2-22-2012

State v. Cox Respondent's Brief Dckt. 39040

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39040
	)	
vs.	)	
	)	
DENNIS O. COX,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

HONORABLE MITCHELL W. BROWN
District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

RULES

STATEMENT OF THE CASE

Nature of the Case

Dennis Cox appeals from his conviction for injury to child.

Statement of the Facts and Course of the Proceedings

The state charged Cox with lewd conduct with a minor under sixteen and rape for conduct arising out of his ongoing relationship with E.S., a client in his gym whom he first met when she was a minor. (R., pp.35-37.) Cox ultimately took advantage of plea negotiations and pled guilty to injury to child, amended from lewd conduct. (R., pp.35-36, 60-62; Tr., p.5, L.16 – p.13, L.18.) In exchange for his plea, the state dismissed the rape charge and agreed, pursuant to a binding Rule 11 agreement, to limit its sentencing recommendation to a penalty no harsher than that recommended by the presentence investigator. (Tr., p.1, L.18 – 2, L.9.)

At sentencing, Cox objected to the presentence report generally as containing conjecture and speculation in the form of statements from two of Cox's three ex-wives and requested the entire report be stricken and a new investigation ordered with another presentence investigator. (Tr., p.19, L.1 – p.21, L.25.) The court initially stated it felt compelled to grant Cox's motion to strike the presentence report and order a new one on the record. (Tr., p.36, Ls.11-17.) However, after taking a break and meeting with "counsel in chambers regarding one aspect of [Rule 32]," the court re-set Cox's sentencing hearing to allow the defense to file a formal motion and for the state "to call the presentence

investigator as a witness to clarify" the issues of reliability and her reliance on the areas of conjecture and speculation in the presentence report. (Tr., p.36, L.18 – p.38, L.11.)

The presentence investigator testified at the continued sentencing that she considered the statements of the two ex-wives to be reliable because they somewhat corroborated one another and they were confirmed by Cox himself in her interview process with him. (Tr., p.71, L.7 – p.74, L.23.) The presentence investigator further testified that her sentencing recommendation of incarceration was not based on the statements of the ex-wives (Tr., p.75, Ls.1-12; p.78, Ls.11-15), but instead on other factors present in the case:

> Well, just by looking at from my statement, I was very concerned that he failed to take full responsibility for his actions. There were discrepancies of when he said their sexual relationship occurred. I didn't like his statement where he talks about that the victim misconstrued his actions as sexual. According to the victim they went into a janitor's closet together and made out and so and I mean how can – I find it difficult to believe that a sixteen year old girl is misconstruing his actions as not being sexual.
>
> The fact that he tried to portray himself as like that he was – only pled guilty to all of this in essence to try and help the victim and his words – and these are quotes that came written from his questionnaire was "get through what he was feeling – what she was feeling". [sic] That is—I just felt that he didn't have very much empathy for her or remorse for what he had done. Like he was basically doing her a favor by pleading guilty.
>
> And the fact that it was a very serious crime and that this has had a lengthy impact on the victim and is affecting her into her adult life, and this is a serious crime.

(Tr., p.78, L.24 – p.79, L.17.) At the conclusion of the testimony, the court concluded "the proper course" of action was "not to strike the presentence investigation in total," but to strike portions of the report which were based on

only speculation and conjecture. (Tr., p.110, L.16 – p.111, L.8.) The court struck the contentious letters of the two ex-wives in full and redlined the excerpts of those letters from the presentence report. (Tr., p.111, Ls.8-22.)

Subsequent to the denial of Cox's motion to strike the entire presentence report, Cox moved the court to "consider recusing itself from after having reviewed that information on the grounds that it would be impossible for the Court to divorce itself from the information that it has already retained and rely on that information to render sentencing." (Tr., p.117, Ls.16-20.) The court declined Cox's request to recuse itself (Tr., p.118, L.14 – p.120, L.4) and sentenced Cox to a ten year unified sentence with the first three years fixed (Tr., p.178, Ls.19-21; R., pp.98-101).

Cox timely appeals. (R., pp.105-107.)

ISSUES

Cox states the issues on appeal as:

1. Did the trial court err in failing to strike the entire presentence investigation based upon the presentence investigation containing inappropriate conjecture and speculation, and by failing to order a new presentence investigation?

2. Did the Court err by failing to disqualify itself, upon motion by counsel, after it had reviewed prejudicial material in the presentence investigation report?

3. Did the District Court err when it sentenced Dennis Cox to ten years unified, three years fixed, seven years indeterminate?

(Appellant's brief, pp. 16, 24, 26.)

The state rephrases the issues as:

1. Has Cox failed to establish the district court abused its discretion in failing to strike the entire presentence report where it properly struck portions of the report which it deemed to be conjecture and speculation?

2. Has Cox failed to establish the district court erred in denying Cox's motion to recuse itself where the court did not act with prejudice directed against Cox?

3. Has Cox failed to establish that the district court abused its discretion by imposing a unified sentence of ten years with the first three years fixed life following his plea of guilty to an amended charge of injury to child for his ongoing relationship with his victim E.S. where E.S. was a minor when the abuse began and Cox continued to avoid accepting responsibility for his actions until his sentencing hearing?

ARGUMENT

I.
Cox Has Failed To Establish The District Court Erred In Failing To Strike The Entire Presentence Report Where It Properly Struck Portions Of The Report Which It Deemed Conjecture And Speculation

A. Introduction

Cox argues on appeal that the district court erred in failing to strike the entire presentence report and order a new one because "the binding Rule 11 agreement was relying on the presentence investigator to comply with Rule 32, and to not reply upon inappropriate material in reaching her conclusions," and as such, the district court's ability to strike portions of the report does not remove the taint of the "inflammatory material." (Appellant's brief, p.24.) Cox's argument fails.

B. Standard Of Review

The district court has broad discretion in determining what evidence is to be admitted at a sentencing hearing. State v. Burdett, 134 Idaho 271, 275, 1 P.3d 299, 303 (Ct. App. 2000); State v. Viehweg, 127 Idaho 87, 92, 896 P.2d 995, 1000 (Ct. App. 1995). It is presumed that a sentencing court was able to ascertain the relevancy and reliability of the broad range of information and material which was presented to it during the sentencing process, to disregard the irrelevant and unreliable evidence, and to properly weigh the remaining evidence which may be in conflict. State v. Pierce, 100 Idaho 57, 58, 593 P.2d 392 (1979); State v. Campbell, 123 Idaho 922, 925, 854 P.2d 265 (Ct. App. 1993); State v. Holmes, 104 Idaho 312, 314, 658 P.2d 983 (Ct. App. 1983).

"A district court's denial of a motion to strike or delete portions of a PSI is reviewed on appeal for an abuse of discretion." State v. Mole, 148 Idaho 950, 961, 231 P.3d 1047, 1058 (Ct. App. 2010) (citing Idaho Criminal Rule 32(e)(1); State v. Rodrigues, 132 Idaho 261, 263, 971 P.2d 327, 329 (Ct. App. 1998).).

C. Cox Has Failed To Show Any Error In The Trial Court's Refusal To Strike The Entire Presentence Report And Order A New One

Idaho Criminal Rule 32 provides:

> The presentence report may include information of a hearsay nature where the presentence investigator believes that the information is reliable, and the court may consider such information. In the trial judge's discretion, the judge may consider material contained in the presentence report which would have been inadmissible under the rules of evidence applicable at trial. However, while not all information is a presentence report need be in the form of sworn testimony and be admissible in trial, conjecture and speculation should not be included in the presentence report.

Idaho Criminal Rule 32(e)(1). The application of I.C.R. 32 has been examined extensively by Idaho courts:

> Under these rules, a sentencing court is free to consider the results of a presentence investigation if the reliability of the information contained in the report is insured by the defendant's opportunity to present favorable evidence, to examine all the materials contained in the report, and to explain or rebut adverse evidence. The court may consider hearsay evidence, evidence of previously dismissed charges against the defendant, or evidence of charges which have not yet been proved, so long as the defendant has the opportunity to object to, or to rebut, the evidence of his alleged misconduct. It is error, however, for the court to consider such information if there is no reasonable basis to deem it reliable, as where the information is simply conjecture or speculation. On appeal, we presume that a sentencing court is able to ascertain the relevancy and reliability of the broad range of information and material which is presented to it during the sentencing process, to disregard the irrelevant and unreliable evidence, and to properly weigh the remaining evidence which may be in conflict.

State v. Campbell, 123 Idaho 922, 926, 854 P.2d 265, 269 (Ct. App. 1993) (internal citations omitted).

On appeal, Cox argues the district court erred in failing to strike the entire presentence report because allowing the conclusions of the presentence report to remain after striking portions of the report "caused harm to" Cox in that "[a] house built of faulty materials and a weak foundation will inevitably fall." (Appellant's brief, p.22.) Cox relies on State v. Mauro, 121 Idaho 178, 824 P.2d 109 (1991), for his assertion that the entire presentence report in his case should have been stricken, stating that "[m]ostly, *Mauro* is on point with Mr. Cox's case." (Appellant's brief, p.18.) The Court's concern in Mauro included a lack of information about the reliability of the information contained within the presentence report:

> Without an explanation from the presentence investigator why he believed that the hearsay information was reliable, or an indication by the trial court that he was not relying on it, we conclude that the presentence report contained too much speculation and conjecture, and too little support for why the presentence investigator believed that the hearsay information was reliable, to comply with I.C.R. 32(e).

Mauro, 121 Idaho at 183, 824 P.2d at 114. Here, not only did the presentence investigator testify about her understanding of the reliability of the statements included in the report and her lack of reliance on them in reaching her ultimate conclusion that incarceration was appropriate (Tr., p.63, L.17 – p.75, L.35), the district judge struck the statements and assured the parties he would impose a sentence not based on the stricken information (Tr., p.110, L.16 – p.112, L.24). Cox has failed to show error by the district court.

Cox further asserts that in his case "the presentence report was even more important in that the she [sic] had tremendous control over the outcome of the case." (Appellant's brief, p.20.) Cox argues "[t]he Rule 11 Binding Plea Agreement bound the Court to sentence no harsher than the recommendations of the presentence report, and that the State was not allowed above and beyond the recommendations of the presentence report." (Appellant's brief, pp.20-21.) Cox appears to argue on appeal that the Rule 11 agreement placed limits on the information which could be included in the presentence report beyond the confines of Rule 32, and the specific nature of the Rule 11 agreement itself is what entitles him to a new presentence report. This argument was not raised below and should not be considered by this Court. State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000) (it is a fundamental tenet of appellate law that a claim not raised before the district court will not be considered on appeal).)

Even if considered by this Court, there is no support for Cox's position on appeal that the plea agreement of the parties placed any limitations on the information allowed in the presentence report. The Rule 11 plea agreement provided for the amendment of one charge and dismissal of another and set sentence recommendation limits on the state. (See R., pp.60-63 (minute entry and order of change of plea); Tr., p.1, L.14 – 3, L.6.) The only mentions of the presentence report in the Rule 11 agreement were in relation to the limitation of the state in recommending a sentence with "no harsher of a penalty than what is recommended by the presentence investigator" (Tr., p.1, L.25 – p.2, L.1) and the binding of the court pursuant to the agreement to a "sentence no harsher as

defined above than what is recommended by the presentence investigator" (Tr., p.2, Ls.5-7). The Rule 11 agreement did not set limits on the information allowed in the presentence report.

At sentencing, Cox objected to "areas of conjecture and speculation." (Tr., p.20, Ls.21-22). In response, the court struck the letters of Cox's two ex-wives and the portions of the presentence report that "contain[ed] conjecture and hearsay." (Tr., p.110, Ls.16-20.) In making its sentencing recommendations, the state recommended a prison sentence, within the limitations of the Rule 11 agreement, based on the serious nature of the crime Cox pled guilty to and the need of the system to "protect society." (See generally Tr., p.156, L.24 – p.167, L.10 (state's sentencing recommendation).) The trial court, in concluding that probation would "depreciate the seriousness" of Cox's crime, properly weighed the remaining evidence available to it in imposing a prison sentence. See Mauro, 123 Idaho at 926, 854 P.2d at 269; Tr., p. 177, Ls.7-13.

Cox has failed to show that the plea agreement set limits on the presentence report which would entitle him to his requested relief of having the original presentence report stricken in its entirety with a new report prepared. The trial court's refusal to order a new presentence report was appropriate.

II.

Cox Has Failed To Establish The District Court Erred In Denying Cox's Motion To Recuse Itself Where The Court Did Not Act With Prejudice Directed Against Cox

A. Introduction

Cox asserts on appeal that the trial court erred in failing to disqualify itself because:

> The Court read, in a presentence report information that was wholly inappropriate, to the level that the Court took the unusual step of redlining and deleting the material. The material deleted was inflammatory. It was highly prejudicial. Reading it has to have an impact on the reader.

(Appellant's brief, p.25.) Because Cox has failed to show the judge was biased or prejudiced against Cox, his argument fails.

B. Standard Of Review

Idaho Criminal Rule 25(b)(4) allows for the disqualification of a judge who is "biased or prejudiced for or against any party or that party's case in the action." However, whether a judge's involvement in a case reaches a point where disqualification from further participation becomes necessary is left to the sound discretion of the trial judge. State v. Kenner, 121 Idaho 594, 826 P.2d 1306 (1992); Sivak v. State, 112 Idaho 197, 731 P.2d 192 (1987).

C. Cox Has Failed To Show The Trial Judge Was Biased Or Prejudiced Against Him, Necessitating Disqualification

Disqualification is appropriate where "there is actual prejudice against the litigant of such a nature as to render it improbable that the presiding judge could or would give the litigant a fair and impartial trial." State v. Elliott, 126 Idaho 323,

329, 882 P.2d 978, 984 (Ct. App. 1994). Cox cannot show that the judge was actually prejudice against him or that any claimed actual prejudiced resulted in an imposition of sentence. The basis for Cox's disqualification claim is that the judge read inappropriate an highly prejudicial information in a presentence report and as such, it could not be ascertained with certainty that the court could be "fair and unbiased." (Appellant's brief, pp.26-27.) There is no merit to this argument.

In Mauro, the Court vacated Mauro's sentence and remanded his case for resentencing with a new presentence report, but found "the trial court did not act with prejudice directed against Mauro" where "the judge at sentencing indicated that he would not take into consideration the information regarding ... the improper statements contained in the presentence report." 121 Idaho at 183-84, 824 P.2d at 114-15. Here, the trial court struck letters and excerpts from letters it deemed conjecture and speculation (Tr., p.111, Ls.5-22), made sure Cox had "an adequate opportunity to present favorable evidence and to explain or rebut any adverse information" (Tr., p.112, L.25 – p.113, L.2), made it clear in imposing sentence that he was not relying on statements of conjecture and speculation but instead focused on the goals of sentencing and the nature of the crime before him (Tr., p.112, Ls.21-24 ("At this point in time I have stricken those statements of the ex-wives in this matter that I spoke of previously and do not intend to consider those statements in any respect, form, or fashion.")).

Cox has failed to show that the judge was actually biased.

III.
Cox Has Failed To Establish An Abuse Of The Sentencing Court's Discretion By Imposing A Ten Year Unified Sentence With The First Three Years Fixed Following His Plea Of Guilty To Injury To Child

A. Introduction

Cox argues the district court erred in imposing sentencing of three years fixed followed by seven years indeterminate where the court "seemed to have a natural predisposition against crimes of a sex related nature." (Appellant's brief, pp.27-28.) Cox cites the fact that he was 53 years old at the time of sentencing with "nary a criminal charge prior to these allegations"[1] (Appellant's brief, p.27), his "heartfelt apology," his status as being a low-risk to re-offend, his lack of other victims, and the reduced nature of the charge to which he pled as factors which the court gave insufficient weight to in fashioning his sentence. (Appellant's brief, pp. 27-28.) Cox has failed to meet his burden and thereby failed to establish that the district court abused its discretion in imposing a 10-year unified sentence with the first three years fixed upon his plea of guilty to injury to child.

B. Standard Of Review

When a defendant alleges an excessive sentence on appeal, the appellate court independently reviews "all of the facts and circumstances of the case" and considers the nature of the offense and the character of the offender. State v.

[1] This is not entirely forthcoming as although the initial information alleged Cox's offenses to have occurred in 2001 and 2004 (R., pp.35-37) and were not disclosed to law enforcement until 2010 (PSI, pp.2-6), Cox was charged with two counts of lewd conduct with a child under sixteen for allegations from 2003 and received an acquittal on both in December of 2010, prior to his sentencing in this case. (PSI, p.7.)

Cope, 142 Idaho 492, 500, 129 P.3d 1241, 1249 (2006). To prevail, the appellant must establish that, under any reasonable view of the facts, the sentence is excessive considering the objectives of criminal punishment. Cope, 142 Idaho at 500, 129 P.3d at 1249. Those objectives are "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing." State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). The fixed portion of the sentence is considered the probable duration of confinement. State v. Sanchez, 115 Idaho 776, 777, 769 P.2d 1148, 1149 (Ct. App. 1989). A sentence that does not exceed the statutory maximum will not be disturbed on appeal absent a clear abuse of discretion. State v. Reinke, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). Where reasonable minds might differ as to the length of sentence, the appellate court will not substitute its view for that of the sentencing court. State v. Brown, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992).

C. Cox Has Failed To Establish That The District Court Abused Its Discretion

The district court properly took into consideration the goals of sentencing when formulating Cox's sentence. (Tr., p.176, L.17 – p.177, L.6.)

Cox asserts his sentence was excessive when viewed in light of all of the circumstances, including his "lack of a criminal history, and other mitigating factors." (Appellant's brief, p.28.) The district court took into consideration the mitigation presented on Cox's behalf:

> As I consider this case, I have given close consideration to the facts and circumstances that are set forth in the presentence investigation report. I have given close consideration to the abnormally large amount of support that Mr. Cox has, and a ream full of support letters that have been submitted in support of Mr. Cox, which indicates as Mr. Love and Ms. Marriott have done here today, that their experiences with Mr. Cox has [sic] been nothing but positive, and they make good statements on his behalf and that is what the majority of these letters reflect.
>
> I see an individual who is Mr. Thompson indicates here in Court today, as a fifty three year old individual who appears to have been successful in his life to date. He has ran [sic] businesses, his [sic] presently employed in an important occupation and position with his employer and who has apparently done a lot of good.

(Tr., p.171, L.12 – p.172, L.1.) The court also took note of the flip side of Cox:

> But as is also reflected in the presentence report, there is a lot under the surface there that perhaps is not as upstanding, and I have given consideration to those issues as well. I recognize that there is a lot of peripheral issues and peripheral allegations in this particular matter, and I don't give much consideration – I don't give any consideration to a lot of those issues. I agree with both the State and the defense in this matter, that this issue needs to focus in on the particular crime and the circumstances surrounding that particular crime . . .

(Tr., p.172, Ls.1-10.) The court was concerned with the ongoing nature of the relationship between Cox and his victim which started when E.S. was a juvenile. (Tr., p.173, L.5 – p.176, L.16.) The district court considered all of these factors and concluded "a sentence of probation would not – would depreciate the seriousness of this particular crime, probation can be an appropriate punishment, but I think it would depreciate the seriousness of this crime." (Tr., p. 177, Ls. 7-10.)

The court took into consideration the fact that Cox finally appeared to be taking responsibility for his actions:

> The Court also finds in this matter, and will find as follows – well before I do that I am going to state one other issue. Mr. Cox, I have given consideration to your statement in allocution today. I think for the first time, today, perhaps, I sensed more of a sense of remorse and empathy for the victim that what has come across to me in the presentence investigation reports in the past, and I commend you for that. You ask – you take responsibility for your conduct. You admit that it is wrong and you ask the Court show leniency on you with respect to this matter, and I appreciate that and I will take that into consideration.

(Tr., p.177, Ls.14-24.) This information was considered against the backdrop of the repercussions suffered by Cox's victim:

> When we commit what are not victimless crimes, but are crimes against our youth, that are long lasting, I can only start to look at my notes with respect to [the victim's] statements concerning the way this will affect her and she says it has a lifelong effect on her. It affects how she relates to people; how she relates to her husband and family, and it creates trust issues with respect to her and others.
>
> The affects and the effects of sexual abuse upon minors is long lasting and the effects – the extend of the effects are never known in their entirety, and I cannot reach any other conclusion but the appropriate punishment for a crime of this magnitude, based upon these facts and circumstances, dictates [a prison sentence].

(Tr., p.178, Ls.7-18.)

Cox has failed to show that the sentence three years fixed followed by seven years indeterminate is excessive considering the seriousness of the offense and the lasting impact upon his victim combined with his continued denial of wrong doing and inability to take responsibility for his actions minimized only at the time of sentencing.

CONCLUSION

The state respectfully requests this Court to uphold Cox's judgment of conviction and sentence.

Dated this 22nd day of February 2012.

NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of February 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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NLS/pm