12-5-2008

State v. Turney Respondent's Brief Dckt. 33154

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

PHILIP ANDREW TURNEY,

Defendant-Appellant.

NO. 33154

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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District Judge

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Nature of the Case

Phillip Andrew Turney appeals from the judgment and sentence entered upon the jury's verdict finding him guilty of two counts of aggravated driving under the influence and a persistent violator enhancement. Turney contends that the district court twice placed him in jeopardy for the same crime when he was charged with two separate counts of aggravated DUI, where there was only one act of driving, and that the district court abused its discretion in sentencing him.

Statement of the Facts and Course of the Proceedings

In 2004, Turney contracted as a cab driver with "U.S. Taxi" in Boise. (Trial Tr., p.435, Ls.18-22; p.436, Ls.13-21.) On the evening of December 23, 2004, Turney and Tom Sage ("Tom"), a driver for "Ace" cab company, decided to "break off about 11:00 o'clock ... to go out to one of the bars." (Trial Tr., p.434, Ls.8-10; p.437, Ls.14-21; p.439, Ls.3-13.) As planned, Turney picked up Tom and drove them in his taxi to "The Fireside" bar. (Trial Tr., p.439, L.17 - p.440, L.9; p.754, L.15 – p.755, L.6.) After they had "a couple of shots" at "The Fireside" (Trial Tr., p.441, Ls.4-9), Tom drove Turney's taxi to another local bar - "The Navajo [Room]" - where Tom and Turney continued drinking (Trial Tr., p.441, Ls.10-13; p.443, Ls.17-18; p.444, L.2 – p.445, L.1). They left "The Navajo" around 1:30 a.m. on December 24th and Tom drove them to his apartment. (Trial Tr., p.445, Ls.13-17; p.446, Ls.4-16.) According to Tom, when they arrived at his apartment about fifteen minutes later he got out (Trial Tr.,

p.447, Ls.11-22; p.448, Ls.8-12) and Turney "got in the driver's seat [of his taxi]...insisted that he would be fine ... and drove off" (Trial Tr., p.448, Ls.8-24).

Shortly after 3 a.m. that morning, 9-1-1 dispatch reported a "possible intoxicated [female] driver ... in the area of Nez Perce and Vista at the Jackson station ... in a blue Nissan Pathfinder, license plate 1A L6538." (Trial Tr., p.22, Ls.3-15; p.39, Ls.15-17; p.42, Ls.17-19; p.59, Ls.13-19.) Within minutes of receiving this bulletin, Boise City Police Officer White stopped a blue Nissan Pathfinder near the intersection of Vista and Palouse. (Trial Tr., p.59, L.22 – p.60, L.16.) Upon observing the driver of the Pathfinder, Travis Anderson, Officer White suspected he was operating the vehicle under the influence of alcohol. (Trial Tr., p.61, Ls.22-25.) When Sergeant Hagler arrived to provide back-up (Trial Tr., p.61, Ls.10-16; p.62, Ls.1-3), Officer White conducted field sobriety tests of Mr. Anderson and ultimately arrested him for DUI (Trial Tr., p.62, Ls.3-22). After Mr. Anderson was handcuffed and seated in the back of Officer White's patrol vehicle (Trial Tr., p.62, Ls.8-12), Sergeant Hagler moved the Pathfinder off the street (Trial Tr., p.63, L.25 – p.64, L.2). He then returned to his patrol car parked directly behind Officer White's vehicle and waited for Officer White to complete the investigation. (Trial Tr., p.64, L.25 – p.65, p.7.)

As Officer White started to enter the Pathfinder's license plate into the mobile data terminal located in his patrol car, he heard a loud crash and went "flying forward hitting ... [the] steering wheel." (Trial Tr., p.66, Ls.1-8; p.70, Ls.1-5; State's Exhibit 1A.) Officer White immediately went to check on Sergeant Hagler and observed that Sergeant Hagler's patrol car was "smashed ... and

extensively damaged" to the extent "the whole back end of his car was gone." (Trial Tr., p.66, Ls.8-14; p.67, Ls.10-11; State's Exhibits 10-23.) Officer White found Sergeant Hagler in the driver's seat leaning to the right with his mouth open, his eyes rolled back, and completely disoriented; Sergeant Hagler could talk but was not coherent. (Trial Tr., p.66, Ls.21-25; p.67, Ls.13-24; p.88, Ls.17-24; State's Exhibit 17.) Officer White immediately called dispatch to report that he and Sergeant Hagler had been involved in a crash. (Trial Tr., p.67, Ls.5-7; p.75, Ls.8-25; p.331, Ls.1-3; State's Exhibit 1.) Concerned for Mr. Anderson, Officer White pulled him from the back of his patrol car and sat him on the ground. (Trial Tr., p.68, Ls.2-8.) In the course of stabilizing the scene (Trial Tr., p.68, Ls.18-19), Officer White saw Turney open up the driver's side door of the taxicab that smashed into the parked patrol cars and roll out on the ground (Trial Tr., p.66, Ls.15-20; p.85, L.4 – p.86, L.1; p.86, L.21 - p.87, L.19). As other officers arrived they took control over the accident investigation. (Trial Tr., p.68, Ls.20-21.) Firemen at the scene extricated Sergeant Hagler from his patrol car. (Trial Tr., p.80, Ls.7-24; State's Exhibits 11 -12.)

Both Officer White and Sergeant Hagler sustained serious injuries and were transported by ambulance to the hospital. (Trial Tr., p.94, L.10; p.96, Ls.1-6.) Although Officer White was cleared to return to work three weeks later, he continued to be treated for injuries to his back and neck. (Trial Tr., p.99, L.3 – p.102, L.16.) At the time of trial, nearly fourteen months later, Officer White was still undergoing treatment; he had received a "five percent impairment rating on his neck" and was scheduled to undergo extensive shoulder surgery. (Trial Tr.,

p.102, L.20 - p.103, L.7.) Sergeant Hagler sustained several injuries including a brain injury, memory loss, a broken nose, numbness in his hands, a neck injury and a low back injury causing him to struggle with decreased work performance. (Trial Tr., p.695, L.19 – p.699, L.22.)

The state charged Turney with two counts of aggravated driving under the influence, in violation of I.C. § 18-8006, for the injuries inflicted on Boise City Police Officers Hagler and White as a result of Turney's taxicab smashing into their parked patrol cars. (R., pp.25-26; 101-02.) The state also charged Turney with being a persistent violator. (R., pp. 36-38.) At trial, Turney admitted he blew .16 shortly after the crash (Trial Tr., p.759, Ls.20-23; p.764, Ls.15-24; p.776, Ls.11-13; p.797, Ls.8-13) but denied he was driving the taxi (Trial Tr., p.775, Ls.17-18; p.776, Ls.10-14). Turney contended he had fallen asleep in the backseat and that Tom was actually driving the taxi at the time of the crash. (Trial Tr., p.766, L.20 – p.768, L.2; p.769, Ls.2-4; p.774, Ls.5-9; Trial Tr., p.775, Ls.17-18; p.803, Ls.23-24.) At trial Tom admitted to driving Turney's cab earlier in the evening, but testified that he was not in the taxi or driving it at the time of the accident. (Trial Tr., p.441, L.18 – p.444, L.13; p.448, L.8 – p.449, L.13.) After a five day trial, the jury found Turney guilty of both counts of aggravated DUI and of being a persistent violator. (R., pp.139-41.) The district court sentenced Turney to concurrent unified life sentences, with a minimum period of confinement of fifteen years. (Sent. Tr., p.1050, L.2 – p.1051, L.4; R., pp.158-60.) The district court denied Turney's Rule 35 Motion. (R., pp.187-90.) Turney timely appealed. (R., pp.162-64; 192-95.)

ISSUES

Turney states the issues on appeal as:

1. Was Mr. Turney twice put in jeopardy for the same offense when he was charged and convicted of two counts of aggravated DUI when there was only one act of driving?

2. Did the district court abuse its discretion when it imposed concurrent sentences of life, with fifteen years fixed?

(Appellant's brief, p.5.)

The state rephrases the issues on appeal as:

1. Has Turney's failure to file a I.C.R. 12(b)(2) motion challenging the information prior to trial preclude him from challenging the information now for the first time on appeal?

2. If Turney's claim is reviewable, has Turney failed to establish that he was punished twice for the same offense?

3. Has Turney failed to carry his burden of establishing that the district court abused its discretion when it imposed concurrent unified life sentences with 15 years fixed upon his conviction for two counts of aggravated DUI and being a persistent violator?

ARGUMENT

I.
Turney's Failure To Challenge Defects In The Information Prior To Trial Precludes Turney From Raising This Issue For The First Time On Appeal

A. *Introduction*

For the first time on appeal, Turney argues that his right to be free from double jeopardy was violated because, he claims, "he was **charged** with two separate counts of aggravated DUI ... [when] there was clearly only one act of driving." (Appellant's brief, p.6 (emphasis added).) Turney's claim fails. An objection or claim based upon defects in the information can be waived. Because Turney failed to object to the charges in the information prior to trial, he is barred from raising the issue on appeal. As such, Turney's claim was not preserved for appeal and should be dismissed.

B. Standard of Review

Interpretation of court rules is a question of law reviewed de novo. See State v. Moore, 131 Idaho 814, 821, 965 P.2d 174, 181 (1998).

C. Turney's Double Jeopardy Claim Based Upon His Objection To The Information Is Barred By His Failure To Raise The Issue Prior To Trial As Required By I.C.R. 12(b)(2)

"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). This same principle is embodied in I.C.R. 12, which reads, in relevant part:

(b) **Pretrial motions**. Any defense objection or request which is capable of determination without trial of the general issue may be raised before trial by motion. The following must be raised prior o trial:

....

(2) Defenses and objections based upon defects in the complaint, indictment or information (other than it fails to show jurisdiction of the court or to charge any offense which objection shall be noticed by the court at any time during the pendency of the proceedings);

....

(f) **Effect of Failure to Raise Defenses or Objections**. Failure by the defendant to raise defenses or objections or to make requests which must be made prior to trial...shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

I.C.R. 12 (emphasis in original).

The Idaho Supreme Court has repeatedly affirmed this rule:

> The are a host of due process requirements that must be met by a charging document, such as factual specificity adequate to "enable a person of common understanding to know what is intended" and to shield against double jeopardy. State v. Grady, 89 Idaho 204, 208-09, 404 P.2d 347, 349-50 (1965); see I.C. § 19-1418. Although such due process concerns may be valid, they are waived unless raised before trial. I.C.R. 12(b)(2); State v. Halbesleben, 139 Idaho 165, 168, 75 P.3d 219, 222 (Ct. App. 2003); State v. Robran, 119 Idaho at 287, 805 P.2d at 493.

State v. Jones, 140 Idaho 755, 758, 101 P.3d 699, 702 (2004) (where the defendant moved to dismiss the charges prior to trial alleging that the information failed to allege sufficient facts to provide notice and protect against double jeopardy).

Although Turney "acknowledges that no objection was made in the district court to [the state] bringing two charges of aggravated DUI," a review of his claim shows Turney is attempting to now belatedly raise a claim there are defects in the information for the first time on appeal. Such challenges to the charging

document, however, must be made prior to trial. I.C.R. 12(b)(2). Turney's appellate claim that the state was precluded from charging two counts of aggravated DUI is, therefore, not preserved and may not be considered for the first time on appeal absent a showing of fundamental error. See State v. Anderson, 144 Idaho 743, 748, 170 P.3d 886, 891 (2007).

"Before reaching the issue of whether fundamental error is reviewable, or whether fundamental error occurred at all, it first must be determined whether the district court even committed an error." Anderson, 144 Idaho at 748, 170 P.3d at 891. In this case, Turney's mere implication of a double jeopardy claim based upon the information charging two counts of aggravated DUI does not constitute error, much less fundamental error. Under I.C.R. 12(b)(2), a motion to dismiss based upon objections to the information which are not jurisdictional or based upon a failure to charge must be raised prior to trial, and the failure to timely raise such objections results in a waiver of that claim on appeal. I.C.R. 12(b)(2) and I.C.R. 12(f). Jones, 140 Idaho 755, 758, 101 P.3d 699, 702. (citing State v. Luke, 134 Idaho 294, 300, 1 P.3d 795, 801 (2000)); see State v. Quintero, 141 Idaho 619, 115 P.3d 710 (2005) (holding that any due process challenges to the information were waived because they were not raised before commencement of trial, but Quintero could raise a jurisdictional challenge to information); State v. Cahoon, 116 Idaho 399, 400, 775 P.2d 1241, 1242 (1989) (concluding that the defendant could challenge the sufficiency of a citation, but that the citation charged the offense for which the defendant was convicted). Turney's right to challenge any defects in the information was waived when he failed to raise this

issue prior to trial. I.C.R. 12(b). As such, Turney has failed to show error, much less fundamental error.

In addition, this Court should not be inclined to conclude an error is fundamental in cases where the failure to challenge the information "may be done for legitimate strategic or tactical purposes." Mintun v. State, 144 Idaho 656, 662, 168 P.3d 40, 46 (Ct. App. 2007) (citations omitted) (noting that "a trial attorney's failure to object to inadmissible evidence or other potential errors may be done for legitimate strategic or tactical purposes.") It is quite possible in this case that counsel for Turney did not object to the information charging him with committing two counts of aggravated DUI because it would serve no purpose (as discussed in more detail in Section II, below) other than to highlight that two Boise City police officers were seriously injured by Turney's drunk driving. The victims in this case should not be subject to another trial because counsel failed to object to the information and may have done so solely for tactical reasons.

II.
Even If Turney's Challege To The Complaint Was Not Waived, Turney Has Failed To Establish A Double Jeopardy Violation

A. Introduction

Even if this Court determines Turney's claim challenging the information is reviewable, his claim that the state violated his right to be free from double jeopardy is not supported in law. In arguing the state twice placed him in jeopardy when he was convicted of two counts of aggravated DUI which arose out of one act of driving (Appellant's brief, pp.7-12), Turney ignores contrary Idaho Supreme Court case law which holds otherwise.

B. Standard of Review

Whether a prosecution complies with the constitutional protection against being placed twice in jeopardy is a question of law subject to free review. State v. Hussain, 143 Idaho 175, 176, 139 P.3d 777, 778 (Ct. App. 2006).

C. Turney Has Failed To Establish That The State Violated Turney's Double Jeopardy Rights By Pursuing Two Counts Of Aggravated DUI

Turney has failed to establish that he was punished twice for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment. The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This Clause affords a defendant three basic protections. It protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple criminal punishments for the same offense. Schiro v. Farley, 510 U.S. 222, 229 (1994); State v. McKeeth, 136 Idaho 619, 622, 38 P.3d 1275, 1278 (Ct. App. 2001). However, "offenses committed against multiple victims are not the same offense, for double jeopardy purposes, even though they may arise from the same criminal episode." State v. Alsanea, 138 Idaho 733, 744, 69 P.3d 153,164 (Ct. App. 2003); see also State v. Major, 111 Idaho 410, 415 n.1, 725 P.2d 115, 120 n.1 (1986) (citing Wilkoff v. Superior Court, 696 P.2d 134, 138 (Cal. 1985)).

In this case, Turney was convicted of two counts of aggravated DUI, I.C. § 18-8006, for causing debilitating injuries to two victims – Sergeant Hagler and Officer White – when he crashed his taxi while driving with a .16 blood alcohol

level. Although Turney's single act of driving while intoxicated injured multiple victims for which he was subjected to multiple punishments, Turney nevertheless attempts to raise a "double jeopardy" claim, relying specifically on the Idaho Court of Appeals' decision in State v. Lowe, 120 Idaho 391, 816 P.2d 347 (1990). Although no double jeopardy claim was raised in Lowe, Turney cites Lowe (hereinafter "Lowe I") for the proposition that multiple punishments are permissible "when multiple injuries result from a single **act of violence**." Lowe I, 120 Idaho at 393, 816 P.2d at 349 (emphasis added). (Appellant's brief, pp.9-12.) He further relies on Judge Swanstrom's specially concurring opinion in Lowe I, to suggest "a different rule should apply to crimes of aggravated DUI under § 18-8006."

Turney's reliance on Lowe I, however, is misplaced, especially given the Idaho Supreme Court's subsequent review of that decision. In granting review of Lowe I, the Idaho Supreme Court did not adopt such a rule. State v. Lowe, 120 Idaho 252, 255, 815 P.2d 450, 453 (1991) (hereinafter "Lowe II"). Rather, the Idaho Supreme Court determined multiple punishments are permissible where a defendant's single act of driving under the influence results in serious injuries to more than one victim. Id. In adopting a "multiple victims" test, the Idaho Supreme Court explained:

> In this case, there were two victims. The fact that Lowe's vehicle collided with the Smith vehicle only once, does not mean Lowe was guilty of only one act or omission. Lowe's conduct constituted a separate act or omission with regard to each victim.
> ....
> In this case, the fact that the person who suffered great bodily harm in the aggravated DUI (Blake) is different than the person who was

> killed in the vehicular manslaughter (Mary) is significant. Lowe's injury of Blake was one act or omission; Lowe's killing of Mary was another act or omission. I.C. § 18-301 was not intended to prevent multiple prosecutions or punishments in cases where more than one victim is involved.

Lowe, 120 Idaho at 255, 815 P.2d at 453 (1991). Directly contrary to Turney's contention, the Idaho Supreme Court has determined, specifically relying upon its analysis in Lowe II, that the state is authorized to prosecute and punish an individual for multiple counts of aggravated DUI that arise from one incident. State v. Garner, 121 Idaho 196, 824 P.2d 127 (1992) (affirming convictions and sentences for three counts of aggravated DUI where three victims were injured in a collision caused by the defendant's act of driving while intoxicated).

Although neither Lowe II or Garner involved claims of constitutional double jeopardy, both cases involved claims brought under I.C. § 18-301 (repealed 1995) which provided a greater scope of protection than that found in the Idaho and United States Constitutions. See State v. Seamons, 126 Idaho 809, 811, 892 P.2d 484, 486 (Ct. App. 1995) ("I.C. § 18-301 provides a greater scope of protection than the constraints of double jeopardy found in the Idaho and United States Constitutions"); State v. Horn, 101 Idaho 192, 197, 610 P.2d 551, 556 (1980) ("I.C. § 18-301 exceeds the scope of the constitutional constraints on double jeopardy"). That the Idaho Supreme Court found no double jeopardy violation under the broader provisions of I.C. § 18-301 (repealed 1995) shows that the legislature did not intend for defendants who injure multiple victims to be punished only once.

The question under the Double Jeopardy Clause whether punishments are "multiple" is essentially one of legislative intent. State v. Osweiler, 140 Idaho 824, 826, 103 P.3d 437, 439 (2004) (quoting Ohio v. Johnson, 467 U.S. 493, 499 (1984). Even if the crimes are the same, if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry ends. Osweiler, 140 Idaho at 827, 103 P.3d 440 (citing Ohio v. Johnson, 467 U.S. 493, 500 n.8). "Where the language of the statute is clear and unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." State v. Mercer, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006) (quoting State v. Hart, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001)). "In construing statutes, the plain, obvious and rational meaning is always to be preferred to any curious, narrow hidden sense." Mercer, 143 Idaho at 109, 138 P.3d at 309 (quoting Higginson v. Westergard, 100 Idaho 687, 691, 604 P.2d 51, 55 (1979). "In determining the ordinary meaning of a statute 'effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant.'" Mercer, 143 Idaho at 109, 138 P.3d at 309 (quoting In re Winton Lumber Company, 57 Idaho 131, 136, 63 P.2d 664, 666 (1936))

Here, Turney was charged, convicted and ultimately sentenced for two violations of the aggravated DUI statute which provides, in pertinent part, that the defendant shall be guilty of a felony for "causing great bodily harm, permanent disability or permanent disfigurement to any person other than himself" while driving under the influence. I.C. § 18-8006(1). Based upon this plain language,

the legislature has criminalized the act of causing harm not merely increased the punishment for DUI. Turney's argument that the crime of aggravated DUI in violation of I.C. 18-8006(1) is an enhancement statute which "simply raise[s] the punishment for DUI to a felony when great bodily injury occurs" (Appellant's brief, p.11), is directly contrary to the legislative intent. The legislature specifically intended that a defendant, such as Turney, may be punished for violation of I.C. § 18-8006 whenever "any" victim is injured by his act of driving under the influence. Turney's argument is contrary to the plain language of I.C. § 18-8006, and as such, his double jeopardy claim fails.

Turney's contention that he is being twice punished for one act of drunk driving is without merit. Turney is being punished for two acts of injuring two other human beings. Because the two aggravated DUI convictions in this case did not result in Turney being twice placed in jeopardy for the same offense, he is not entitled to relief.

III.
Turney Has Failed To Establish An Abuse Of The Sentencing Court's Discretion

A. Introduction

The district court imposed concurrent terms of life imprisonment with fifteen years fixed upon a jury finding Turney guilty of two counts of aggravated DUI and being a persistent violator. (R., pp. 158-60.) Although Turney contends on appeal that his sentences are excessive (Appellant's brief, pp.12-14), he has failed to show from the record that the district court abused its discretion.

B. Standard of Review

When a sentence is within statutory limits, the appellate court will review it only for an abuse of discretion. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). The appellant has the burden of demonstrating that the sentencing court abused its discretion. Id.

C. Turney Has Failed To Establish The Sentences Imposed Are Excessive Under Any Reasonable View of the Facts

To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive. Farwell, 144 Idaho at 736, 170 P.3d at 401 (2007). To establish that the sentence was excessive, he must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Id. Where reasonable minds might differ, the sentences imposed by the district court must stand. State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

Aggravated DUI is a felony punishable by a maximum ten year period of incarceration. I.C. § 18-8006(1)(a).[1] However, when a defendant, like Turney, is convicted of aggravated DUI and is also found to be a persistent violator, his underlying sentences may be enhanced up to life imprisonment. I.C. § 19-2514. Turney does not contend his sentences fall outside of the statutory limits. (Appellant's brief, p.12.) Instead, he asserts the trial court abused its sentencing

[1] When Turney was sentenced on May 3, 2006, I.C. § 18-8006(1)(a) provided for a maximum ten year period of incarceration. I.C. § 18-8006(1)(a), however, was subsequently amended and the maximum period of incarceration was increased from ten to fifteen years. See 2006 Idaho Session Laws, ch. 261.

discretion given he was "truthful in the past" and has "potential for the future." (Appellant's brief, p.14.)

Contrary to Turney's assertions on appeal, the facts of this case clearly support the sentences imposed. In sentencing Turney the district court examined the the relevant legal criteria. (Sent. Tr., p. 1038, L.1 – p. 1049, L.1.) The court considered protection of society as its foremost obligation, recognizing that "[a]ggravated DUIs are particularly heinous .... [as] these kinds of activities kill and maim innocent people." (Sent. Tr., p.1038, L.6 – p.1039, L.3.) In this case, Turney put other peoples' lives in danger when he decided to drink and drive and in fact seriously injured two veteran Boise police officers when he smashed his taxicab into their patrol cars.

The sentencing court examined Turney's twenty-year criminal history, which included seven prior felony convictions (larceny, grand theft by possession, theft by receiving stolen property, grand theft, using a telephone to harass, forgery (2 times)) and his failed attempts at probation. (Sent. Tr., p.1046, L.17 – p.1049, L.1; PSI, pp.3-7.) In reviewing the PSI, the court also noted Turney's behavior had not changed while he was incarcerated:

> While in prison you racked up a number of disciplinary reports which includes substance abuse at prison and your continued use and your continued misbehavior includes, I will note, lying to staff. I bring that up because both you and your counsel have maintained that you are not untruthful.

(Sent. Tr., p.1043, Ls.17-21.) Given his criminal history, the district court specifically discounted Turney's claim of being truthful, reasoning:

> [T]he forgeries are crimes that suggest you are untruthful. But more importantly, I agree with Miss Longhurst [the prosecutor],

> you told a version which was sympathetic to the jury, I think calculated, to suggest that you were somehow the victim ... in these forgeries, that you did not know signing someone else's name was somehow a violation of law....
>
> So for all of your counsel's representations and yours that you are truthful, clearly you are not truthful because you lied to the jury in an effort to make them feel sorry for you and in an effort to mitigate the effect of them learning that you were a felon. So you somewhat cleverly decided to bring it out in your direct examination so that you could present your side to the jury. But you and I know that what you told the jury was not true. So all of this business today of you're not a liar, you've always taken responsibility for what it is that you have done, that you are truthful is not true.
>
> ....
>
> It's important because you are now standing before the Court proclaiming that you continue to be innocent and you and your attorney are suggesting that somehow this should mitigate the punishment and that I should believe it because you are truthful when the record clearly establishes that you are not truthful.

(Sent. Tr., p.1044, L.10 – p.1046, L.11.) The court was also not impressed with Turney's claimed desire to submit to a polygraph test noting that "nothing prevented you [Turney] from going out and doing your own polygraph if that is what you really wanted to do." (Sent. Tr., p.1033, Ls.5-13; p.1037, Ls.12-25.)

Despite Turney's contention, the court did take into account his "potential for the future," however, the court was troubled that, despite having "a lot of programming," Turney's prior attempts at rehabilitation failed:

> The other thing that I [the court] noticed is that you've had a lot of programming. You've had cognitive self-change, you've had whole vision, you've had thinking errors, breaking barriers, anger management, rationale recovery. You have been to Port of Hope. You have had a lot of programming, none of it has worked.

(Sent. Tr., p.1043, Ls.11-16.)

Turney's sentences are not excessive given the nature of his offenses, his character and his unwillingness to accept responsibility for his actions. The

district court noted Turney's failure to accept responsibility, emphasized the seriousness of the offense and Turney's history, and considered all other information before it, including Turney's "truthfulness" and "potential for the future" and determined "imprisonment is appropriate punishment." (Sent. Tr., p.1039, Ls.6-7.) Under any reasonable view of the facts in this case, the district court acted well within its discretion when it imposed concurrent unified life sentences with fifteen years fixed upon a jury convicting Turney for two counts of aggravated DUI and being a persistent violator. The record shows the sentences imposed were not only warranted, but also necessary to achieve the primary sentencing objective of protecting society. Turney has failed to carry his burden of establishing that the sentencing court abused its discretion.

CONCLUSION

The state respectfully requests dismissal of Turney's appeal on the grounds that he failed to challenge the information in a timely I.C.R. 12(b)(2) motion prior to trial. In the alternative, the state requests this Court affirm both of Turney's convictions and concurrent sentences for aggravated DUI and being a persistent violator.

DATED this 5th day of December 2008.

ANN WILKINSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of December, 2008, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

JUSTIN M. CURTIS
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.

ANN WILKINSON
Deputy Attorney General

AW/pm