

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 47901

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| STATE OF IDAHO, |) | |
| |) | Filed: March 18, 2021 |
| Plaintiff-Respondent, |) | |
| |) | Melanie Gagnepain, Clerk |
| v. |) | |
| |) | THIS IS AN UNPUBLISHED |
| JEREMY J. KITER, |) | OPINION AND SHALL NOT |
| |) | BE CITED AS AUTHORITY |
| Defendant-Appellant. |) | |
| _____ |) | |

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Franklin County. Hon. Mitchell W. Brown, District Judge.

Order revoking probation, affirmed.

Eric D. Fredericksen, State Appellate Public Defender; Jacob L. Westerfield, Deputy Appellate Public Defender, Boise, for appellant.

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

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

PER CURIAM

Jeremy J. Kiter pleaded guilty to burglary, Idaho Code § 18-1401, and the district court imposed a sentence of five years, with two years determinate, suspended the sentence, and placed Kiter on probation. Approximately a year later, Kiter admitted to violating the terms of his probation, and the district court revoked probation and retained jurisdiction. After Kiter completed the period of retained jurisdiction, the district court suspended the sentence and placed Kiter on probation. Subsequently, Kiter admitted to violating the terms of his probation, and the district court continued him on probation. Nearly five years later, Kiter again violated some of the terms of his probation. Kiter admitted the allegations. At the disposition hearing, Kiter’s counsel asked the district court to terminate Kiter’s probation and reduce the determinate portion of his sentence

to the amount of time that he had already served. The State recommended the district court revoke probation. The district court revoked probation and ordered execution of the original sentence. Kiter timely appeals from the order revoking probation and ordering execution of the suspended sentence.

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. *State v. Beckett*, 122 Idaho, 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); *State v. Marks*, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989). 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 defendant's motion for reduction of sentence under Idaho Criminal Rule 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).

Kiter does not challenge the revocation of his probation; rather, Kiter asserts only that the district court abused its discretion by not reducing the determinate portion of his sentence when it revoked probation. Kiter asserts his request for a reduced sentence was an oral I.C.R. 35 motion. The State disagrees, arguing no such motion was made and the issue is not preserved for appeal.

Considering the arguments, applying the foregoing standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion in ordering execution of Kiter's previously suspended sentence without modification either pursuant to I.C.R. 35 or simply as a result of the probation revocation. Therefore, the order revoking probation and directing execution of Kiter's previously suspended sentence is affirmed.

