

11-6-2014

State v. Fencil Respondent's Brief Dckt. 41985

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	No. 41985
Plaintiff-Respondent,)	
)	Ada Co. Case No.
vs.)	CR-2013-10572
)	
SARAH JOANN FENCL,)	
)	
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**

**HONORABLE LYNN G. NORTON
District Judge**

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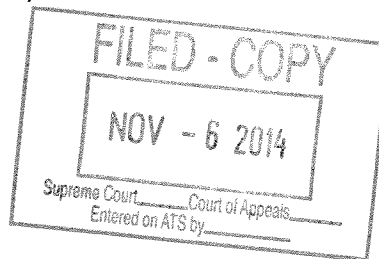


TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature Of The Case	1
Statement Of Facts And Course Of Proceedings	1
ISSUES.....	3
ARGUMENT	4
I. FencI Has Failed To Show That The District Court's Sentencing Determination And Denial Of FencI's I.C.R. 35 Motion Were Based Upon A Misunderstanding Of Its Sentencing Discretion With Regard To The Persistent Violator Enhancement	4
A. Introduction	4
B. Standard Of Review	4
C. The District Court's Sentencing Determinations Were Not Based Upon A Misunderstanding Of The Scope Of Its Discretion	5
II. FencI Has Failed To Show That The District Court Imposed An Excessive Sentence	9
A. Introduction	9
B. Standard Of Review	9
C. The District Court Acted Well Within Its Sentencing Discretion.....	9
CONCLUSION	12
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>State v. Clements</u> , 148 Idaho 82, 218 P.3d 1143 (2009)	5
<u>State v. Farwell</u> , 144 Idaho 732, 170 P.3d 397 (2007).....	9
<u>State v. Fuhriman</u> , 137 Idaho 741, 52 P.3d 886 (Ct. App. 2002)	4
<u>State v. Harrington</u> , 133 Idaho 563, 990 P.2d 144 (Ct. App. 1999).....	5
<u>State v. Huffman</u> , 144 Idaho 201, 159 P.3d 838 (2007).....	5
<u>State v. Ish</u> , __ P.3d __, 2014 WL 2619597 (Ct. App. 2014).....	8
<u>State v. Morgan</u> , 109 Idaho 1040, 712 P.2d 741 (Ct. App. 1985)	7
<u>State v. Toyne</u> , 151 Idaho 779, 264 P.3d 418 (Ct. App. 2011)	5, 6, 7, 8
<u>Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.</u> , 119 Idaho 87, 803 P.2d 993 (1991)	4
 <u>STATUTES</u>	
I.C. § 19-2514	5, 7, 8
 <u>RULES</u>	
Idaho Criminal Rule 35	5, 6

STATEMENT OF THE CASE

Nature Of The Case

Sarah Joann FencI appeals from the sentence imposed upon her guilty plea to felony driving under the influence, and from the district court's denial of her I.C.R. 35 motion for reduction of sentence.

Statement Of Facts And Course Of Proceedings

A Boise police officer stopped FencI for a taillight violation and for failing to maintain her lane. (PSI, p.79.¹) The officer noted that FencI slurred her speech and exhibited memory impairment. (Id.) The officer also detected a slight odor of alcohol. (Id.) FencI failed the standard field sobriety tests. (PSI, pp.82-83.) After FencI refused to submit to a breath test, officers obtained a warrant to draw a blood sample. (PSI, pp.83-84.) Testing of the blood sample revealed a .170 BAC. (PSI, p.88.) Because FencI had two prior felony DUI convictions within the previous fifteen years, the state charged her with both felony driving under the influence and the persistent violator sentencing enhancement. (R., pp.51-52, 68-69.)

Pursuant to a Rule 11 plea agreement, FencI pled guilty to felony driving under the influence and the sentencing enhancement. (R., pp.80-83; Tr., p.5, L.17 – p.14, L.6.) Pursuant to the agreement, the state was required to cap its sentencing recommendation to five years fixed and 10 years indeterminate, and FencI was permitted to request that the court retain jurisdiction. (R., pp.80-83.)

¹ Citations to the PSI are to the electronic file "FENCL_psi."

The district court followed the state's recommendation and imposed a unified 15-year sentence with five years fixed. (R., pp.85-88.) The court then denied FencI's subsequent I.C.R. 35 motion for reduction of sentence. (R., pp.92-94, 106-109.) FencI timely appealed. (R., pp.111-115.)

ISSUES

Fencl states the issues on appeal as:

1. Did the district court abuse its discretion, both at sentencing and in denying the Rule 35 motion, when it failed to recognize that the persistent violator statute did not require the imposition of a minimum sentence of five years fixed, but a minimum unified sentence of five years?
2. Did the district court abuse its discretion when it imposed, upon Ms. Fencl, a unified sentence of fifteen years, with five years fixed, following her pleas of guilty to driving under the influence and a persistent violator enhancement?

(Appellant's brief, p.3)

The state rephrases the issues on appeal as:

1. Has Fencl failed to show that the district court's sentencing determination and denial of Fencl's I.C.R. 35 motion were based upon a misunderstanding of its sentencing discretion with regard to the persistent violator enhancement?
2. Has Fencl failed to show that the district court imposed an excessive sentence?

ARGUMENT

I.

Fencil Has Failed To Show That The District Court's Sentencing Determination And Denial Of Fencil's I.C.R. 35 Motion Were Based Upon A Misunderstanding Of Its Sentencing Discretion With Regard To The Persistent Violator Enhancement

A. Introduction

Fencil contends that the district court was not aware that the persistent violator sentencing enhancement permitted it to impose a fixed term of incarceration of less than five years, and that it therefore abused its discretion in imposing its sentence and in denying Fencil's I.C.R. 35 motion for reduction of sentence. (Appellant's brief, pp.4-10.) However, a review of the record reveals that the district court was aware of the applicable law and the scope of its discretion. Further, even if the district court misperceived the scope of its discretion, any such error was harmless.

B. Standard Of Review

Sentencing determinations are reviewed for an abuse of discretion. State v. Fuhriman, 137 Idaho 741, 745, 52 P.3d 886, 890 (Ct. App. 2002). When evaluating a claim that the trial court has abused its discretion, the sequence of the appellate court's inquiry is first, whether the trial court correctly perceived the issue as one of discretion; second, whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and finally, whether the trial court reached its discretion by an exercise of reason. Sun Valley Shopping Ctr., Inc. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

C. The District Court's Sentencing Determinations Were Not Based Upon A Misunderstanding Of The Scope Of Its Discretion

Idaho Criminal Rule 35(a) allows a trial court to correct a sentence that is illegal from the face of the record any time. State v. Clements, 148 Idaho 82, 84, 218 P.3d 1143, 1145 (2009). If a sentence is within applicable statutory limits, a motion for reduction of sentence under I.C.R. 35(b) 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).

The Idaho persistent violator sentencing enhancement provides that upon a third conviction for a felony, an individual “shall be sentenced to a term in the custody of the state board of correction which term shall be for not less than five (5) years and said term may extend for life.” I.C. § 19-2514.

In State v. Harrington, 133 Idaho 563, 566-568, 990 P.2d 144, 147-149 (Ct. App. 1999), the Court of Appeals, analyzing the language of I.C. § 19-2514 and applying the rule of lenity, held that the persistent violator sentencing enhancement did not prohibit district courts from imposing suspended sentences upon persistent violators. Id. In State v. Toyne, 151 Idaho 779, 781-783, 264 P.3d 418, 420-422 (Ct. App. 2011), the Court of Appeals similarly held that the district court abused its discretion when at the sentencing hearing, it expressed a belief that I.C. § 19-2514 required it to impose a minimum sentence of five years fixed. Id. Therefore, pursuant to I.C. § 19-2514, as interpreted by Harrington and Toyne, the district court in the present case had the discretion to impose a *unified* sentence of between five years and life, and to suspend the sentence if it so chose.

Pursuant to plea agreement, FencI was permitted to request that the district court suspend the sentence and retain jurisdiction. (R., pp.80-83; Tr., p.1, L.11 – p.2, L.17.) At the change of plea hearing, the district court specifically referenced Toyne and made clear that it was aware of its discretion to suspend FencI's sentence. (Tr., p.7, Ls.9-19.) At the sentencing hearing, the district court again recognized it had discretion to suspend Finch's sentence, but declined to do so, citing FencI's significant criminal history and previous unsuccessful rehabilitative attempts. (Tr., p.31, L.2 – p.33, L.21.) The court instead chose to follow the state's recommendation and imposed a unified 15-year sentence with five years fixed. (R., pp.85-88.)

In an I.C.R. 35 motion,² FencI asserted that the district court was unaware of the scope of its sentencing discretion. FencI argued:

Although the Court stated at sentencing that its discretion was limited by the persistent violator statute, the Court had discretion to sentence the minimum mandatory sentence of thirty days and suspend the [sic] any or all of the persistent violator term or to sentence Defendant to a fixed life term or any unified sentence between those extremes.

(R., pp.93-94.) FencI's motion concluded:

Defendant respectfully requests that this Court reconsider her sentence of five years fixed followed by ten years indeterminate and consider a lesser fixed period.

(R., p.94.)

In its written order denying FencI's I.C.R. 35 motion, the district court relied primarily on the reasoning it utilized to support the original sentence – FencI's

² FencI cited both I.C.R. 35(a) and (b). (R., p.93.)

criminal history and prior failed rehabilitative attempts. (R., pp.106-109.)
However, prior to the portion of the order that contained this analysis, the court also stated:

The Defendant's motion for reconsideration acknowledges a fixed term of five years was required but asks the court, in its discretion[], for leniency in a reduction of the indeterminate portion of the sentence.

(R., p.107.)

On appeal, Fencil relies on this excerpt to argue that the district court's sentencing determination and denial of the I.C.R. 35 motion was based upon a misunderstanding of its discretion pursuant to I.C. § 19-2514. (Appellant's brief, pp.6-7.) However, in light of its previously-expressed knowledge of State v. Toyne, it is more likely that this excerpt constitutes simply an inadvertent statement or typo that did not accurately reflect the court's understanding of its sentencing discretion. In State v. Toyne, the Court of Appeals expressly recognized that I.C. § 19-2514 "requires only a *unified* sentence of at least five years, not a fixed term of five years." Toyne, 151 Idaho at 781-782, 264 P.3d at 420-421 (emphasis in original). In light of the district court's expressed knowledge of this case, Fencil cannot show that the district court actually misunderstood the scope of its sentencing discretion.

However, in the alternative, even if the district court misperceived its sentencing discretion, it is clear from the record that any such misunderstanding did not actually impact the court's sentencing determination or denial of Fencil's I.C.R. 35 motion. Any such error is therefore harmless. See State v. Morgan, 109 Idaho 1040, 1043, 712 P.2d 741, 744 (Ct. App. 1985) (holding that in the

context of sentencing, error is harmless, and remand is unnecessary, “if it is plain from the judge’s reasoning that the result would not change or if it appears that any different result would represent an abuse of the judge’s discretion.”); see also State v. Ish, ___ P.3d ___, 2014 WL 2619597 *3 (Ct. App. 2014).

There is no indication in the record that the district court would have actually imposed a lesser fixed sentence if it was aware of its discretion to do so. Instead, it is clear from the court’s comments at the sentencing hearing and its I.C.R. 35 denial order that the court decided to follow the state’s recommendation due to FencI’s prior criminal history and failed previous rehabilitative attempts, not because of any misunderstanding of its sentencing discretion. See Tr., p.31, L.2 – p.33, L.21; R., pp.106-109.) Unlike in Toyne, the district court in the present case did not directly reject any particular sentencing request by reciting an incorrect interpretation of the requirements of I.C. § 19-2514. Next, the state never argued that I.C. § 19-2514 required the district court to impose a minimum five-year *fixed* sentence, and actually indicated the opposite in its written objection to FencI’s I.C.R. 35 motion.³ (R., p.104.) Finally, as discussed below, the record supports the sentence imposed. Because it is clear from the record that any apparent district court misunderstanding of its sentencing discretion did not actually impact the court’s sentencing determination and denial of the I.C.R. 35 motion, any error is harmless.

³ However, it appears as though the district court wrote its denial order before it had the opportunity to review the state’s written objection. (See R., pp.103-109.) The district court signed the denial order on April 5, 2014, and noted that “[t]he state did not file a response [to the I.C.R. 35 motion].” (R., p.106, 109.) The state filed its objection one day earlier, on April 4, 2014. (R., pp.103-105.)

II.
Fencl Has Failed To Show That The District Court Imposed An Excessive Sentence

A. Introduction

Fencl asserts that the district court abused its discretion by imposing an excessive sentence. (Appellant's brief, pp.10-14.) Fencl has failed to establish that the district court's unified sentence of 15 years with five years fixed for felony driving under the influence was excessive considering the objectives of sentencing and Fencl's extensive criminal history and previous failed attempts at rehabilitation.

B. Standard Of Review

When a sentence is within statutory limits, the appellate court will review 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. The District Court Acted Well Within Its Sentencing Discretion

To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence is excessive. Farwell, 144 Idaho at 736, 170 P.3d at 401. To establish that the sentence is excessive, Fencl 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.

In this case, the district court reviewed Fencil's presentence investigation report and her GAIN-I substance abuse and mental health evaluation prior to sentencing. (Tr., p.17, Ls.11-15.) It also recited the appropriate sentencing factors. (Tr., p.31, L.2 – p.32, L.3.) A review of the record supports the district court's sentencing determination.

Fencil has an extensive criminal history, including at least six prior convictions for driving under the influence, the most recent two of which were felony convictions. (PSI, pp.3-5, 93-98.) Several of these prior incidents appear to have occurred while Fencil had a suspended license and/or was on probation or parole. (See PSI, pp.3-5, 93-100, 112-121.) Certainly, community supervision and license suspensions have been unsuccessful in preventing Fencil from driving under the influence. Fencil also has prior felony convictions for burglary and grand theft, and prior misdemeanor convictions for petit theft, open container, contempt, escape, driving without privileges, and resisting and obstructing an officer. (PSI, pp.3-5, 93-98.)

Fencil has continued to commit crimes despite previous rehabilitative opportunities. Fencil acknowledged to the presentence investigator that she had participated in "several" substance abuse treatment programs, but that she "does not always use" the tools she has learned. (PSI, pp.12, 16.) Fencil previously had the opportunity to participate in the retained jurisdiction program, but violated her probation upon release from custody by consuming alcohol and driving under the influence. (PSI, pp.129-131.) The presentence investigator observed that

“previously imposed sanctions failed to satisfy the goals of deterrence and rehabilitation.” (PSI, p.16.)

On appeal, Fencil contends that the district court failed to give proper weight or consideration to mitigating factors, including her expressed amenability to further rehabilitation, remorse, ability to maintain employment and pursue an education, support from family and friends, and mental health issues. (Appellant’s brief, pp.11-14.) However, there is no indication in the record that the district court ignored any of these factors. To the contrary, the court reviewed the pre-sentence investigation report which contained the information Fencil relied on to make her sentencing argument. (Tr., p.17, Ls.11-15.) The district court expressly acknowledged Fencil’s mental health issues and her sincerity in expressing a desire for further rehabilitation. (Tr., p.19, Ls.14-17; p.32, Ls.18-22.) Further, at the sentencing hearing, the state acknowledged most of these mitigating factors in its sentencing argument to the court and argued that its recommended sentence “actually weighs all the mitigation in Ms. Fencil’s case.” (Tr., p.24, Ls.3-8.)

The district court's concurrent unified sentence of 15 years with five years fixed for Fencil’s conviction for felony driving under the influence was entirely reasonable in light of the nature of the crime, Fencil’s significant criminal record, and her previous failures on community supervision. Fencil has therefore failed to show that the district court abused its sentencing discretion.

CONCLUSION

The state respectfully requests that this Court affirm the district court's sentence and denial of Fencil's I.C.R. 35 motion for reduction of sentence.

DATED this 6th day of November, 2014.




MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of November, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ELIZABETH ANN ALLRED
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.



MARK W. OLSON
Deputy Attorney General

MWO/pm