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State v. Lay Respondent's Brief Dckt. 40159

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	Nos. 40159, 40160
Plaintiff-Respondent,)	
)	Ada Co. Case Nos.
vs.)	CR-2011-17463, CR-2011-19826
)	
CHRISTOPHER LEE LAY,)	
)	
Defendant-Appellant.)	
_____)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

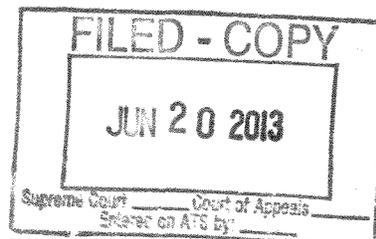
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STATEMENT OF THE CASE

Nature Of The Case

In this consolidated appeal, Christopher Lee Lay appeals from the judgments entered upon the jury verdicts finding him guilty of attempted strangulation, misdemeanor domestic battery in the presence of children, a persistent violator enhancement, and intimidating a witness. For the first time on appeal, Lay claims a due process violation in relation to the persistent violator enhancement. Lay also asserts the district court abused its discretion by failing to place him on probation.

Statement Of Facts And Course Of Proceedings

In Ada County Case No. CR-FE-2011-0017463 ("Case No. 2011-17463"), the state charged Lay with attempted strangulation and misdemeanor domestic battery in the presence of children for acts he committed against his girlfriend, Jamie. (R., pp.10-12, 37-38.) In that same case, the state filed an Information Part II alleging Lay is a persistent violator. (R., pp.45-46.)

Two months later, in Ada County Case No. CR-FE-2011-0019826 ("Case No. 2011-19826"), the state charged Lay with intimidating a witness, but did not allege a persistent violator enhancement in that case. (R., pp.221-222, 239-240.) The state filed a motion to consolidate both cases, which the court granted. (R., pp.234-236.)

A jury found Lay guilty of both charges alleged in Case No. 2011-17463 and of the intimidating a witness charge in Case No. 2011-19826. (R., pp.189-191, 375.) The jury also found Lay is a persistent violator. (R., p.376.)

In Case No. 2011-17463, the court imposed a unified 15-year sentence with five years fixed for attempted strangulation and a concurrent 90-day sentence for the misdemeanor charge, with 90 days credit for time served. (R., pp.203-206.) The court imposed a consecutive indeterminate five-year sentence in Case No. 2011-19826. (R., pp.388-391.) Lay filed timely notices of appeal in both cases, which were consolidated by order of the Idaho Supreme Court. (R., pp.2-3, 211-214, 394-396.)

ISSUES

Lay states the issues on appeal as:

1. Was Mr. Lay's due process right to notice violated when he as found to be a persistent violator with respect to the intimidating a witness conviction when the State provided no notice of its intent to seek such an enhancement and the jury's verdict did not include a finding that he was a persistent violator as to the intimidating a witness conviction?
2. Did the district court abuse its discretion when it declined to place Mr. Lay on probation following his convictions for attempted strangulation and intimidating a witness?

(Appellant's Brief, p.3.)

The state rephrases the issues as:

1. Has Lay failed to show reversible error in relation to the persistent violator enhancement?
2. Has Lay failed to show the district court abused its discretion in denying his request for probation given the nature of the offenses and his criminal history, including his prior failures on probation and parole?

ARGUMENT

I.

Lay Has Failed To Show Reversible Error In Relation To The Persistent Violator Enhancement

Although the state did not allege the persistent violator enhancement in the intimidating a witness case, Case No. 2011-19826, the verdict form for the persistent violator enhancement included both Case No. 2011-19826 and Case No. 2011-17463, the case in which the enhancement was alleged. (R., p.376.) Lay expressly stated he had no objection to the verdict form. (Tr.¹, p.354, Ls.3-4, 6.) The verdict form reflects the jury's finding that Lay is a persistent violator. (R., p.354.)

At the outset of sentencing, the court noted:

Mr. Lay was found guilty as a persistent violator in the 2011 case ending 17463 of attempted strangulation and domestic battery in the presence of child [sic] as a misdemeanor. Likewise he was found guilty in the case – 2011 case ending 19826 of intimidating, impeding, influencing or preventing the attendance of a witness.

(Tr., p.377, Ls.5-12.)

Later, in imposing sentence, the court stated:

So what I'm going to do in the 2011 case ending in 17463, on Count One, the attempted strangulation, I hereby sentence you to the custody of the Idaho State Board of Corrections under the Unified Sentence Law of the [S]tate of Idaho for an aggregate of 15 years with five fixed followed by ten indeterminate.

On Count Two, the misdemeanor, I sentence you to three months. You'll get credit for all time served. It will be concurrent.

In the case ending -- it's a 2011 case ending 19826, intimidation of a witness, I hereby sentence you to the custody of

¹ There are three transcripts included in the record on appeal. The transcript referred to in this brief contains the jury trial and sentencing hearing.

the Idaho State Board of Corrections under the Unified Sentence Law of the State of Idaho for an aggregate term of five years. And all of this, by the way, is enhanced as a persistent violator. Five years with zero fixed followed by five indeterminate. That case will run consecutive.

(Tr., p.399, L.17 – p.400, L.10.)

Lay did not object to the manner in which the court imposed his sentence. (See generally Tr., pp.400-402.) The court entered a separate judgment in both cases and both judgments indicate the jury found Lay guilty of the persistent violator enhancement. (R., pp.203, 388.) Lay has taken no action in the district court to amend the language of the judgment in Case No. 2011-19826.

For the first time on appeal, Lay complains “the parties and the district court erroneously believed that [he] had been found to be a persistent violator as to the intimidating a witness conviction” even though the enhancement was never alleged in that case. (Appellant’s Brief, p.4.) Lay argues his “due process right to notice” was violated as a result. (Appellant’s Brief, p.4.) Lay further contends that although “the sentence imposed did not exceed the non-enhanced maximum sentence for intimidating a witness, it is impossible to say from the record that the erroneous persistent violator finding was harmless.” (Appellant’s Brief, p.5.) Lay is incorrect.

“It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal.” State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho

209, 227, 245 P.3d 961, 979 (2010). Review under the fundamental error doctrine requires Lay to demonstrate the error he alleges: “(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.” Perry, 150 Idaho at 228, 245 P.3d at 980.

The state concedes the persistent violator enhancement was not alleged in the Information filed in Case No. 2011-19826. Nevertheless, the verdict form for the enhancement included that case number, and was submitted to the jury without objection. While this was technically incorrect, Lay’s claim that he was deprived of notice that the state was seeking to “enhance” the intimidating a witness charge seems somewhat disingenuous given that the cases were consolidated prior to trial and he was well-aware that the enhancement would be submitted to the jury along with all the substantive charges in both cases. After all, the purpose of providing notice is to afford a defendant an opportunity to know what he is being charged with so he can defend against it and protect himself against future prosecutions for the same offense. See State v. Owen, 129 Idaho 920, 926, 935 P.2d 183, 189 (Ct. App. 1997). Lay cannot seriously contend he was deprived of notice in that sense.

In any event, Lay has failed to demonstrate any error in relation to the persistent violator enhancement is anything but harmless in this case. In support of his argument that the error is not harmless, Lay relies on State v. Clark, 132

Idaho 337, 971 P.2d 1161 (Ct. App. 1998). (Appellant's Brief, p.5.) Clark actually supports a contrary conclusion.

In Clark, the state charged the defendant with two counts of lewd conduct and with being a persistent violator. 132 Idaho at 338, 971 P.2d at 1162. A jury found him guilty of both counts of lewd conduct and he moved to dismiss the enhancement, claiming the evidence was insufficient. Id. The district court denied the motion and, after the jury found Clark was a persistent violator, the court imposed two concurrent unified life sentences with 30 years fixed. Id. On appeal, the Court concluded "the district court erred when it submitted the persistent violator issue to the jury." Id. at 340, 971 P.2d at 1164. Addressing the state's argument that the error was harmless because it "did not affect the district court's sentence," the Court stated:

The issue before us then is whether we are convinced, beyond a reasonable doubt, that the persistent violator finding did not affect the sentence imposed by the district court. We recognize that the legislature created the persistent violator statute to insure that habitual criminals will serve longer periods of incarceration than first-time felons. The persistent violator status carries with it a certain stigma and may place pressure on the sentencing court to protect the public with a more lengthy sentence, as well as on prison officials who may be reluctant to grant parole. Therefore, a persistent violator finding will often cause enhancement of the sentence imposed by the sentencing court and may also defer one's parole status.

Clark, 132 Idaho at 340, 971 P.2d at 1164.

The Court ultimately concluded the error was not harmless, reasoning:

In this case, Clark was found to be a persistent violator and was sentenced to prison for a long term, perhaps a term that will exceed the duration of his life. Although the district court listed the persistent violator finding separately in Clark's judgment of conviction, it did not make a separate reference to the persistent

violator finding when it defined the sentence. Also, a review of the transcript reveals that the record is silent as to how the persistent violator finding was taken into account by the district court in constructing the sentence. Based on the underlying policies of the persistent violator legislation, the district court's silence as to what weight, if any, it gave the persistent violator finding, and the facts of this particular case, we are not convinced beyond a reasonable doubt that the district court would have sentenced Clark to thirty years fixed if he had not been found to be a persistent violator.

Clark, 132 Idaho at 340-341, 971 P.2d at 1164-1165.

Unlike in Clark, there was a valid persistent violator finding in this case, which the district court correctly noted at the outset of sentencing was part of "the 2011 case ending 17463." (Tr., p.377, Ls.5-6.) Further, because the cases were consolidated, the court imposed sentence on all charges at the same time, properly taking into account the enhancement in doing so. While the court commented that its sentence was "enhanced" because of the persistent violator finding, and both judgments reflect the enhancement, both felony sentences are within the statutory maximum and nowhere near the potential life sentence available as a result of the enhancement. It is difficult to conceive, under these circumstances, that the sentences would have been different but for the error in the verdict form, which carried through to the judgments. Lay has failed to meet his burden of demonstrating that any error related to the persistent violator enhancement affected the outcome of his case, *i.e.*, his sentence. Perry, 150 Idaho at 226, 245 P.3d at 978. Any error is therefore harmless.

II.

Lay Has Failed To Show The District Court Abused Its Sentencing Discretion

A. Introduction

Lay contends the district court “abused its discretion when it declined to place him on probation.” (Appellant’s Brief, p.6.) A review of the applicable sentencing standards to the facts of this case shows Lay has failed to meet his burden of showing the district court abused its sentencing discretion.

B. Standards Of Review

“Where the sentence imposed by a trial court is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion.” State v. Miller, 151 Idaho 828, 834, 264 P.3d 935, 941 (2011) (quotations and citations omitted). “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” Id.

C. Lay Has Failed To Show The District Court Abused Its Discretion In Denying His Request For Probation

Lay contends the district court abused its discretion in declining to place him on probation, claiming the “mitigating factors present in his case, most notably the express wishes of the victim,” warranted granting his probation request. (Appellant’s Brief, p.6.)

Prior to imposing sentence, the district court stated it considered the facts of Lay's crimes, his criminal history, and "all the Toohill² factors." (Tr., p.395, Ls.17-19.) The court then explained:

I'm not going to lay out all of the things that both counsel have laid out, but I do want to make it clear the evidence in this case in my view was overwhelming that, in fact, you did these crimes contrary to what you say. The pictures of [the victim], the immediate statements that were made by her and her daughter are at complete odds with what you now claim and what she now claim [sic]. In fact, she's gone through several versions. That's not unusual in a domestic violence situation. It's very common that women and men who have been abused will change their versions and usually end up trying to support the person who's been accused. That happens all of the time.

But the evidence in this case really was quite overwhelming. You had a third party who observed the things that happened when you both came out of that house. It was at complete odds with your testimony and her later testimony. It's consistent with what she told the officer at the scene. It's consistent with what the eleven year old told the officers at the scene. There is no corroboration for any of your testimony.

(Tr., p.395, L.20 – p.396, L.18.)

While Lay may find it significant that "the victim asked the district court not to sentence him to any term of incarceration" (Appellant's Brief, p.7), as noted by the district court, such a request is hardly surprising in a domestic violence situation. If anything, the victim's request and willingness to take the blame in this case following Lay's abuse and intimidation of her shows why she, and others, need protection from Lay. That Lay can successfully exercise power and

² State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982) (articulating the following "four objectives of criminal punishment: (1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment or retribution for wrongdoing").

control over an intimate partner is a factor weighing against probation, not in favor of it, especially given what the court characterized as his “extreme anger issues,” which are consistent with the domestic evaluator’s finding that he has “antisocial personality disorder.” (Tr., p.396, Ls.21-25.)

In addition to his reliance on the victim’s request, Lay cites his drug addiction, his acknowledgement that he has performed poorly on probation and parole in the past, his “insight,” alleged amenability to treatment, and the support of family and friends as other “mitigating factors” demonstrating an abuse of the court’s discretion in denying his request for probation. (Appellant’s Brief, pp.7-8.) Contrary to Lay’s claims, the record fully supports the district court’s sentence of imprisonment without probation.

The district court explained why probation was not an option:

I would find if I were to place you on probation, there’s an undue risk that during any period of probation you would commit additional crimes that may very well involve violence. And more importantly you are a multiple offender, and, quite frankly, 1994 or ’93, since 1993 you have been involved in the criminal justice system. So you are a multiple offender.

The statements you’ve made today are, as [the prosecutor] pointed out, eerily similar to those that have been made in the past. You have never had a successful probation or parole.

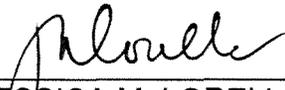
(Tr., p.398, L.16 – p.399, L.2.)

Lay’s claim that the district court should have placed him on probation despite the fact that he is a persistent violator who has “never had a successful probation or parole” is without merit.

CONCLUSION

The state respectfully requests this Court to affirm the judgments in both cases.

DATED this 20th day of June 2013.



JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of June 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



JESSICA M. LORELLO
Deputy Attorney General

JML/pm