmed; appeal from judgment of conviction and concurrent unified sentence of seven years with three years determinate for possession of methamphetamine, dismissed.

Eric D. Fredericksen, State Appellate Public Defender; R. Jonathan Shirts, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jeff Nye, Deputy Attorney General, Boise, for respondent.

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

PER CURIAM

In Docket No. 47626, Michael Lynn Gibson entered an *Alford*¹ plea to possession or manufacture of drug paraphernalia with intent to deliver, Idaho Code § 37-2734B. In exchange for his guilty plea, a persistent violator enhancement was dismissed. The district court imposed a

¹ See *North Carolina v. Alford*, 400 U.S. 25 (1970).

unified sentence of nine years with five years determinate, suspended the sentence, and placed Gibson on probation.

Subsequently, Gibson violated the terms of his probation by incurring a charge for possession of methamphetamine, I.C. § 37-2732(c)(1), in Docket No. 47627. Gibson pled guilty, and the district court imposed a unified sentence of seven years with three years determinate, to run concurrently with his sentence in Docket No. 47626. The district court revoked probation in Docket No. 47626 and ordered execution of the underlying sentence. Gibson appeals, contending that the district court erred in failing to retain jurisdiction in both cases.

In Docket No. 47627, Gibson signed a plea agreement waiving his right to appeal “any issues, including all matters involving the plea and the sentence.” The State argues Gibson’s appeal in Docket No. 47627 should be dismissed as a result of this waiver. We agree.

A defendant may waive his right to appeal as a term of a plea agreement. *State v. Straub*, 153 Idaho 882, 885, 292 P.3d 273, 276 (2013). A waiver of the right to appeal included as a term of a plea agreement is enforceable if it was voluntarily, knowingly, and intelligently made. *State v. Cope*, 142 Idaho 492, 496, 129 P.3d 1241, 1245 (2006). On appeal, Gibson does not challenge the waiver’s enforceability; has not presented any argument as to why this Court should deem the waiver invalid or unenforceable; and does not claim the plea agreement was not voluntarily, knowingly, and intelligently. Accordingly, we enforce the waiver and dismiss Gibson’s appeal in Docket No. 47627.

In Docket No. 47626, Gibson also signed a plea agreement waiving his right to appeal “any issues, including all matters involving the plea and the sentence.” The State concedes, however, that this waiver is unenforceable. Thus, we address the merits of the issue Gibson properly raises on appeal in Docket No. 47626.

In that case, Gibson identifies as the sole issue on appeal that the district court abused its discretion by failing to retain jurisdiction.² Sentencing is a matter for the trial court’s discretion.

² In his brief, Gibson references the standard of review for an excessive sentence and also argues the district court failed to adequately consider mitigating evidence when imposing Gibson’s sentence in Docket No. 47627. To the extent Gibson was attempting to challenge either of his sentences as excessive, we decline to consider this argument with regard to either case because Gibson waived his right to appeal his sentence in Docket No. 47627 and because Gibson did not include the issue in his statements of issues as Idaho Appellate Rule 35(a)(4) requires. *See State v. Crowe*, 131 Idaho 109, 111, 952 P.2d 1245, 1247 (1998) (ruling failure to include issue in statement of issues eliminates consideration of issue on appeal).

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), (4); *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 594, 596-97 (Ct. App. 1990). The record in this case shows that the district court properly considered the information before it and determined that retaining jurisdiction was not appropriate.

Applying these standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion. Therefore, Gibson's judgment of conviction and sentence in Docket No. 47626 are affirmed, and his appeal from the judgment of conviction and sentence in Docket No. 47627 is dismissed.