3-15-2013

State v. Widmyer Appellant's Brief Dckt. 39954

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 39954
Plaintiff-Respondent,	)	
	)	
VS.	)	
	)	
GARRY KEVIN WIDMYER,	)	
	)	
	)	
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

HONORABLE BENJAMIN R. SIMPSON, District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho
PO Box 83720
Boise, Idaho 83720-0010
(208) 331-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

J. BRADFORD CHAPMAN
Sr. Staff Attorney
The Law Office of the
Kootenai County
Public Defender
PO Box 9000
Coeur d'Alene, Idaho 83816-9000
(208) 446-1700

ATTORNEY FOR
DEFENDANT-APPELLANT

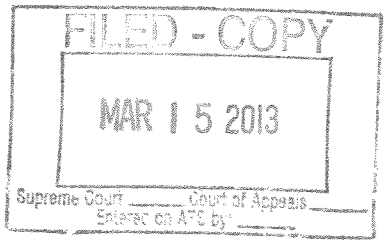

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

United States Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

Mr. Widmyer entered an *Alford* plea of guilty to a charge of injury to a child. During sentencing the court punished Mr. Widmyer for exercising a fundamental right and rejecting the psychosexual evaluation and polygraph, which were the intended conditions of probation. As a result of Mr. Widmyer invoking his constitutional rights in regard to the psychosexual evaluation and polygraph, the court gave Mr. Widmyer close to the maximum penalty under the statute and did not consider the four objectives of sentencing appropriately.

Statement of the Facts and Course of Proceedings

On January 5, 2012, Mr. Widmyer entered an *Alford* plea of guilty to a charge of injury of a child, rather than go to trial on felony matters for the third time. (Tr. 752, 754:6-9; R. 442). The *Alford* plea arises from charges brought in May 2008. (Tr. 756:22-23). The charge of injury to a child under I.C. 18-1501(2), is a misdemeanor and punishable by six months and $1,000.00. (Tr. 801:10, 753:13-14, 793:7-8). The plea Mr. Widmyer entered into contained no factual allegations, and the complaint contained only allegations contained in the statute. (Tr. 795:10-13; R. 171).

On January 27, 2012, Mr. Widmyer was sentenced by the trial court to pay fines and costs totaling $750.00, 365 days of jail, with 174 suspended and credit for 11 days served. (Tr. 777:24-25, 778:10-11; R. 443). Mr. Widmyer was further placed on two years supervised probation, and ordered to obtain a sex offender evaluation and polygraph. (Tr. 778:14- 779:16; R. 444). When the trial court determined Mr. Widmyer's sentence it concentrated on providing

protection to the public and rehabilitation. (Tr. 777:1-11). During this hearing Mr. Widmyer's attorney reminded the trial court that they were not here on felony sentencing. (Tr. 769:7-22). Mr. Widmyer's attorney further notified the court that Mr. Widmyer had reported and adhered to the conditions of pretrial services since 2008. (Tr. 772:7-15). The conditions Mr. Widmyer had to comply with were the inability to leave the state, reporting to pretrial services weekly, and consuming no alcohol. (Tr. 772:7-15). The court commented it sat through one of Mr. Widmyer's trials and became intimately familiar with the facts of the case. (Tr. 777:13-17).

On April 6, 2012 at a Rule 35 hearing, Mr. Widmyer petitioned the court for leniency because the sentence was excessive at the time of pronouncement, was excessive in light of the information and circumstances arising since pronouncement, the sentence was illegal at the time it was imposed, the sentence improperly encroaches on Mr. Widmyer's constitutional protections against being compelled as a witness against himself, and county supervision of misdemeanor probation is unconstitutional. (Tr. 785:2-17; R. 449-65). The trial court accordingly vacated the sentence because it was illegal as imposed since the statutory maximum was exceeded. (Tr. 789:8; R. 467).

On April 13, 2012 at the second sentencing hearing, Mr. Widmyer had served 81 days of his sentence. (Tr. 793:15-18). The trial court stated, "if the Court places Mr. Widmyer back on probation, it is my intent that he would be required as conditions of that probation to complete a psychosexual and polygraph." (Tr. 800:7- 801:17). Mr. Widmyer rejected the conditions of probation because he declined to obtain a psychosexual evaluation and wanted to preserve his Fifth Amendment right. (Tr. 794:3-11, 802:8-9). Mr. Widmyer further informed the court he has no criminal history, is an attentive father, and does whatever he can to entertain his kids. (Tr. 795:19, 796:4-5). Mr. Widmyer's attorney stated Ms. Widmyer has dealt with numerous issues

since her husband's incarceration, including an inability to leave the house because she cannot plow snow, an inability to take out the garbage because she only has one arm, the complete destruction of their financial situation with imposed costs, and the stress and anxiety of going though this criminal action. (Tr. 794:25 – 795:7). Additionally, since Mr. Widmyer's incarceration, prowlers have been at his house on a regular basis to require the installation of cameras, and the perpetrators have been identified as one of the victims and their father. (Tr. 796). Mr. Widmyer's daughter has been harassed directly from people coming from the victims to tell her nasty things about her father or nasty things about what they are going to see happen to her father. (Tr. 796)

The court decided at the second sentencing hearing to impose a sentence of 156 days in jail with credit for 81, since Mr. Widmyer declined to accept what the court would impose as a condition of probation. (Tr. 801: 18-19; R. 471). Mr. Widmyer's attorney during sentencing reminded the trial court that Mr. Widmyer plead guilty to the misdemeanor, injury to a child. (Tr. 795:8-13). The court reasoned supervised probation with a psychosexual evaluation and a polygraph are in line with protecting the public to make sure if Mr. Widmyer did pose a risk to the public he could get appropriate treatment. (Tr. 800:7-12).

ISSUES PRESENTED ON APPEAL

1. **Did the district court abused its judicial discretion in imposition of Mr. Widmyer's sentence?**
2. **Did the district court imposed an illegal sentence?**
3. **Did the district court imposed a penalty upon Mr. Widmyer for asserting his 5th Amendment right?**

ARGUMENT

1. **The district court abused its judicial discretion in imposition of sentence of 156 days in jail because the sentence does not promote the protection of society, is excessive for deterring crime as applied to Mr. Widmyer, and is an excessive punishment.**

STANDARD OF REVIEW

The standard of review of whether the sentence is reasonable is abuse of discretion. *State v. Charboneau,* 124 Idaho 497, 861 P.2d 67 (1993). It has been held as long as the sentence is "within the statutory limits, the appellant must show the trial court, when imposing the sentence, clearly abused its discretion." *State v. Knighton,* 143 Idaho 318, 144 P.3d 23 (2006). The decision of the sentencing court will not be disturbed if reasonable minds could differ whether a sentence is excessive. *Id.* To determine whether the trial court has abused its discretion, the following factors are reviewed:

> (1)whether the trial court correctly perceived the issue as one of discretion, (2) whether the trial court acted within the outer bounds of that discretion and consistently with applicable legal standards, and (3) whether the trial court's decision was founded on and guided by an exercise of judicial reasoning.

Charboneau, 861 P.2d at 69 (citing *State v. Hedger,* 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989)).

DISCUSSION

In *Charboneau*, the "fundamental requirement in the proper exercise of sentencing discretion is reasonableness." *Charboneau*, 861 P.2d at 69. The Court will consider the actual term of confinement imposed in light of the "nature of the offense, the character of the offender, and the protection of the public interest" when determining if a sentence is longer than necessary to protect society and achieve "any or all of the related goals of deterrence, rehabilitation or retribution." *State v. Stands,* 121 Idaho 1023, 1026, 829 P.2d 1372(Ct.App. 1992)(citing *State v. Shideler,* 103 Idaho 593, 594, 651 P.2d 527, 528 (1982)). Additionally, the sentence imposed

should meet both the purpose of the "statute under which a defendant is convicted and the particular circumstances surrounding an individual defendant." *State v. Barnes,* 121 Idaho 409, 411, 825 P.2d 506 (Ct.App. 1992).

Furthermore, in reviewing a sentence, the Court will "conduct an independent examination of the record, focusing upon the nature of the offense and the character of the offender." *State v. Reinke,* 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct.App. 1982). To establish an imposed sentence is improper, the defendant must show the sentence is excessive under any reasonable view of the facts. *Charboneau,* 861 P.2d at 69.

The four objectives of sentencing are: (1) the protection of society, (2) the deterrence of crime both generally and specifically, (3) the possibility of rehabilitation, and (4) punishment or retribution for wrong doing. *Charboneau,* 861 P.2d at 69.

Here, an independent examination of the record showed the nature of the offense is injury to a child, a misdemeanor. Additionally, the record demonstrated the court's sentence is excessive under any reasonable view of the facts because the sentence does not protect society, is excessive for deterring crime as applied to Mr. Widmyer, does not take into account the possibility of rehabilitation, and the sentence is too harsh for an individual with no criminal history.

The court's sentencing does not protect society from Mr. Widmyer. Rather, the sentencing of Mr. Widmyer to jail deprives society of a worker paying taxes, a loving father, and husband who helps his wife, who has a missing arm, with the upkeep of the home. Additionally, Mr. Widmyer has not been convicted on any criminal charges prior to his *Alford* plea, and his plea contained no factual allegations. Furthermore, the complaint contained only allegations contained in the statute regarding injury to a child. As this case was brought in May of 2008, and

Mr. Widmyer has not committed or incurred any further criminal charges, despite prowlers coming around his home, which have been identified as one of the victims and their father. Therefore, there is a substantial likelihood Mr. Widmyer is not a risk to society since Mr. Widmyer has no criminal history prior and after the plea, and has shown control over himself despite prowlers going to his house and one of the victims and their father harassing him.

The sentencing exceeds the necessary effect of deterring Mr. Widmyer from committing crime both generally and specifically. Mr. Widmyer has been litigating this criminal matter for close to five years. During this time Mr. Widmyer has experienced a complete destruction of his financial situation with the imposed costs and attorney fees, has dealt with the stress and anxiety of going though this criminal action, and has experienced prowlers around his house on a regular basis requiring the installation of cameras. Moreover, Mr. Widmyer's daughter has been harassed by people coming from the victims to tell her nasty things about her father or about what they are going to see have happen to her father. Lastly, Mr. Widmyer has spent 81 days in jail. Therefore, when looking at all the facts and circumstances Mr. Widmyer has experienced since the charges were brought in 2008, a 156 day jail sentence is excessive. Litigating criminal charges for close to five years, living through two trials regarding the same matter, witnessing both his and his family's life fall apart due to this criminal matter, and spending 81 days in jail has sufficiently deterred Mr. Widmyer from committing any new crimes.

A sentence much shorter in duration would be sufficient to deter Mr. Widmyer from committing crime because Mr. Widmyer has no criminal history except for the *Alford* plea, and has not received any additional charges.

The court's sentencing abused its discretion regarding the possibility of rehabilitation. The court fails to take into account Mr. Widmyer has no criminal history, and is punishing Mr.

Widmyer by imposing the maximum sentence, for refusing to take a polygraph and psychosexual evaluation as a term of probation. During the court's first sentence of Mr. Widmyer, it imposed two years supervised probation with a polygraph and a psychosexual evaluation as conditions to probation. The court also imposed one year incarceration with 169 days suspended when it was under the belief the statute Mr. Widmyer pled guilty to allowed 1 year jail time as opposed to 6 months. Upon Mr. Widmyer's rule 32 motion, the court vacated the sentence due to the sentence exceeding the maximum sentence permitted under I.C. §18-1501(2). At the second sentencing the court would have placed Mr. Widmyer on supervised probation with the same conditions. However, Mr. Widmyer wanted to preserve his 5th Amendment right and specifically rejected the polygraph and psychosexual conditions. As a result, Mr. Widmyer was punished for not accepting the illegal terms of probation by the court imposing the maximum sentence available despite having no prior criminal history, and displaying to the court he was not a threat to society as he acquired no further charges since 2008. *See, infra* Argument sec. 2.

Lastly, the trial court acted within the outer bounds of its discretion and improperly sentenced Mr. Widmyer. The trial court sentenced Mr. Widmyer according to the charges he was tried for, rather than the charges he entered his *Alford* plea to. This is evidenced by Mr. Widmyer's attorney reminding the trial court Mr. Widmyer had pled guilty to a misdemeanor, not a felony at both the sentencing hearings; the judge commented he sat though at least one of the trials during the first sentencing hearing; and the judge kept trying to impose conditions of probation which relate to sexual offenders when Mr. Widmyer submitted an *Alford* plea to injury to a child, which contained no allegations of sexual misconduct.

Therefore, the six month jail sentence is excessive under any reasonable view of the facts because Mr. Widmyer is not a risk to society, the sentence exceeds the necessary effect of

deterring Mr. Widmyer from committing crime both generally and specifically, and the court refuses probation because Mr. Widmyer declines to take a polygraph and psychosexual evaluation.

2. The district court imposed an illegal term of probation upon Mr. Widmyer and imposed its sentence in an illegal manner.

STANDARD OF REVIEW

The court will exercise free review over whether a sentence is illegal or was imposed in an illegal manner because it is a question of law. *State v. Clements,* 148 Idaho 82, 84, 218 P.3d 1143 (2009) Idaho Criminal Rule 35 is a narrow rule that allow a trial court to correct an illegal sentence at any time, or to correct a sentence imposed in an illegal manner within 120 days. *State v. Farwell,* 144 Idaho 732, 735, 170 P.3d 397 (2007).

DISCUSSION

The court placed as a condition of probation that Mr. Widmyer submit to a polygraph and psychosexual evaluation. The court has discretion in determining whether to place a defendant on probation or to relinquish jurisdiction over the defendant. *State v. Goodgion,* 149 Idaho 17, 20, 232 P.3d 338 (Ct.App. 2010). However, if there is a term of probation not authorized by law, the court should find the court imposed an illegal sentence.

An illegal sentence is narrowly interpreted as a sentence that is illegal from the face of the record. *State v. Clements*, 148 Idaho 82, 86, 218 P.3d 1143 (2009). A sentence must be harmonious with current Idaho law, and the sentence may not impose a penalty that is simply not authorized by law. *Id.* at 86. The court may correct an illegal sentence at any time and may correct a sentence that has been imposed in an illegal manner within 120 days after the filing of a judgment or conviction or within 120 days after the court releases retained jurisdiction. *State v. Peterson,* 148 Idaho 610, 613, 226 P.3d 552 (Ct.App. 2010).

Idaho Code §18-8316 contains the requirement for psychosexual evaluations upon conviction. Here, the I.C. §18-8316 does not pertain to Mr. Widmyer because he submitted an *Alford* plea to injury to a child. Idaho Code §18-8316 provides:

> If ordered by the court, an offender convicted of any offense listed in section 18-8304, Idaho Code, may submit to an evaluation to be completed and submitted to the court in the form of a written report from a certified evaluator as defined in section 18-8303, Idaho Code, for the court's consideration prior to sentencing and incarceration or release on probation. The court shall select the certified evaluator from a central roster of evaluators compiled by the sexual offender management board. A certified evaluator performing such an evaluation shall be disqualified from providing any treatment ordered as a condition of any sentence, unless waived by the court. An evaluation conducted pursuant to this section shall be done in accordance with the standards established by the board pursuant to section 18-8314, Idaho Code.

Idaho Code § 18-8304 lists offenses which mainly pertain to sexual misconduct. Here, injury to a child does not fall within any of the offenses listed under I.C. § 18-8304. Additionally, under I.C. § 19-2524, a court may order defendant to take a substance abuse assessment and/or a mental health examination if defendant has pled guilty or been convicted of a felony. Here, Mr. Widmyer pled guilty to a misdemeanor and I.C. § 19-2524 is inapplicable to him. Therefore, the trial court's requirement Mr. Widmyer take a psychosexual evaluation as a condition of probation is an illegal requirement for probation.

Mr. Widmyer rejected probation solely because of the psychosexual examination, and as an alternative to probation was forced to accept the 156 day jail sentence. Since the court is not authorized to require Mr. Widmyer to take a psychosexual examination under I.C. §18-8316, the court tried to impose an illegal sentence, and imposed a six month jail sentence in an illegal manner.

3. The district court imposed the maximum sentence, a penalty, upon Mr. Widmyer because he asserted his 5th Amendment right.

STANDARD OF REVIEW

The court will exercise free review over whether a sentence is illegal or was imposed in an illegal manner because it is a question of law. *State v. Clements,* 148 Idaho 82, 84, 218 P.3d 1143 (2009) Idaho Criminal Rule 35 is a narrow rule that allow a trial court to correct an illegal sentence at any time, or to correct a sentence imposed in an illegal manner within 120 days. *State v. Farwell,* 144 Idaho 732, 735, 170 P.3d 397 (2007).

DISCUSSION

The Idaho Supreme Court held while "no United States Supreme Court case has specifically articulate a Fifth Amendment right against self-incrimination as it applies to psychosexual evaluations that may support a harsher sentence in a non-capital case, the case law . . . indicates that the Fifth Amendment applies to psychosexual evaluations." *Estrada v. State,* 143 Idaho 558, 564, 149 P.3d 833 (2006). A sentence must be harmonious with current Idaho law, and the sentence may not impose a penalty that is simply not authorized by law. *Clements*, 148 Idaho at 86. Additionally, a state may not impose substantial penalties on a person who decides to invoke his 5th Amendment right against self-incrimination. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977). Furthermore, where the government prevents an individual from asserting his 5th Amendment privilege by threatening to penalize him should he invoke it creates a "classic penalty situation." *Minnesota v. Murphy,* 465 U.S. 420, 434, 435 (1984). The Supreme Court of the United States noted there is "a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation." *Id.* at 435.

In this case, the court expressly asserted Mr. Widmyer would not receive probation if he did not take the psychosexual evaluation, however; would receive probation if he agreed to the

psychosexual evaluation as a condition of probation. This condition for probation is used on defendants who commit a crime of a sexual nature. Mr. Widmyer did not plead guilty to committing a crime of a sexual nature. He pled guilty to injury of a child, and his plea contained no factual allegations, and the complaint contained only the allegations contained in the statute. Therefore, Mr. Widmyer rejected these conditions of probation to preserve his 5th Amendment right. Subsequently, the court gave Mr. Widmyer close to the maximum sentence under the statute because Mr. Widmyer wanted to assert his 5th Amendment right. Had Mr. Widmyer accepted the terms of probation, the court would have probably sentenced Mr. Widmyer to about three months jail, [1] which would be proportionally consistent with the court's first sentencing of Mr. Widmyer. Therefore, the court gave Mr. Widmyer an illegal sentence because it was based on a penalty and Mr. Widmyer's sentence should be vacated.

CONCLUSION

The district court imposed an excessive sentence upon Mr. Widmyer because it did not apply the four objectives of sentencing appropriately. The district court abused its discretion when sentencing Mr. Widmyer to close to six months of jail because it was unable to withhold its own emotions for Mr. Widmyer's when determining the sentencing. Lastly, the district court penalized Mr. Widmyer for asserting his Fifth Amendment right and placed an illegal condition of probation on him. This Court is asked to vacate the sentence imposed herein and remand the case to a different district court based on the judge's bias or prejudice towards Mr. Widmyer. *See* I.C.R. 25; *see also, State v. Kennedy,* 139 Idaho 244, 76 P.3d 988 (Ct.App. 2003).

[1] During the sentencing on January 27, 2012 Mr. Widmyer was sentenced to one year, with 169 days suspended and two years supervised probation. The court was under the mistaken impression the maximum penalty was 1 year incarceration, not 6 months incarceration. (R. 443).

Respectfully submitted this 12 day of March, 2013,

J. BRADFORD CHAPMAN
Senior Staff Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of March, 2013, served a true and correct copy of the attached BRIEF OF APPELLANT via United States, postage prepaid, addressed to:

Lawrence G. Wasden
Attorney General
State of Idaho
P.O. Box 83720
Boise, Idaho 83720-0010