

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35559

STATE OF IDAHO,	)	2011 Unpublished Opinion No. 513
	)	
<b>Plaintiff-Respondent,</b>	)	<b>Filed: June 9, 2011</b>
	)	
v.	)	<b>Stephen W. Kenyon, Clerk</b>
	)	
DAVID ALLEN OPPELT,	)	<b>THIS IS AN UNPUBLISHED</b>
	)	<b>OPINION AND SHALL NOT</b>
<b>Defendant-Appellant.</b>	)	<b>BE CITED AS AUTHORITY</b>
	)	

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

Order relinquishing jurisdiction, affirmed; judgment of restitution, modified.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

David Allen Oppelt appeals from the district court’s order relinquishing jurisdiction. Oppelt also appeals from his judgment of restitution. For the reasons set forth below, we affirm the order relinquishing jurisdiction and modify the judgment of restitution.

**I.**

**FACTS AND PROCEDURE**

Oppelt was charged with burglary, I.C. § 18-1401, for his participation in the theft of items from an antique jewelry store. Oppelt pleaded guilty to burglary and, in exchange, the state dismissed a habitual offender enhancement. The district court sentenced Oppelt to a unified term of three years, with a minimum period of confinement of one year. However, the district court retained jurisdiction for 180 days pursuant to I.C. § 19-2601(4).<sup>1</sup> Following a hearing after the completion of Oppelt’s rider, the district court relinquished jurisdiction. The state sought

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<sup>1</sup> The retained jurisdiction program is also commonly referred to as the “rider.”

restitution pursuant to I.C. § 19-5304 and, after a hearing, the court entered a judgment of restitution in the amount of \$3,894. Oppelt appeals.

## II. ANALYSIS

### A. Order Relinquishing Jurisdiction

Oppelt argues that the district court abused its discretion when it relinquished jurisdiction and imposed Oppelt's sentence. Specifically, Oppelt contends that the district court should have placed him on a short period of probation and, at the completion of the probationary period, allowed Oppelt to complete a second period of retained jurisdiction.

The decision to place a defendant on probation or whether, instead, to relinquish jurisdiction over the defendant is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. *State v. Hood*, 102 Idaho 711, 712, 639 P.2d 9, 10 (1981); *State v. Lee*, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

At Oppelt's rider review hearing, the district court mentioned that, even though a second rider may have been in Oppelt's best interest, the court could not impose a consecutive period of retained jurisdiction because it would violate Idaho law. Oppelt argues on appeal that the district court did not recognize its discretion to order a second period of retained jurisdiction. The only authority for a trial court to place a defendant on a second period of retained jurisdiction within the same case is that provided in I.C. § 19-2601(4), which states, in part, that the trial court, "in its discretion may sentence a defendant to more than one (1) period of retained jurisdiction after a defendant has been placed on probation in a case." The Idaho Supreme Court has held that this statutory provision does not empower a court to place a defendant on successive periods of retained jurisdiction without an intervening period of probation. *State v. Urrabazo*, 150 Idaho 158, 244 P.3d 1244 (2010). The Court there said:

The plain language of section 19-2601(4) unconditionally requires an intervening period of probation prior to ordering an additional period of retained jurisdiction.

The provision only permits a court to sentence a defendant to a second rider “*after* a defendant has been placed on probation in a case.” In other words, a court may retain jurisdiction for a second time only after sentencing the defendant to a period of probation.

*Id.* at 162, 244 P.3d at 1248. In this case, the district court did not place Oppelt on probation after the completion of his first period of retained jurisdiction. Therefore, Oppelt’s argument that the district court should have ordered a second period of retained jurisdiction at that time is without merit.

Finally, the district court did not abuse its discretion by declining to place Oppelt on probation. The district court considered the addendum to the presentence investigation report, which recommended that the court relinquish jurisdiction and described Oppelt’s problems attending classes while on the rider and his failure to develop a probation plan. The district court also considered Oppelt’s explanation for his attendance problems and recognized Oppelt’s physical difficulties, which may have contributed to such problems. In addition, the district court reviewed Oppelt’s extensive criminal history and the likelihood that he would reoffend should he be placed on probation. The district court recognized its discretion to place Oppelt on probation and arrived at its decision to relinquish jurisdiction consistent with the applicable legal standards and through an exercise of reason. Thus, Oppelt has failed to establish that the district court abused its discretion by relinquishing jurisdiction.

## **B. Restitution**

Oppelt argues that the district court abused its discretion when calculating the amount of restitution. Idaho Code Section 19-5304(7) provides that a court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of economic loss sustained by the victim as a result of the offense; the financial resources, needs and earning ability of the defendant; and such other factors as the court deems appropriate. Idaho Code Section 19-5304(6) provides that economic loss shall be based upon the preponderance of evidence submitted to the court by the prosecutor, defendant, victim, or presentence investigator. The determination of the amount of restitution is a question of fact for the trial court, whose findings will not be disturbed if supported by substantial evidence. *State v. Hamilton*, 129 Idaho 938, 943, 935 P.2d 201, 206 (Ct. App. 1997).

At the restitution hearing, the owner of the antique store testified about various items that were missing from her store and the value of such items. The owner also testified that she paid

three employees to help locate the missing items within the store. Some of those items were recovered by the employees, while others remained missing and presumably stolen. Oppelt does not dispute the value of certain specific items of jewelry totaling \$2,265. However, Oppelt disputes the method used by the district court in calculating the remaining \$1,629 of restitution. Specifically, Oppelt argues that the district court relied upon the owner's "speculation" and that there was no testimony or other evidence presented to support the number of hours worked by one of the store's employees in attempting to locate the missing items. Further, Oppelt argues that the district court did not consider his ability to pay when determining the amount of restitution.

The district court relied upon the owner's testimony in order to determine which items were missing, what those items were worth, and what the owner paid her employees to search for the missing items. The owner testified to a range of loss for the missing items that is consistent with the district court's award. Oppelt offered no testimony or other evidence to rebut the state's evidence as to the items' value or the amount paid to the employees for their work in locating those missing items. The state concedes on appeal that \$104 of the total restitution award was not supported by substantial and competent evidence because the owner did not testify as to the specific number of hours worked by one of the store employees in attempting to locate the missing items. However, the remaining amount of restitution was supported by substantial and competent evidence. Finally, Oppelt's immediate inability to pay does not bar the court from ordering restitution. *See State v. Bybee*, 115 Idaho 541, 543, 768 P.2d 804, 806 (Ct. App. 1989). Therefore, we conclude that the amount of restitution should be modified from the original award of \$3,894 to \$3,790.

### **III.**

#### **CONCLUSION**

Oppelt has failed to demonstrate that the district court abused its discretion by failing to order a second period of retained jurisdiction. Substantial and competent evidence supports the district court's award of restitution in the amount of \$3,790. The district court's order relinquishing jurisdiction is affirmed. The judgment of restitution is modified, and the district court is hereby directed to enter an amended judgment of restitution consistent with this opinion.

Chief Judge GRATTON and Judge LANSING, **CONCUR.**