

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37510

STATE OF IDAHO,)	2011 Unpublished Opinion No. 475
)	
Plaintiff-Respondent,)	Filed: May 13, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
RICHARD MARIO DAVID FRASER,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Lansing L. Haynes, District Judge.

Order revoking probation and executing previously suspended sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Spencer J. Hahn, Deputy Appellate Public Defender, Boise, for appellant. Spencer J. Hahn argued.

Hon. Lawrence G. Wasden, Attorney General; Elizabeth A. Koeckeritz, Deputy Attorney General, Boise, for respondent. Elizabeth A. Koeckeritz argued.

MELANSON, Judge

Richard Mario David Fraser appeals from the district court’s order revoking his probation and executing his previously suspended sentence. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

In 2008, Fraser pled guilty to felony driving under the influence (DUI) and was sentenced to a unified term of seven years, with a minimum period of confinement of two years. Fraser’s sentence was suspended and he was placed on probation. In 2009, a probation violation report was filed by the state alleging, among other things, that Fraser had been convicted of a new DUI in Washington and that he had consumed alcohol in connection with that DUI. The state later filed a probation violation addendum report which alleged that Fraser had violated his probation in Idaho by committing battery and consuming alcohol. Evidentiary hearings were held on the alleged probation violations. At the initial hearing, the state moved to admit its Exhibit 2 which

included a police report concerning the Washington DUI and a copy of the Washington judgment of conviction. Fraser objected to the admission of Exhibit 2 based on a lack of foundation and hearsay. The district court overruled the objection and admitted Exhibit 2 into evidence. Thereafter, the evidentiary hearing was continued.

At a subsequent hearing, the state moved to admit Exhibit 1, which contained a police report describing an allegation of battery against Fraser, a summons and criminal complaint charging Fraser with battery, and a bench warrant issued for Fraser's failure to appear at his arraignment. Fraser objected to the admission of Exhibit 1 asserting that, because the police report contained hearsay, its admission violated his due process right to confront and cross-examine adverse witnesses. The district court overruled Fraser's objection, admitted Exhibit 1 into evidence, and again continued the hearing. Fraser filed a motion to reconsider the district court's admission of Exhibit 1. At the continued probation violation hearing, the district court affirmed its decision to admit Exhibit 1, finding that there was good cause to deny Fraser his right to confrontation.

Ultimately, the district court found that Fraser had violated his probation based on the Washington conviction for DUI, his consumption of alcohol in relation to that DUI, and the commission of the battery. The district court found that Fraser did not violate his probation by consuming alcohol in relation to the battery charge. The district court revoked Fraser's probation and ordered his sentence executed without modification. Fraser appeals.

II.

ANALYSIS

Fraser argues that the district court violated his procedural due process rights by denying him the right to confrontation. Specifically, Fraser argues that the district court violated his confrontation right by admitting state's Exhibits 1 and 2, which contained hearsay and which formed the basis for the district court's finding that he violated his probation.

In analyzing Fraser's claims, it is important to note that probation revocation proceedings are altogether different from an actual criminal trial. *State v. Murillo*, 135 Idaho 811, 813, 25 P.3d 124, 126 (Ct. App. 2001); *State v. Nez*, 130 Idaho 950, 953, 950 P.2d 1289, 1292 (Ct. App. 1997). Probationers do not enjoy the full panoply of constitutional protections afforded to criminal defendants. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). A probation violation need not be proven beyond a reasonable doubt. *Murillo*, 135 Idaho at 813, 25 P.3d at 126; *State*

v. Roy, 113 Idaho 388, 390, 744 P.2d 116, 118 (Ct. App. 1987). Likewise, the Idaho Rules of Evidence do not apply in probation revocation proceedings. I.R.E. 101(e)(3); *State v. Peters*, 119 Idaho 382, 382, 807 P.2d 61, 61 (1991); *Murillo*, 135 Idaho at 813, 25 P.3d at 126. Unlike criminal prosecutions, revocation of probation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of certain restrictions. *Morrissey*, 408 U.S. at 480. Consequently, the Confrontation Clause of the Sixth Amendment, which grants a criminal defendant the right to confront adverse witnesses, does not apply to probationers. *State v. Rose*, 144 Idaho 762, 765, 171 P.3d 253, 256 (2007).

Probationers are entitled, however, to minimum due process rights under the Fourteenth Amendment. *Morrissey*, 408 U.S. at 482. *See also Gagon v. Scarpelli*, 411 U.S. 778, 782 (1973) (holding the same minimum due process rights apply to proceedings to revoke parole and probation). Probationer's due process rights include, among other things, the right to confront and cross-examine adverse witnesses. *Morrissey*, 408 U.S. at 489. This right to confront witnesses may be limited, however, should the hearing officer determine that there is good cause for not allowing confrontation. *Id.*

A. Admission of Exhibits

We first address Exhibit 2 because it is dispositive. Fraser argues that the district court denied him due process by admitting Exhibit 2, which contained hearsay, without providing him an opportunity to exercise his right to confrontation. Exhibit 2 contained a police report detailing the events surrounding Fraser's arrest for DUI in Washington, as well as a copy of Fraser's Washington DUI conviction. Fraser asserts that, because the report contained out-of-court statements by the police officer and he was not given an opportunity to confront the officer, his due process right to confrontation was violated. During his probation violation hearing, Fraser objected to the admission of Exhibit 2 on hearsay and foundation grounds, but he did not raise a due process claim with regard to Exhibit 2 before the district court.

Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Idaho decisional law, however, has long allowed appellate courts to consider a claim of error to which no objection was made below if the issue presented rises to the level of fundamental error. *See State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007); *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262

(1971). Recently, in *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010), the Idaho Supreme Court abandoned the definitions it had previously utilized to describe what may constitute fundamental error. The *Perry* Court held that an appellate court should reverse an unobjected-to error when the defendant persuades the court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) the error is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) the error affected the outcome of the trial proceedings (*i.e.*, was not harmless). *Id.* at 221, 245 P.3d at 978.

We hold, under the third prong of *Perry*, that the error of the district court, if any, in admitting Exhibit 2 and denying Fraser his right to confrontation was harmless. During his probation violation hearings, Fraser admitted under oath that he had been convicted of the Washington DUI. When a probationer admits a direct violation of his probation agreement, no further inquiry into the question of whether he or she violated probation is needed. *State v. Peterson*, 123 Idaho 49, 50, 844 P.2d 31, 32 (Ct. App. 1992). In addition, the Washington DUI conviction was before the district court.¹ A certified copy of a new criminal conviction is sufficient proof for revocation of probation. *State v. Dempsey*, 146 Idaho 327, 330, 193 P.3d 874, 877 (Ct. App. 2008). Fraser's admission and the DUI judgment were, in and of themselves, sufficient to sustain the district court's finding of a probation violation. The district court did not have to rely on the hearsay statements contained in the police reports to conclude that Fraser violated his probation. Substantial nonhearsay evidence demonstrated that Fraser violated his probation by consuming alcohol and incurring a new felony conviction for DUI. The outcome of the probation violation proceedings on these two claims would not have been different had Fraser been afforded an opportunity to confront and cross-examine the officer who authored the police report. Therefore, we hold that Fraser has failed, under the third prong of *Perry*, to

¹ Fraser also claims on appeal that the district court erred in relying on the Washington DUI judgment in finding a probation violation because the copy of the judgment admitted into evidence was unreliable. Specifically, Fraser asserts that the admitted copy was deficient because it was missing a page, did not contain either the date of the incident or the date of conviction, did not indicate whether Fraser was represented by counsel in those proceedings, and was not a certified copy. Fraser did not object to the sufficiency of the copy of the Washington DUI judgment in the court below. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Therefore, because Fraser failed to object to the reliability of the copy of the DUI conviction contained in Exhibit 2 in the court below, we will not address this argument on appeal.

demonstrate that the outcome of his probation violation hearing was affected by any district court error in admitting Exhibit 2. Because the error, if any, was harmless, we will not address Fraser's due process claims as to Exhibit 2 on appeal.

Fraser also argues that the district court denied him due process by admitting Exhibit 1, which contained hearsay, without providing him an opportunity to exercise his right to confrontation. Exhibit 1 contained a copy of a Post Falls police report detailing allegations that Fraser committed battery, a copy of a criminal complaint and summons charging Fraser with battery, and a bench warrant issued to Fraser for failing to appear at his arraignment on the battery charges. Fraser argues that the Post Falls police report in Exhibit 1 contained hearsay statements by the victim and a bystander and that he was denied due process when the district court admitted the exhibit without allowing him to confront and cross-examine these witnesses. It is unnecessary for this Court to resolve this issue as to whether the district court erred in admitting this evidence of a battery because it is apparent from the record that the district court would have revoked Fraser's probation based upon his DUI conviction and his consumption of alcohol.

In determining whether to revoke probation a court must consider whether probation is meeting the objective of rehabilitation while also providing adequate protection for society. *State v. Boss*, 122 Idaho 747, 748, 838 P.2d 876, 877 (Ct. App. 1992); *State v. Phillips*, 113 Idaho 176, 177, 742 P.2d 431, 432 (Ct. App. 1987). This decision is committed to the discretion of the trial court, and we review the determination for an abuse of discretion. *State v. Reine*, 122 Idaho 928, 841 P.2d 458 (Ct. App. 1992); *State v. Hass*, 114 Idaho 554, 758 P.2d 713 (Ct. App. 1988); *State v. Roy*, 113 Idaho 388, 392, 744 P.2d 116, 120 (Ct. App. 1987). Where the district court acts within the boundaries of its discretion, consistently with the applicable legal standards and through an exercise of reason, we will not reverse. *Hass*, 114 Idaho at 558, 758 P.2d at 717.

When a discretionary ruling has been tainted by legal or factual error, we ordinarily vacate the decision and remand the matter for a new, error-free discretionary determination by the trial court. *State v. Truman*, ___ Idaho ___, ___, ___ P.3d ___, ___ (Ct. App. 2010); *State v. Upton*, 127 Idaho 274, 276, 899 P.2d 984, 986 (Ct. App. 1995). However, a remand may be avoided where it is apparent from the record that the result would not change or that a different result would represent an abuse of discretion. *Truman*, ___ Idaho at ___, ___ P.3d at ___; *State v. Medrain*, 143 Idaho 329, 333, 144 P.2d 34, 38 (Ct. App. 2006). Therefore, if the district court erred in finding one

probation violation but correctly found one or more other violations, remand is not necessary if it is clear from the record that the district court would have revoked probation based solely upon the other violations. *Upton*, 127 Idaho at 276, 899 P.2d at 986.

Here, the district court found two violations of Fraser's probation in addition to the battery charge related to Exhibit 1. The district court found that Fraser had committed a new crime, DUI, and that he had consumed alcohol in connection with that crime. At the disposition hearing, the district court focused exclusively on Fraser's prior record and his new DUI conviction. The court noted that the crime for which Fraser was then on probation was not only his third felony but also his first felony DUI. The district court then reviewed Fraser's prior record which included felony eluding, theft, hit and run, a DUI that was amended to inattentive driving, a DUI that resulted in a deferred prosecution, malicious mischief, and probation violations. The district court noted that the DUI which resulted in this probation violation included a dangerous driving pattern of Fraser driving into a concrete barrier and running from the scene. The district court continued:

And it's primarily for that reason that I consider you to be just an unacceptable risk in the community because I think you're seeing some insights. And I think you have a chance at--I don't know if you're 40 years old yet. Have you turned 40? I mean, you've got a lot of life ahead of you. And the insights that you're gaining here may help you to live an alcohol-free life or at least an addiction not giving in or not being subject and enslaved by alcohol addictions in the future. But I just can't say that it's an acceptable risk right now to say that the insights and the time that you've been in custody and the treatment that you have gone through now makes you an acceptable risk. It may or it may not. And instead of running into a concrete barrier you're running into a van full of family members, and people are killed. And then we're here saying: "Oh, gosh. We made a mistake." And it's just an unacceptable risk.

So, with that in mind, it is the judgment of the Court that your probation is revoked. Your previously suspended sentence is imposed. It is not modified.

Not once during the disposition hearing did the district court mention the new battery charge. It is abundantly clear that the district court would have revoked Fraser's probation regardless of its finding that Fraser committed a battery. The district court properly determined that Fraser presented an unacceptable risk to society and that probation had not served its intended purpose.

B. Excessive Sentence

Fraser also argues that the district court erred in ordering execution of his original unified sentence of seven years without reduction. 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.* Applying these standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion.

III.

CONCLUSION

The district did not err in determining that Fraser violated his probation based upon Fraser's conviction for felony DUI and in finding that he consumed alcohol in connection with that DUI. We do not consider the claimed error in the admission of Exhibit 1 because it is apparent from the record that, even without that evidence, the district court would have revoked probation and imposed sentence. We find no abuse of discretion in the district court's decision to revoke Fraser's probation and impose the original sentence without reduction. Therefore, the order revoking Fraser's probation and executing his sentence is affirmed.

Judge LANSING and Judge GUTIERREZ, **CONCUR.**