9-22-2011

State v. Wilkins Appellant's Brief Dckt. 38117

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38117
	)	
v.	)	
	)	
TIMOTHY ROBERT DUANE WILKINS,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Timothy Robert Duane Wilkins appeals from the judgment of conviction, convicting him of possession of a controlled substance and possession of drug paraphernalia, following a jury trial. Mr. Wilkins asserts that the evidence was insufficient to support his convictions for possession of a controlled substance and drug paraphernalia, and that the evidence was insufficient to support the district court's finding that he was a persistent violator. He further asserts that the district court abused its discretion when it imposed an excessive sentence on the possession of a controlled substance charge.[1]

Statement of the Facts and Course of Proceedings

This case began when Mr. Wilkins was stopped by Corporal Lind, of the Idaho State Police, following a complaint about his driving. (Tr., p.41, L.13 – p.45, L.21.) Mr. Wilkins was arrested for driving without privileges. (Tr., p.47, Ls.2-7.) After placing Mr. Wilkins in handcuffs in the back of his patrol car, Corporal Lind, assisted by Trooper Spike, inventoried the truck that Mr. Wilkins had been driving. (Tr., p.47, L.10 – p.48, L.14.) During that inventory, Trooper Spike alerted Corporal Lind to the presence of some plastic baggies, a lighter, and what "looked like a glass pipe" in a compartment located on the dashboard.[2] (Tr., p.49, L.24 – p.50, L.20.) Corporal Lind took a photograph of the items as they were positioned before pulling a plastic bag out and

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[1] Mr. Wilkins has already served the full sentence for the misdemeanor charge of possession of drug paraphernalia, therefore rendering any excessive sentence claim as to that charge moot.

[2] Corporal Lind testified that it was only after picking up the baggies that he was able to recognize that they contained suspected methamphetamine. (Tr., p.56, Ls.6-19.)

taking additional photographs. (Tr., p.51, L.1 – p.52, L.16.) When Mr. Wilkins was told of the discovery of the items in the truck, he became "excited[,]" "[s]aid it wasn't his[,]" and "[e]ventually . . . accused me of planting it." (Tr., p.55, L.3 – p.56, L.2.)

As a result of this incident, Mr. Wilkins was charged by Information with possession of a controlled substance, driving while suspended, possession of drug paraphernalia, and failure to provide proof of liability insurance.[3] (R., pp.36-37.) Part II of the Information charged him with a persistent violator enhancement. (R., p.38.) Following jury selection, the district court issued orders precluding the State from mentioning in its "case in chief the citizen's observations of the driving, nor the report that the citizen made to the trooper" (Tr., p.20, Ls.12-14), and "from putting on any evidence that this vehicle was stolen."[4] (Tr., p.26, Ls.20-21.)

In the State's case-in-chief, Corporal Lind and Trooper Spike testified about the details surrounding their discovery of the baggies and pipe in the dashboard compartment during their inventory of the truck that Mr. Wilkins was driving. (Tr., p.49, L.24 – p.56, L.19, p.106, L.18 – p.110, L.21.) A DVD recording of the encounter from the dashboard video system in Corporal Lind's patrol car was admitted as Plaintiff's Exhibit No. 7, and played for the jury.[5] (Tr., p.59, L.13 – p.62, L.13, p.64, Ls.16-24.)

David Sincerbeaux, an employee of the Idaho State Police Forensic Laboratory, testified that he tested the substance contained in one of the baggies, using both a

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[3] Prior to trial, Mr. Wilkins filed "a written guilty plea" to the charges of driving without privileges and failure to provide proof of liability insurance. (Tr., p.27, L.18 – p.28, L.6; R., pp.165-68.)

[4] Mr. Wilkins was charged separately with stealing the vehicle in which he was stopped, a charge that the State unsuccessfully sought to consolidate with this case. (R., pp.52-57.)

[5] In order to avoid the jury hearing that the truck was reported stolen, the parties stipulated that the DVD was to "be stopped at a spot that I think counsel characterized in the counter system as 2330." (Tr., p.62, Ls.7-10.)

screening color test and a gas chromatograph mass spectrometer, and concluded that it contained methamphetamine. (Tr., p.120, L.2 – p.125, L.1.) Finally, the State called Alex Smith, an employee of the company from whose lot the truck driven by Mr. Wilkins was purportedly stolen, who testified that the truck was missing from the lot for approximately six days in February.[6] (Tr., p.130, L.15 – p.133, L.4.)

In his defense, Mr. Wilkins called one witness: Noah Peterson. (Tr., p.141, Ls.10-11.) Mr. Peterson testified that the night before Mr. Wilkins was arrested he and Mr. Wilkins were in the truck together. (Tr., p.141, L.24 – p.142, L.15.) Mr. Peterson testified that, after picking him up, Mr. Wilkins drove to his apartment to get "cleaned up" before they went out to meet up with some "girls." (Tr., p.142, Ls.17-20.) Mr. Peterson waited in the truck while Mr. Wilkins was cleaning up in his apartment, and, while alone, smoked some methamphetamine. (Tr., p.144, Ls.4-23.) Before Mr. Wilkins returned to the truck, Mr. Peterson placed his baggies of methamphetamine, pipe, and lighter into the dashboard compartment. (Tr., p.145, Ls.13-25, p.150, Ls.2 – p.151, L.11.) After learning that Mr. Wilkins had been arrested for the items that he placed in the truck, Mr. Peterson wrote a letter to Mr. Wilkins' defense attorney explaining that the drugs and paraphernalia were his. (Tr., p.168, Ls.3-24.) The letter was admitted at trial as Defendant's Exhibit A. (Tr., p.172, L.3 – p.173, L.24.)

Following deliberations, Mr. Wilkins was found guilty of the two counts submitted to the jury: possession of a controlled substance and possession of drug paraphernalia. (Tr., p.186, Ls.2-4.) The parties waived a jury trial with respect to the persistent violator

[6] Consistent with the district court's ruling prohibiting any mention of the purported theft of the truck, the witness was limited to testifying that he noticed that the truck was missing on February 15, 2010, and that it was returned to the lot on February 21, 2010. (Tr., p.132, Ls.3-19.) The incident in this case is alleged to have occurred on February 20, 2010.

enhancement. (Tr., p.184, L.1 – p.185, L.8.) The State offered, and the district court admitted, two prior judgments of conviction as Plaintiff's Exhibits Nos. 9 and 10. (Tr., p.190, L.12 – p.191, L.12.) In closing, defense counsel argued that the State had failed to prove beyond a reasonable doubt that Mr. Wilkins was the person named in the exhibits. (Tr., p.192, L.23 – p.193, L.16.) During closing argument, defense counsel noted that the trial court was the same judge as had signed both judgments, and argued, "I don't think the Court can consider things that you have heard before in other proceedings as evidence in this matter." (Tr., p.192, Ls.18-22.)

In reaching its finding that Mr. Wilkins was a persistent violator, the district court explained,

> *And the Court, also I have to say, has an independent memory of Mr. Wilkins as having been before the Court before.* Without looking at these judgments, I could not have said what he has been convicted of, whether it was a felony or a misdemeanor, without reviewing the documents. But *I do recognize Mr. Wilkins. And when I look at these particular judgments I do recognize Timothy Robert Duane Wilkins of these judgments to be the Mr. Wilkins that is the Defendant in this particular case.*

(Tr., p.195, L.25 – p.196, L.9 (emphases added).)

At the sentencing hearing, the State requested "five years fixed plus five years for a total of ten years on the habitual, five years plus two years for a total of seven years on the possession." (Tr., p.284, Ls.12-15.) Defense counsel requested probation, leaving the length of any underlying sentence to the district court's discretion. (Tr., p.286, L.25 – p.287, L.6.) Ultimately, the district court imposed a unified sentence of ten years, with five years fixed, and declined to grant probation or retain jurisdiction.[7]

[7] Mr. Wilkins received jail sentences for the paraphernalia and driving without privileges charges and a fine for failure to carry proof of financial responsibility. (Tr., p.293, L.23 – p.294, L.5.) Mr. Wilkins does not appeal the misdemeanor sentences, as they have already been served, and any excessive sentence claims are therefore moot.

(Tr., p.293, Ls.7-11.) Mr. Wilkins filed a Notice of Appeal timely from the judgment of conviction. (Appended to Motion to Augment filed on June 24, 2011.)

ISSUES

1. Was the evidence sufficient to support Mr. Wilkins' conviction for possession of a controlled substance, possession of drug paraphernalia, and the finding that he was a persistent violator?

2. Did the district court err when it relied on its own memory to find Mr. Wilkins to be a persistent violator?

3. Did the district court abuse its discretion when it imposed an excessive sentence following Mr. Wilkins' conviction for possession of a controlled substance as a persistent violator?

ARGUMENT

I.

The Evidence Was Insufficient To Support Mr. Wilkins' Conviction For Possession Of A Controlled Substance, Possession Of Paraphernalia, And The Finding That He Was A Persistent Violator

A. Introduction

The State failed to present sufficient evidence to establish, beyond a reasonable doubt, that Mr. Wilkins possessed a controlled substance, possessed paraphernalia, and that he was a persistent violator. With respect to the possession charges, the State presented insufficient evidence to establish that Mr. Wilkins knowingly possessed the methamphetamine or the pipe. As for the persistent violator enhancement, without the district court's reliance on its own memory of having dealt with Mr. Wilkins in prior criminal proceedings, the evidence was insufficient to support its finding.

B. Standard Of Review

The standard of review for an appellate court regarding the sufficiency of the evidence to sustain a conviction is set forth in *State v. Peite*, 122 Idaho 809, 823 (Ct. App. 1992), in which the Idaho Court of Appeals noted that:

> A conviction will not be set aside where there is substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. On appeal, we construe all facts, and inferences to be drawn from those facts, in favor of upholding the jury's verdict. Where there is competent although conflicting evidence to sustain the verdict, we will not reweigh the evidence or disturb the verdict.

Id. (citations omitted). "For evidence to be substantial, it must be of sufficient quality that reasonable minds could reach the same conclusion." *State v. Johnson*, 131 Idaho 808, 809 (Ct. App. 1998) (citing *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 586 (1996)).

C. The Evidence Was Insufficient To Support A Conviction For Possession Of A Controlled Substance Or Possession Of Paraphernalia

Considering the lack of evidence connecting Mr. Wilkins to the methamphetamine and pipe found in the truck, along with the exculpating testimony of defense witness Noah Peterson, there was not substantial evidence that Mr. Wilkins was in possession of methamphetamine or paraphernalia, and, as such, the jury's verdicts must be vacated and judgments of acquittal entered as to those charges.

At trial, the State presented evidence that less than three-tenths of a gram[8] of methamphetamine and a pipe were found in a truck that Mr. Wilkins was driving. (Tr., p.124, L.24 – p.125, L.10.) The methamphetamine was in a plastic baggie that was in a compartment in the truck's dashboard along with a pipe.[9] (Tr., p.50, Ls.4-6.) Corporal Lind testified that he began to inventory the truck from the driver's side, but did not notice any contraband until Trooper Spike, who was assisting with the inventory from the passenger side, alerted him to a pipe and some baggies in the dashboard compartment. (Tr., p.48, L.15 – p.50, L.20.)

While Corporal Lind "immediately recognized the pipe[,]" he did not recognize the baggie as containing suspected methamphetamine until after "I picked it up and looked at it." (Tr., p.56, Ls.6-19.) Corporal Lind acknowledged that the first photograph, which

[8] Only one of the two baggies containing suspected methamphetamine – "[t]he one with the most" – was weighed and tested. The weight of the substance in that baggie was 0.29 gram. (Tr., p.125, Ls.4-10.)

[9] Plaintiff's Exhibit Nos. 1 through 4 are photographs taken of the dashboard and the items, which appear to be two small plastic baggies, one of which is almost empty and the other of which contains a small amount of a crystal-like substance, a plastic lighter, and a glass pipe. (Plaintiff's Exhibit Nos. 1 through 4.) However, only the first photograph, one of two contained in Plaintiff's Exhibit No. 1, represents the position of the items at the time they were discovered. (Tr., p.51, L.19 – p.52, L.16 (Describing just one photograph as being of the items before they were moved, with Corporal Lind asked to place a checkmark next to any photograph depicting the items before they were moved).)

he took while standing on the driver's side of the vehicle, in Plaintiff's Exhibit No. 1 reflected all that he could see when he took it, which was only a lighter. (Tr., p.67, L.8 – p.68, L.14.) When he was informed of the discovery of methamphetamine and a pipe in the truck, Mr. Wilkins became "excited[,]" said that "it wasn't his[,]" and "accused me [Corporal Lind] of planting it." (Tr., p.55, L.21 – p.56, L.2.) Mr. Wilkins never admitted to knowing about the methamphetamine or the pipe. (Tr., p.73, Ls.4-22.) The items were never tested for fingerprints or DNA. (Tr., p.71, L.23 – p.72, L.2.)

The defense called a single witness: Noah Peterson. Mr. Peterson testified that, when he found out that Mr. Wilkins had been charged with possession of methamphetamine and paraphernalia for the items discovered in the truck, he wrote a letter to defense counsel admitting that he had placed the items in the truck without Mr. Wilkins' knowledge. (Tr., p.168, Ls.3-24; Defendant's Exhibit No. [sic] A.)

Mr. Peterson explained that, the night before Mr. Wilkins' arrest, Mr. Wilkins picked him up in the truck, and they went to Albertson's before stopping at Mr. Wilkins' apartment. Mr. Peterson remained in the truck while Mr. Wilkins went into his apartment to get "cleaned up" before going "to see some girls[.]" Mr. Wilkins was gone for approximately forty-five minutes during which time Mr. Peterson used a glass pipe to smoke methamphetamine before putting the methamphetamine, pipe, and lighter into the dashboard compartment. When he left the truck later that evening, he "spaced the pipe and the drugs in the dash . . . [and] left them there." Mr. Peterson did not want Mr. Wilkins to know about the drugs because he "knew he didn't smoke. And I didn't want to tempt him or be around him with the substance." (Tr., p.141, L.19 – p.164, L.25.)

A number of Idaho cases have addressed what constitutes constructive possession of drugs or other contraband. In order to be found guilty on a constructive possession theory, the State must prove that the defendant had both knowledge of and control over the contraband. *See State v. Garza*, 112 Idaho 776, 778 (Ct. App. 1987), ("Where, as here, the question is one of constructive possession, the state must prove that the defendant had both knowledge and control of the drugs."); *State v. Vinton*, 110 Idaho 832, 834 (Ct. App. 1986) (holding that, although the State "established the existence of cultivated marijuana and the status of the Vintons as joint owners of the property . . . [t]hat, in our view does not constitute substantial evidence to uphold the conviction of either defendant individually.").

One constructive possession case is almost directly on point with the facts of Mr. Wilkins' case. In *State v. Burnside*, 115 Idaho 882 (Ct. App. 1989), the Court of Appeals had to determine, *inter alia*, whether there was substantial evidence to support the jury's guilty verdict on a charge of possession of psilocybin mushrooms with the intent to deliver. *Id.* at 885. The case began when the police, armed with a warrant to search Burnside's car for evidence of methamphetamine dealing, approached him and a passenger while they were eating in a restaurant.[10] During the search of the car, the police discovered both methamphetamine and psilocybin mushrooms. Burnside was charged with, and convicted of, possession of psilocybin mushrooms with intent to deliver and possession of methamphetamine.[11] *Id.* at 883.

[10] Nothing in the opinion indicates that the police had ever observed the person eating with Burnside as a passenger in the vehicle.

[11] Burnside did not appeal the possession of methamphetamine conviction on sufficiency grounds. *Burnside*, 115 Idaho at 883.

The Court of Appeals noted that, in order to prove that Burnside possessed the psilocybin mushrooms, the State had to establish that he was "aware the mushrooms were in his car and that he exercised dominion or control over them." *Id.* at 885. It noted that "the jury could not infer constructive possession from the mere fact that Burnside occupied, with a passenger, the automobile in which the drugs were seized." *Id.* (citing *State v. Warden*, 97 Idaho 752 (1976)). The Court of Appeals explained that, "in order to prevail, the state had to offer evidence which established that Burnside, individually, knew of the illegal drugs and that he exercised dominion over them." *Burnside*, 115 Idaho at 885.

In concluding that the State had not met its burden, the Court of Appeals analyzed the relevant facts:

> The mushrooms were discovered in a black vinyl bag in Burnside's automobile. When the police began their search of the car, Burnside told the officers that the bag was not his. At trial, Burnside's passenger, Redd, repeatedly declared that he, and not Burnside, owned the mushrooms. Evidence suggested that Burnside may have sold the mushrooms to Redd, several hours earlier, in a motel room. The mushrooms later were packaged for delivery. However, Redd claimed at trial, that he, and not Burnside, had packaged the mushrooms. When asked if he had packaged the mushrooms for Burnside, Redd stated that he could not remember.
>
> The evidence does not establish that Burnside exercised dominion and control over the mushrooms, when in the car. The state failed to rebut Redd's claim of sole ownership . . . Burnside's remark to the police, that the black bag was not his, suggests he probably knew the drugs were in his car. The motel sale also indicates Burnside's knowledge. However, neither piece of evidence establishes control. We find an absence of evidence on this element of the offense.

Id. at 885-86.

In Mr. Wilkins' case, as in *Burnside*, there was a denial of ownership of drugs found in a vehicle driven by the defendant, and sworn testimony from a passenger that the drugs belonged to the passenger. Here, as in *Burnside*, the State failed to rebut the

passenger's claim of ownership of the contraband. The only difference between the two cases is that in *Burnside* there was evidence that Burnside knew of the presence of the drugs in his car, while in this case no evidence exists that Mr. Wilkins knew that the drugs or paraphernalia in the truck. Additionally, here, unlike in *Burnside*, there is no evidence that Mr. Wilkins owned the vehicle in which the drugs were found.

To allow the jury's verdict to stand in light of the total lack of evidence that Mr. Wilkins had both knowledge of and control over the methamphetamine and the paraphernalia[12] would be to allow a conviction to stand not on substantial evidence but on speculation. Mr. Wilkins respectfully requests that this Court vacate the judgments of conviction and remand this matter for the entry of judgments of acquittal on the charges of possession of a controlled substance and possession of paraphernalia.

D. The Evidence Was Insufficient To Support A Persistent Violator Finding

Under Idaho's persistent violator law, a person convicted of a felony for the third time faces a minimum sentence of five years, with a maximum possible sentence of life imprisonment. I.C. § 19-2514. The State must plead the persistent violator enhancement in the indictment or information, and must prove the identity of the defendant beyond a reasonable doubt. *State v. Cheatham*, 139 Idaho 413, 416 (Ct. App. 2003). When the State produces nothing more than a certified copy of a judgment of conviction containing the same name as the defendant, the evidence is insufficient to support a persistent violator finding. *State v. Martinez*, 102 Idaho 875,

[12] Mr. Wilkins acknowledges that the paraphernalia conviction represents a closer case, as Corporal Lind testified that, although he couldn't see that there was anything, let alone methamphetamine, in the baggies until he picked them up and looked at them, that he could tell that he "immediately recognized the pipe" as a meth pipe. (Tr., p.56, Ls.6-19.)

880 (Ct. App. 1982). A judgment of conviction, when accompanied by mug shots and a fingerprint card, is sufficient to support such a finding. *Id.*

A verdict must be based on the evidence presented in court. *State v. Thomas*, 94 Idaho 430, 433 (1971) ("[T]he most important of the constitutional requirements in the area of protections against pre-trial publicity is that the 'jury's verdict be based on evidence received in open court, not from outside sources.'" (quoting *Sheppard v. Maxwell*, 384 U.S. 333 (1966)). In *Patterson v. State of Colorado ex rel. Attorney General*, 205 U.S. 454 (1907), in upholding a finding of contempt against a newspaper for publishing material that "reflected upon the motives and conduct of the supreme court of Colorado in cases still pending," the Supreme Court explained,

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

Id. at 462.

In his closing argument regarding the persistent violator enhancement, defense counsel argued that the State had failed to prove beyond a reasonable doubt that Mr. Wilkins was the person named in the judgments of conviction. (Tr., p.192, L.23 – p.193, L.16.) In announcing its finding that Mr. Wilkins was a persistent violator, the district court explained,

> *And the Court, also I have to say, has an independent memory of Mr. Wilkins as having been before the Court before.* Without looking at these judgments, I could not have said what he has been convicted of, whether it was a felony or a misdemeanor, without reviewing the documents. But *I do recognize Mr. Wilkins. And when I look at these particular judgments I do recognize Timothy Robert Duane Wilkins of these judgments to be the Mr. Wilkins that is the Defendant in this particular case.*

(Tr., p.195, L.25 – p.196, L.9 (emphases added).)

This was a violation of Mr. Wilkins' right to have his case decided on the evidence introduced in open court, and without the district court's reliance on its own memory, the evidence was insufficient to support a persistent violator finding. Mr. Wilkins respectfully requests that this Court vacate the persistent violator finding, and remand this matter for resentencing on the possession of a controlled substance charge without a persistent violator enhancement.[13]

II.

The District Court Was A Witness, And Its Memories Of Matters Outside Of The Record Should Not Have Been Used To Support Its Findings

The district court acted as a witness in this case when it relied on its own memories of prior dealings with Mr. Wilkins in concluding that he was the person named in the judgments and finding him to be a persistent violator. The persistent violator finding must be reversed because it was made by a judge who acted as a witness.

Idaho Rule of Evidence 605 provides, "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." *Id.*

Although the district court did not testify in the traditional sense at trial on the persistent violator enhancement, it engaged in the functional equivalent of testifying when it explained that it was relying on its own memory in order to find that the State had met its burden of establishing Mr. Wilkins' identity beyond a reasonable doubt. Doing so was improper, and should result in the reversal of the district court's finding that Mr. Wilkins was a persistent violator.

[13] Obviously, if Mr. Wilkins' claim regarding the sufficiency of the evidence for the underlying felony charge is successful, this claim will be moot.

Because it acted in violation of Idaho Rule of Evidence 605, Mr. Wilkins respectfully requests that this Court vacate the persistent violator finding, and remand this matter for a new trial on the persistent violator enhancement before a judge who is not a witness to the underlying allegations.[14]

III.

The District Court Abused Its Discretion When It Imposed An Excessive Sentence Following Mr. Wilkins' Conviction For Possession Of A Controlled Substance With A Persistent Violator Enhancement

Mr. Wilkins asserts that, given any view of the facts, his unified sentence of ten years, with five years fixed, for possession of a controlled substance is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Wilkins does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Wilkins must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). The governing criteria, or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of

[14] *See* note 13.

rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978)).

The Idaho appellate courts have held that a defendant's troubled childhood, including one in which abuse was present, is a mitigating factor to be considered at sentencing. *See State v. Walker*, 129 Idaho 409, 410 (Ct. App. 1996) (district court did not abuse its discretion in imposing fixed sentence of twenty-nine years for first degree murder because it considered, *inter alia*, that defendant "had been sexually assaulted as a child"); *see also State v. Windsor*, 110 Idaho 410, 423 (1985) (one factor supporting Idaho Supreme Court's holding that the death penalty was excessive was the defendant's "extremely troubled" childhood with "serious problems in the home environment").

Mr. Wilkins' childhood was nightmarish. During his Presentence Inestigation Report (*hereinafter,* PSI), Mr. Wilkins provided the following description of his childhood:

> Crappy childhood, extremely poor, kicked out of home age 10. sent to foster homes, physically & sexually abused. sent to youth ranch sexually abused there. Sent to Nevada to live with father. Introduced to drugs, city life. moved back to Idaho when 16. 17 was sent to y.s.c. for 9 months. Been on my own, struggling to get it right ever since.

PSI, p.14 (typographical errors in original).)

In an earlier PSI, Mr. Wilkins elaborated on his childhood introduction to drugs, explaining that "he visited his father when he was seven years old and his father gave him marijuana." (PSI, p.13.) Mr. Wilkins' brother described the childhood sexual abuse of Mr. Wilkins as follows:

> While living in Reno, Timothy was molested multiple times by a neighbor. Timothy was one of eight children she affected, Timothy was interviewed by Reno PD, statements were given, and she was arrested, found guilty and sentenced to ten years.

(Jacob A. Smithson Letter, dated June 14, 2010 (*hereinafter*, Smithson Letter), p.[2].)

The Idaho Supreme Court has recognized that an important factor in fashioning a sentence is whether an offender enjoys the support of family and friends in his rehabilitation efforts. *See State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who, *inter alia*, had the support of his family in his rehabilitation efforts). Mr. Wilkins enjoys the support of his family in his rehabilitation efforts. His younger brother, Jacob, wrote a thoughtful and detailed letter on his behalf (Smithson Letter), and testified at sentencing that he would assist Mr. Wilkins while he was on probation, including providing him with employment, and that he would report any violations of which he became aware to Mr. Wilkins' probation officer. (Tr., p.272, Ls.5-25.) Additionally, several members of Mr. Wilkins' family, including all three of his children, appeared at sentencing on his behalf. (Tr., p.273, L.18 – p.274, L.8.) Mr. Wilkins' daughter Andrea wrote a letter to the district court in which she explained, "There is [sic] a lot of people willing to help him on his journey to becoming a better man now that he is truley [sic] ready for change." (Andrea Wilkins Letter, undated (file-stamped as received by the district court on August 2, 2010), pp.[1-2].)

Finally, Mr. Wilkins has expressed that he has a drug problem and that he is willing to participate in any treatment program. At sentencing, he explained,

> I'm willing to do any treatment and/or programs you may give me. I have beaten my addiction, but I will always be an addict. I'm willing to further my knowledge and tools to help my recovery.

(Tr., p.281, Ls.9-12.)

Based on the foregoing mitigating circumstances, along with the weakness of the State's case against him discussed in section I, Mr. Wilkins asserts that his unified sentence of ten years, with five years fixed, for possession of a controlled substance is

excessive. As such, he respectfully requests that this Court order that he be placed on probation.

CONCLUSION

For the reasons set forth herein, Mr. Wilkins respectfully requests that this Court vacate the judgment of conviction and remand this matter to the district court for entry of judgments of acquittal on both charges. In the alternative, Mr. Wilkins requests that this Court vacate the district court's order finding that he was a persistent violator, and remand this matter for resentencing without a persistent violator enhancement, or alternatively, that it vacate and remand for a new trial on the persistent violator finding before a judge who is not a witness. Finally, if Mr. Wilkins is unsuccessful in these other claims, he respectfully requests that this Court order that he be placed on probation.

DATED this 22nd day of September, 2011.

SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of September, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

TIMOTHY ROBERT DUANE WILKINS
INMATE #87098
SAWC
125 N 8TH WEST
ST ANTHONY ID 83445

LANSING L HAYNES
DISTRICT COURT JUDGE
E-MAILED BRIEF

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EVAN A. SMITH
Administrative Assistant

SJH/eas