

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37413

STATE OF IDAHO,)	2011 Unpublished Opinion No. 624
)	
Plaintiff-Respondent,)	Filed: September 21, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
DAVID CLINTON ROBERTS,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Gem County. Hon. Renae J. Hoff, District Judge.

Order revoking probation and executing six-year sentence, with minimum period of confinement of two years, for sexual battery of a minor sixteen or seventeen years of age, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jordan E. Taylor, Deputy Appellate Public Defender, Boise, for appellant. Shawn F. Wilkerson argued.

Hon. Lawrence G. Wasden, Attorney General; Russell J. Spencer, Deputy Attorney General, Boise, for respondent. Russell J. Spencer argued.

WALTERS, Judge Pro Tem

David Clinton Roberts 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

Roberts had a sexual relationship with a sixteen-year-old girl. Roberts was charged with one count of lewd and lascivious conduct with a minor under sixteen years of age, I.C. § 18-1508, and three counts of sexual battery of a minor sixteen or seventeen years of age, I.C. § 18-1508A. Pursuant to a plea agreement, Roberts pled guilty to one count of sexual battery of a minor and the remaining charges were dismissed. Roberts was sentenced to a unified term of six years, with a minimum period of confinement of two years. The sentence was suspended and Roberts was placed on probation for six years. Included in the terms and conditions of Roberts’

probation were, among other things, a requirement that he register as a sex offender, successfully participate in and complete sex offender rehabilitation treatment, not purchase or possess alcohol, and have no unsupervised contact with any minor under the age of eighteen. The terms also included a condition that Roberts would “not purchase, produce, possess, or view any media material . . . that acts as a stimulus for [his] sexual behavior, or . . . possess or view any materials containing male or female nudity. [Roberts] will not be present where such material is available.”

Roberts was found to be in violation of his probation for failing to register as a sex offender. He served thirty days in jail for this violation. Subsequently, Roberts was charged with four additional probation violations. The first count against Roberts alleged that he possessed R-rated DVDs which contained adult nudity and portrayed sexual acts, that he had pornographic videos and pictures on his cell phone, and that he viewed pornography at least once a month at a friend’s house. The second count alleged that Roberts failed to complete sexual abuse treatment because it was determined he was an inappropriate candidate. The third count alleged that Roberts consumed alcohol. The fourth count alleged that Roberts had unsupervised contact with his minor children during a camping trip. After a hearing, the district court found that Roberts had violated the terms of his probation. The district court revoked Roberts’ probation and ordered his sentence executed without modification. Roberts appeals.

II.

ANALYSIS

Roberts argues that the district court erred when it found that Roberts violated his probation by possessing R-rated movies because the probation condition was unconstitutionally overbroad and unconstitutional as applied to him. In addition, Roberts argues that the district court abused its discretion when it revoked his probation and executed his original sentence.

A. Constitutionality of Probation Condition

Roberts argues that the portion of his probation condition concerning the possession of materials containing male and female nudity and the entrance into any place where these materials are available is unconstitutional. Specifically, Roberts argues that the portion of the condition is overbroad and that it is unconstitutional as applied to his situation. Roberts argues that the constitutionality of the probation conditions was implicitly argued below. After a review of the record, we hold that Roberts failed to raise these arguments either at the time the condition

was imposed or at the probation violation hearing. The only issue explicitly raised at the probation violation hearing was whether his actions violated the terms of probation.

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). The parties argue, however, that this issue may be raised under the doctrine of fundamental error. Idaho decisional law has long allowed appellate courts to consider in a criminal case 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). 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. *Id.* at 226, 245 P.3d at 978.

It is unclear, however, whether the fundamental error analysis outlined in *Perry* may be applied to issues arising subsequent to the determination of guilt phase of a trial. Several pre-*Perry* cases have held that, in probation revocation proceedings, an issue which was not raised below may not be raised on appeal. *State v. Russell*, 122 Idaho 488, 490, 835 P.2d 1299, 1301 (1992); *Fodge*, 121 Idaho at 195, 824 P.2d at 126; *State v. Leach*, 135 Idaho 525, 530, 20 P.3d 709, 714 (Ct. App. 2001). Other pre-*Perry* cases, however, have applied the doctrine of fundamental error to claimed error occurring after the trial stage of a proceeding. *State v. Prelwitz*, 132 Idaho 191, 193, 968 P.2d 1100, 1102 (Ct. App. 1998) (applying pre-*Perry* fundamental error doctrine to a probation violation based upon a nonexistent term of the probation). Although no post-*Perry* cases have specifically applied fundamental error to unobjected-to error arising during a probation revocation proceeding, this Court has applied the fundamental error analysis to claimed error occurring after the trial stage. *State v. Reid*, 151 Idaho 80, 88-89, 253 P.3d 754, 762-63 (Ct. App. 2011) (applying fundamental error analysis to unobjected-to information considered by the district court at sentencing). Therefore, it is unclear under current precedent whether the fundamental error doctrine may be applied in this case.

Even were we to apply the *Perry* analysis in this case, however, we hold that Roberts has failed to establish fundamental error because he has failed to establish under the third prong that the error affected the outcome of the proceedings. As noted below, Roberts admitted to three of the four probation violations at the probation revocation hearing. The district court noted that the seriousness of Roberts' violations had escalated and emphasized the seriousness of Roberts' possession of pornography. Based on Roberts' admissions and the seriousness of the three probation violations which are not at issue on appeal, we hold that Roberts has failed to establish that any error affected the outcome of the probation revocation proceedings. Accordingly, we will not further address this claim of fundamental error.

B. Abuse of Discretion

Roberts also argues that the district court abused its discretion when it revoked his probation and executed his original sentence. Alternatively, Roberts argues that he should have been given the opportunity to participate in the retained jurisdiction program.

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 is 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 Idaho Criminal Rule 35 to reduce the sentence. *Beckett*, 122 Idaho at 326, 834 P.2d at 328; *State v. Marks*, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989). 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 326, 834 P.2d at 328. 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 the probation revocation hearing, Roberts admitted to three of the four probation violations. Roberts testified that he consumed alcohol. Roberts admitted that there was pornography on his cell phone and that he viewed pornography on a regular basis at his friend's house. Roberts also admitted that he had unsupervised contact with his minor children for several periods of ten minutes or less when they were left alone together in a tent on a camping trip. Roberts acknowledged at the probation revocation hearing that this was a violation of his probation. Although Roberts did not admit that his possession of R-rated movies which contained adult nudity was a violation of his probation, he testified that the movies were his and that he knew their content. On cross-examination, however, Roberts admitted that he was aware he was prohibited from possessing any DVDs which portrayed adult nudity or contained sexual content. Based on Roberts' testimony admitting his violations, there is substantial evidence in the record supporting the district court's finding that Roberts violated his probation.

The district court recognized its discretion when it noted that it had several options from which to choose in punishing Roberts for his probation violations. The district court stated that it could execute Roberts' sentence or retain jurisdiction. The district court went on to note that Roberts had been unable to follow the requirements of probation on multiple occasions, including his initial failure to register as a sex offender. The district court determined that Roberts had been found in possession of the R-rated movies, had been warned by his probation officer about having such movies in his home, but had ignored the warning. The district court emphasized that Roberts continued to view pornography on his phone and at a friend's house. The district court acknowledged that Roberts was given multiple chances to comply with the conditions of his probation, but he had failed to do so. The district court then ordered execution of Roberts' sentence. The district court's decision to revoke Roberts' probation resulted from its conclusion that continuing probation would not meet the goals of rehabilitation and the protection of society. Therefore, the district court did not abuse its discretion when it revoked Roberts' probation and ordered that his previously suspended sentence be executed.

III.
CONCLUSION

We decline to consider whether the district court erred in finding Roberts violated his probation by possessing R-rated movies which contained nudity because Roberts failed to raise the issue of the constitutionality of this condition in the court below and failed to establish fundamental error. The district court also did not abuse its discretion by revoking Roberts' probation and executing his previously suspended sentence. Therefore, the district court's order revoking Roberts' probation and ordering execution of his sentence is affirmed.

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