7-25-2013

State v. Farr Respondent's Brief 2 Dckt. 40499

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. DWAYNE JOSEPH FARR, Defendant-Appellant.	)	No. 40499 Kootenai Co. Case No. CR-2011-19395

AMENDED BRIEF OF RESPONDENT

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

HONORABLE DARREN B. SIMPSON
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

DAPHNE J. HUANG
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

SALLY J. COOLEY
Deputy State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEY FOR
DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

Nature of the Case

This amended brief removes a footnote on page three and clarifies the timeliness of Farr's Rule 35 Motion.

Dwayne Joseph Farr appeals from his judgment of conviction on guilty plea to felony domestic battery. Farr argues the district court erred by failing to sua sponte order a mental health evaluation before sentencing, and by relinquishing retained jurisdiction. Farr also argues the district court abused its discretion by not reducing his sentence of eight years with three years fixed.

Statement of Facts and Course of Proceedings

Dwayne Joseph Farr assaulted his wife Gena Farr by slapping her in the face, throwing her against the wall and strangling her, and threatening her with a kitchen knife. (PSI, pp. 3-4.) Farr also grabbed Gena by the hair and dragged her around the living room as their four year-old son and 15 year-old daughter watched. (PSI, p. 4.) Gena escaped with the children and called police. (PSI, p. 4.) Police found and arrested Farr, who smelled of alcohol and slurred his speech. (PSI, p. 4.)

The state charged Farr with felony domestic battery, felony attempted strangulation, and felony aggravated assault. (R., pp. 43-44, 53-55.) The district court entered a no contact order against Farr, prohibiting him from having any contact with Gena, or being within 300 feet of their shared residence unless accompanied by law enforcement. (R., p. 37.)

Pursuant to a written agreement, Farr pleaded guilty to the domestic battery charge. (R., pp. 49-52.) In exchange, the state dismissed the remaining counts and agreed to recommend probation and local jail time at sentencing, so long as Farr complied with terms in the settlement offer. (R., pp. 52, 56-60.) At the plea hearing, the district court advised Farr he would be released on his own recognizance subject to conditions which included compliance with the no contact order. (12/21/11 Tr., p. 13, Ls. 22-24; p. 14, L. 18 – p. 15, L. 23.) In the weeks before his sentencing hearing, Farr violated the no contact order twice. (R., p. 64; PSI, pp. 8, 34; 2/17/12 Tr., pp. 5, 7.) Thus at sentencing, the district court imposed a term of eight years with three years fixed, but retained jurisdiction and recommended placement in the therapeutic community. (2/17/12 Tr., p. 12, Ls. 2-9; R., pp. 66-70.)

At Farr's jurisdictional review hearing in October 2012, the state argued that Farr violated terms and conditions of his rider program. (10/5/12 Tr., p. 42, Ls. 15-19; see PSI, p. 54.) At the hearing, Gena testified that Farr called her phone number "almost every day, several times a day" while in his retained jurisdiction program. (10/5/12 Tr., p. 28, Ls. 13-14; p. 29, Ls. 9-18.) Disciplinary hearing officer Tom Rodgers testified that Farr acknowledged making phone calls to Gena's phone, but said he had a right to contact his daughter. (10/5/12 Tr., p. 39, L. 20 – p. 40, L. 10; p. 40, Ls. 13-14.)

The district court noted that Farr was served with a no contact order prohibiting him from directly or indirectly contacting or communicating with Gena. (10/5/12 Tr., p. 44, Ls. 8-13.) The court said it did not believe "that because he's

allowed to contact his children that gives him the right to contact his children through his wife's phone number, knowing that there is a no contact order in place." (10/5/12 Tr., p. 44, Ls. 17-20.) Accordingly, the court found the no contact order violation was substantiated. (10/5/12 Tr., p. 45, Ls. 1-4.) In light of the troubling, "[i]n fact . . . chilling" facts, the court relinquished jurisdiction and executed Farr's sentence of eight years with three years fixed. (10/5/12 Tr., p. 46, Ls. 9-19.)

Farr filed a timely notice of appeal.[1] (R., pp. 94-96.) Later, Farr filed a timely motion to reduce sentence under Rule 35, which the district court denied. (2/8/13 Tr., p. 5, Ls. 13-14; p. 12, Ls. 8-18; 3/26/13 Order Granting Augmentation.)

[1] Under Idaho Criminal Rule 14(a), timely appeal from an order relinquishing jurisdiction gives the appellate court jurisdiction to review the district court's sentence imposed. State v. Hansen, __ P.3d __, 2013 WL 1859337 (Idaho App. 2013) (citation omitted).

ISSUES

Farr states the issues on appeal as:

1. Did the district court act in manifest disregard for the pertinent provisions of I.C.R. 32 and the requirements of I.C. § 19-2522, when it failed to *sua sponte* order a mental health evaluation of Mr. Farr prior to sentencing?

2. Did the district court abuse its discretion when it relinquished its retained jurisdiction over Mr. Farr?

3. Did the district court abuse its discretion when it denied Mr. Farr's Idaho Criminal Rule 35 Motion?

(Appellant's brief, p. 5.)

The state rephrases the issues as:

1. Has Farr failed to demonstrate the district court erred in not sua sponte ordering a mental health evaluation of Farr before sentencing?

2. Has Farr failed to establish that the district court abused its discretion by relinquishing jurisdiction?

3. Has Farr failed to show the district court abused its discretion by denying his Rule 35 motion?

ARGUMENT

I.
Farr Has Failed To Demonstrate The District Court Erred In Not Sua Sponte Ordering A Mental Health Evaluation Of Farr Before Sentencing

A. Introduction

Farr asserts he "suffers from serious mental health problems" that warranted evaluation before sentencing. (Appellant's brief, p. 6.) According to Farr, the district court's failure to sua sponte order a mental health evaluation was in manifest disregard of Idaho law. (Appellant's brief, pp. 7-13.) Farr has failed to show fundamental error.

B. Standard Of Review

The appellate court will affirm the district court's decision not to order a psychological evaluation if the record supports "that there was no reason to believe [the] defendant's mental condition would be a significant factor at sentencing or if the information already before the court adequately meets the requirements of I.C. § 19-2522(3)." State v. Collins, 144 Idaho 408, 409, 162 P.3d 787, 788 (Ct. App. 2007). Where, as here, the defendant did not request a psychological evaluation or object to its absence at sentencing, the defendant must show the sentencing court's failure to order an evaluation was fundamental error in manifest disregard of I.C.R. 32. State v. Jockumsen, 148 Idaho 817, 820, 229 P.3d 1179, 1182 (Ct. App. 2010).

C. The Record Supports The District Court's Decision Not To Order A Psychological Evaluation

Although a presentence investigator may recommend a psychological evaluation, the decision to order the evaluation "lies within the sentencing court's discretion." I.C.R. 32(d); Collins, 144 Idaho at 409, 162 P.3d at 788. Thus, the sentencing court is not required to order an evaluation on the presentence investigator's recommendation alone. By statute, the court shall order an examination of defendant's mental condition if there is reason to believe such condition "will be a significant factor at sentencing and for good cause shown." I.C. § 19-2522(1). A defendant's mental condition presents a significant factor at sentencing if it could be "an underlying factor in the crime," such as "when the actions of the defendant are contrary to his or her history and character." Collins, 144 Idaho at 109, 162 P.3d at 788 (citations omitted). In such instances, a psychological evaluation "can assist the sentencing court in assessing the defendant's capacity to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law . . .." Id. (citing I.C. § 19-2523(1)(f)).

The record here supports that Farr's criminal actions were perfectly consistent with his history and character. The victim, Gena, acknowledged that in the past, "when [Farr] became angry and accusatory, he was able to stop himself from becoming too physical, by either going into the garage to break things or by going on a walk," and "if it got too bad, she would take the kids and leave the house to give him time to calm down." (PSI, p. 5.) Further, information from Farr's sister supports that Farr has been violent and controlling in his

previous two relationships. (PSI, pp. 10-11.) Farr's sister expressed fear that Farr would try to hurt her and her family, as well as Gena and Gena's family. (PSI, pp. 10-11.)

In his own interview with the presentence investigator before sentencing, Farr openly discussed feelings of inadequacy and insecurity, and that he drank alcohol excessively. (PSI, p. 20.) Farr "indicated that he has never considered or attempted suicide," but would welcome counseling to help understand himself. (PSI, p. 16.) At sentencing, Farr said, "I need some help and I really am sorry for hurting my wife. She's been through enough. I think it's time I just . . . get help. . . . I look forward to getting to be with my wife again if she wants me; if she doesn't, I look forward to a relationship where we can at least have the kids between us and it not be bad." (2/17/12 Tr., p. 9, L. 23 – p. 10, L. 7.)

The presentence investigator reported that Farr appeared to be in need of intensive treatment to address mental health and substance abuse issues, and that Farr would benefit from a psychological evaluation. (PSI, pp. 16, 20.) However, under the Treatment Programs and/or Optional Recommendations section of the PSI, the investigator did not recommend a psychological evaluation to assist the court; she only recommended placement with the Idaho Department of Corrections, and a traditional retained jurisdiction program. (PSI, p. 21.) Ultimately, the information before the district court did not rule out that counseling would assist Farr in understanding his insecurities. But it also did not raise concerns about Farr's ability to appreciate the wrongfulness of his conduct.

In other words, the record does not reflect that the court needed a psychological evaluation to assess factors relevant to Farr's sentencing.

In arguing that a psychological evaluation was necessary, Farr cites both Jockumsen and Collins. However, these cases are distinguishable on their facts. In Collins, the court found that significant evidence indicated the defendant's "criminal actions . . . were part of a suicide effort," despite the district court's conclusion to the contrary. Collins, 144 Idaho at 410, 162 P.3d at 789. The Collins court noted that the district court "made decisions about [the defendant's] mental condition, the role it played in his crimes, and how that was to affect his sentence, without any formal psychological evaluation to assist in that determination." Id. Concluding that the district court abused its discretion and manifestly disregarded I.C.R. 32, the Collins court remanded for completion of an evaluation and resentencing. Id.

Similarly, in Jockumsen, the record supported that the defendant's mental condition was "plainly a significant factor for sentencing." Jockumsen, 148 idaho at 823, 229 P.3d at 1185. In that case, the defendant "had been found mentally incompetent to assist with his defense or to stand trial." Id. In Jockumsen, as in Collins, the district court's comments showed that it considered the defendant's mental condition as an important factor at sentencing. Id. Notably, the district court commented, "you are a risk to the community. What I'm having trouble getting my arms around is whether . . . that's a result of your criminal thinking or . . . issues of mental illness or . . . some combination of the two." Id. The Jockumsen court concluded the district court lacked adequate information, and

remanded for resentencing, directing the district court to order a psychological evaluation under I.C. § 19-2522. Id.

Here, in contrast, the record does not support that Farr had any suicidal ideation. (See PSI, p. 16.) As Farr acknowledges, the district court made no mention of Farr's mental health at sentencing. (See 2/17/12 Tr., pp. 10-12; Appellant's brief, p. 7.) Instead, the district court imposed a term of eight years with three fixed "to rehabilitate [Farr] as well as protect the public." (2/17/12 Tr., p. 12, Ls. 2-5.) The district court also retained jurisdiction and recommended the therapeutic community with the warning, if Farr did not follow the rules, he would be sent "back with a relinquishment," and probably sent to do his prison term. (2/17/12 Tr., p. 12, Ls. 14-17.)

The record shows no reason to believe Farr's mental health was a factor at sentencing. Collins, 144 Idaho at 409, 162 P.3d at 788. In light of the record before this Court, Farr has failed to show that the district court committed fundamental error in manifest disregard of I.C.R. 32, in not ordering a psychological evaluation. Jockumsen, 148 Idaho at 820, 229 P.3d at 1182.

II.
Farr Has Failed To Establish That The District Court Abused Its Sentencing Discretion

A. Introduction

Farr argues that the district court abused its discretion by relinquishing jurisdiction, citing Farr's – admittedly limited – success while on the retained jurisdiction program, Farr's recognition that he has a problem, and his

rehabilitative potential. (Appellant's brief, pp. 13-14.) The record supports the district court's exercise of sentencing discretion.

B. Standard Of Review

The decision to relinquish jurisdiction over a defendant and order execution of his sentence is within the sound discretion of the district court and will not be reversed absent a finding the court abused its discretion. State v. Steelsmith, 153 Idaho 577, ___, 288 P.3d 132, 138 (Ct. App. 2012).

C. The District Court Acted Well Within Its Sentencing Discretion In Relinquishing Jurisdiction

A court's decision to relinquish jurisdiction will not be deemed an abuse of discretion if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate under I.C. § 19-2521. State v. Chapel, 107 Idaho 193, 194, 687 P.2d 583, 584 (Ct. App. 1984). Here, the record fully supports the district court's determination that probation was inappropriate for Farr.

When the district court accepted Farr's plea and released him on his own recognizance, it admonished Farr of the terms and conditions of such release, including the importance of heeding the no contact order. (12/21/11 Tr., p. 13, L. 22 – p. 15, L. 21.) Despite the court's advice, Farr violated the no contact order. (PSI, p. 8.) When the district court ordered retained jurisdiction, it again cautioned Farr that "[t]his is your last chance to make a probation resolution in the case." (2/17/12 Tr., p. 12, Ls. 18-19.) But again, Farr violated the no contact order. (See 10/5/12 Tr., p. 40, Ls. 4-10.)

The district court described the facts of Farr's domestic battery conviction as "very alarming," "very troubling," and "chilling." (10/5/12 Tr., p. 44, Ls. 5-6; p. 46, Ls. 14-15.) Farr's repeated violations of the no contact order – entered to protect the victim of his underlying crime – strike at the very nerve of that conviction. Farr's limited success in otherwise complying with treatment and programming do not diminish the real concern raised by Farr's refusal to abide by the no contact order. (See 10/5/12 Tr., p. 45, Ls. 18-21.) The facts establishing Farr's no contact order violations support the district court's exercise of discretion in relinquishing jurisdiction and executing sentence.

III.
Farr Has Failed To Show The District Court Abused Its Discretion By Denying His Rule 35 Motion

A. Introduction

Farr contends the district court abused its discretion by denying his Rule 35 motion to reduce his sentence. (Appellant's brief, pp. 15-19.) If a sentence is within applicable statutory limits, as here, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007).

B. Standard Of Review

On his appeal, Farr must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id. Farr fails to satisfy his burden.

C. The Record Does Not Support That Denial Of Farr's Rule 35 Motion Was An Abuse Of Discretion

As an initial matter, the new or additional information presented at hearing is limited to Farr's completion of "the MRT program and an anger management program." (2/8/13 Tr., p. 5, Ls. 17-19.) Accordingly, the other grounds raised on appeal must not be considered, including Farr's mental health condition, his alcohol problem, his lack of a prior felony record, and his expression of remorse. (Appellant's brief, pp. 15-19.) Even if this Court considers those arguments, Farr fails to show an abuse of discretion.

Notably, the challenged sentence is not particularly harsh, either with respect to the maximum allowed or as compared to the sentences reversed as unduly harsh in cases cited by Farr. The statutory maximum for Farr's crime is 20 years. I.C. § 18-918(2), (4). The district court did not impose this maximum, despite finding that the underlying facts were "alarming," "troubling," and "chilling." (10/5/12 Tr., p. 44, Ls. 5-6; p. 46, Ls. 14-15.) Instead, it imposed eight years, with three years fixed. (R., pp. 66-67, 91-92.) In cases cited by Farr, the scrutinized sentences included consecutive maximum terms (State v. Hoskins, 131 Idaho 670, 962 P.2d 1054 (Ct. App. 1998)), and the death penalty (State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981)). Farr cites no authority on point, to support that the district court's sentencing decision here was excessive in light of his limited programming success. Instead, Farr relies on cases distinguishable by their facts.

Farr first argues the district court failed to properly consider his mental health as a mitigating factor, citing Hollon v. State, 132 Idaho 573, 581, 976 P.2d

927, 935 (1999).[2] (Appellant's brief, pp. 15-19.) The Hollon court cited I.C. § 19-2523. Id. That provision requires a sentencing court to consider, among other factors, the risk of danger to the public, and defendant's ability to appreciate the wrongfulness of his conduct "if the defendant's mental condition is a significant factor." I.C. § 19-2523. The record here fails to support that Farr's mental condition was a significant factor in his crime, warranting leniency. At best, the record shows Farr struggles with insecurities that combine toxically with his alcohol abuse and anger management problems, resulting in, but not excusing, his criminal conduct. Farr has not met his burden of showing the district court abused its discretion by failing to properly consider his mental condition.

Farr next argues the district court should have considered his alcohol problem as a mitigating factor, citing State v. Nice, 103 Idaho 89, 645 P.2d 323 (Ct. App. 1982). (Appellant's brief, p. 16.) In Nice, the defendant was convicted of lewd and lascivious conduct with a minor; the record showed the victim had initiated and pursued sexual contact with the defendant. Id. at 90, 645 P.2d at 324. The Nice court held that the trial court failed to give proper consideration "to the part [defendant's alcohol problem] played in causing defendant to commit the crime," noting defendant had no prior history of sexual violations. Id. at 91, 645 P.2d at 325. The record in Nice showed that the defendant's alcohol problem lowered his inhibitions to sexual advances by the victim. Id. In contrast, Farr's alcohol problem here contributed to a drunken rage in which he battered

[2] Ultimately, the Hollon court rejected the defendant's argument of excessive sentence given mental condition, for failure to raise the issue on direct appeal. Hollon, 132 Idaho at 581, 976 P.2d at 935.

his wife in front of his children. (PSI, pp. 3-4.) Given the factual differences, Nice does not support that the district court abused its discretion with respect to considerations of Farr's alcohol problem.

Farr also cites State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981), arguing that his alcohol abuse should have been a mitigating factor at sentencing. (Appellant's brief, p. 16.) In Osborn, the court addressed the need to weigh mitigating factors against aggravating circumstances in determining whether imposition of the death penalty is unduly harsh. Id. at 414, 631 P.2d at 196. The court noted that written findings of sentencing considerations, required under I.C. § 19-2515 for capital cases, serves to help "assure that the imposition of the sentence of death is reasoned and objective as constitutionally required." Id. at 414-15, 631 P.2d at 196-97. Because Farr's is not a capital case, Osborn is also distinguishable.

Farr further contends the district court failed to consider that he had no prior felony convictions. (Appellant's brief, pp. 15, 17 (citing PSI, pp. 3, 5-6).) In support, Farr cites Hoskins, 131 Idaho 670, 962 P.2d 1054. As already noted, the court in Hoskins, cited by Farr, concluded that an order imposed on a first-time felony offender, to *serve consecutive maximum sentences*, was unduly harsh. Id. at 673, 962 P.2d at 1057. Farr's singular sentence, not at the maximum, is distinguishable from the defendant's sentences in Hoskins. See I.C. 18-918(2)(b). Although the defendant's first-time felony status was cited by the Nice court as a mitigating factor, it was one factor among many, as already discussed herein. Nice, 103 Idaho at 90-91, 645 P.2d at 324-25. Thus Farr has

failed to show the district court abused its discretion by failing to properly consider his lack of a prior felony record.

Finally, Farr argues the district court failed to properly consider Farr's expressions of remorse, citing State v. Shideler, 103 Idaho 593, 651 P.2d 527 (1982). (Appellant's brief, pp. 17-19.) In Shideler, the court concluded "that the defendant's character and the circumstances surrounding the case . . . outweigh[ed] the gravity of the crime and the protection of the public interest," warranting reduction of the sentence "in the furtherance of justice" from 20 years indeterminate to 12. Id. 595, 651 P.2d at 529. The holding in Shideler does not require an automatic sentence reduction whenever a defendant expresses remorse. Rather it emphasizes the need to weigh the circumstances against the seriousness of the crime and the public interest, and reduce a sentence where such reduction is needed to further justice.

In this case, although terse, the district court stated, "Mr. Farr, the Court has considered your Rule 35 motion. I went a long ways towards having a contested extended hearing on why you . . . should be relinquished. I've considered the sentence. I've reconsidered the PSI today, both your version and the victim's version of what happened." (2/8/13 Tr., p. 12, Ls. 8-13.) Again highlighting the seriousness of Farr's domestic battery against his wife, the district court noted that its concerns were reflected in the sentence, and concluded, "It is discretionary with the Court whether to grant you some sort of relief . . . I am going to deny the motion today." (2/8/13 Tr.,p. 12, Ls. 14-18.)

Given the facts of this case and the district court's comments, Farr has not shown the court abused its discretion.

CONCLUSION

The state respectfully requests that this Court affirm the judgment of conviction and denial of the Rule 35 motion.

DATED this 19th day of July, 2013.

DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of July, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY
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.

DAPHNE J. HUANG
Deputy Attorney General

DJH/pm