

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 49323/49324/49325

STATE OF IDAHO,)
) Filed: September 30, 2022
Plaintiff-Respondent,)
) Melanie Gagnepain, Clerk
v.)
) THIS IS AN UNPUBLISHED
MATTHEW STEPHEN GERVAIS,) OPINION AND SHALL NOT
) BE CITED AS AUTHORITY
Defendant-Appellant.)
_____)

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John T. Mitchell, District Judge.

Order revoking probation, affirmed; orders denying I.C.R. 35 motions for reduction of sentences, affirmed.

Eric D. Fredericksen, State Appellate Public Defender; Kiley A. Heffner, Deputy Appellate Public Defender, Boise, for appellant.

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

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

PER CURIAM

In Docket No. 49323, Matthew Stephen Gervais pled guilty to possession of a controlled substance, Idaho Code § 37-2732(c)(1), and the State dismissed other charges. The district court sentenced Gervais to a unified term of seven years with two years determinate and retained jurisdiction. Following the period of retained jurisdiction, the district court suspended the sentence and placed Gervais on probation for a period of three years.

In Docket No. 49324, Gervais pled guilty to possession of a controlled substance, I.C. 37-2732(c)(1), admitted to a probation violation from Docket No. 49323, and the State dismissed other charges. The district court revoked Gervais’s probation in Docket No. 49323 and retained jurisdiction. Gervais was sentenced in Docket No. 49324 to a unified term of seven years with

three years determinate, to run consecutive to the sentence in Docket No. 49323, and the district court retained jurisdiction. After Gervais's second period of retained jurisdiction, the district court placed Gervais on probation for three years.

Subsequently, Gervais admitted to violating his probation. The district court revoked probation and again placed Gervais on retained jurisdiction in Docket Nos. 49323 and 49324. Following the third period of retained jurisdiction, the district court placed Gervais on probation for a period of three years in both cases.

In Docket No. 49325, Gervais pled guilty to possession of a controlled substance and admitted to violating his probation in his other cases. The district court sentenced Gervais to a unified term of seven years with three years determinate, ordered the sentence to run consecutive to the sentences in 49323 and 49324, and placed Gervais on probation in all three cases.

Gervais admitted to violating his probations on two additional occasions and the district court each time retained jurisdiction. Following each period of retained jurisdiction, the district court placed Gervais on probation for three years.

The State filed another motion for probation violation after Gervais was discharged from drug court. Gervais admitted to violating his probations, and the district court revoked his probations. The district court ordered Gervais's sentences executed in all three cases: a unified term of seven years with two years determinate and credit for time served in Docket No. 49323; a consecutive seven-year sentence with three years determinate and credit for time served in Docket No. 49324; and, a consecutive seven-year sentence with three years determinate and credit for time served in Docket No. 49325.

In Docket Nos. 49324 and 49325 Gervais filed Idaho Criminal Rule 35 motions asking for reduced sentences or to make his sentences concurrent. The district court denied the motions. Gervais timely appeals asserting that the district court abused its discretion by declining to make his sentence in Docket No. 49323 concurrent with the sentences in Docket Nos. 49324 and 49325. Gervais also asserts that the district court abused its discretion by denying his Rule 35 motions in Docket Nos. 49324 and 49325, although he is mindful that he did not supply any new or additional information in support of his 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(4). 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 these standards, we cannot say that the district court abused its discretion by revoking Gervais's probations.

Next, we review whether the district court erred in denying Gervais's Rule 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 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). An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information. *Id.* Because no new information in support of Gervais's Rule 35 motions was presented, the district court did not abuse its discretion.

Therefore, and the district court's orders revoking Gervais's probation and ordering his sentences executed and the orders denying Gervais's Rule 35 motions, are affirmed.