10-7-2015

State v. McCoggle Respondent's Brief Dckt. 43178

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. MARIO KOWAM McCOGGLE, Defendant-Appellant.	)	Nos. 43178 and 43179 Ada Co. Case Nos. CR-2012-6722 and CV-2013-19939

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 SAMUEL A. HOAGLAND
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

The district court granted one claim in Mario McCoggle's post-conviction petition, reinstating his right to appeal from the criminal judgment, but dismissed the other claims. In this joint appeal McCoggle challenges the summary dismissal of one of his post-conviction claims and asserts the district court abused its sentencing discretion.

Statement Of The Facts And Course Of The Proceedings

McCoggle filed a petition for post-conviction relief challenging his conviction for felony domestic violence in the presence of a child. (R., pp. 34-44.) In an amended petition McCoggle alleged that trial counsel was ineffective for failing to move to strike "extensive unproven allegations of child abuse" contained in a CARES interview and victim impact statement attached to the PSI. (R., pp. 81-82.) In support of the claim McCoggle submitted a transcript of the sentencing hearing. (R., pp. 85-92.) McCoggle also claimed that his appellate counsel was ineffective. (R., p. 82.)

The district court filed a notice of intent to dismiss "certain of the claims raised in the amended petition." (R., p. 98.) The district court stated that there was no evidence to support the claim that counsel was ineffective for not objecting to evidence that McCoggle had physically abused the victim's son, and the transcript tended to actually rebut the claim because counsel provided a detailed statement regarding what parts of the PSI McCoggle disputed, and McCoggle, when presented the opportunity to present additional matters, said he

had nothing to add. (R., pp. 101-02.) McCoggle presented no additional evidence (see, generally, R.) and this claim was dismissed (R., p. 115).

In relation to the remaining claim of ineffective assistance of appellate counsel (R., p. 82), the court granted a stipulation[1] finding appellate counsel to be ineffective, and re-entered judgment to allow an appeal in the criminal case. (R., pp. 114-15; see also p. 19.)

McCoggle thereafter filed a timely notice of appeal. (R., pp. 24, 117.)

[1] The basis for the stipulation is unknown, as McCoggle failed to allege, much less prove, that appellate counsel's choice of issues on appeal was deficient or that McCoggle was prejudiced. (R., p. 82.) Heilman v. State, 158 Idaho 139, ___, 344 P.3d 919, 925-26 (Ct. App. 2015) (petitioner claiming ineffective assistance of appellate counsel must show deficient performance and prejudice).

ISSUES

McCoggle states the issues on appeal as:

1. Did the district court err in summarily dismissing the claim of ineffective assistance of trial counsel?

2. Did the district court err in imposing an excessive sentence?

(Appellant's brief, p. 3.)

The state rephrases the issues as:

1. Has McCoggle failed to show that the district court erred when it concluded the claim of ineffective assistance of counsel for failing to object to evidence in the PSI was unsupported by evidence?

2. Has McCoggle failed to show that the district court abused its discretion when it imposed a sentence of fifteen years with five years determinate upon his conviction for felony domestic violence in the presence of a child?

ARGUMENT

I.
McCoggle Has Failed To Show That The District Court Erred When It Concluded The Claim Of Ineffective Assistance Of Counsel For Failing To Object To Evidence In The PSI Was Unsupported By Evidence

A. Introduction

The only evidence McCoggle submitted in support of his claim that his trial counsel was ineffective for failing to object to evidence in the PSI that he physically abused the victim's son was the sentencing transcript. (R., pp. 81-82, 85-92.) The district court dismissed this claim because "the record conclusively rebuts this claim, and the petitioner has mustered no evidence rebutting the presumption of competence on the part of counsel with respect to strategic or tactical decisions." (R., p. 102.) On appeal McCoggle asserts that the record does not rebut his claim, but makes no claim that he presented evidence rebutting the presumption of competence. (Appellant's brief, pp. 4-7.) Because McCoggle does not challenge one of the bases for the district court's ruling, he has failed to show error.

B. Standard Of Review

On review of a dismissal of a post-conviction application, the appellate court will review the entire record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require that relief be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The court freely reviews the district court's application of the law. Id.

When the basis for a trial court's ruling is not challenged on appeal, an appellate court will affirm on the unchallenged basis. State v. Goodwin, 131 Idaho 364, 366–67, 956 P.2d 1311, 1313–14 (Ct. App. 1998).

C. Dismissal For Lack Of Evidence Was Proper And Is Unchallenged On Appeal

The district court dismissed the claim of ineffective assistance of counsel at sentencing, in part, for lack of evidence. (R., p. 102 ("petitioner has mustered no evidence rebutting the presumption of competence on the part of counsel").) On appeal McCoggle does not challenge this basis for the court's ruling. (Appellant's brief, pp. 4-7 (challenging only district court's conclusion that the record rebuts the claim).) This Court must therefore affirm on the unchallenged basis.

Even had McCoggle challenged the district court's conclusion his claim was unsupported by evidence, his claim would fail. There is "a strong presumption that trial counsel was competent and diligent" requiring proof that challenged decisions were "based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." Baldwin v. State, 145 Idaho 148, 153-54, 177 P.3d 362, 367-68 (2008) (internal citations omitted). Although McCoggle presented evidence of what counsel did and did not object to at sentencing, he presented neither evidence nor argument indicating that counsel's choices in that regard were objectively unreasonable.

Because the district court's conclusion that McCoggle failed to support his claim with evidence is unchallenged on appeal and correct even if reviewed, McCoggle has failed to show error.[2]

II.

McCoggle Has Failed To Show That The District Court Abused Its Discretion When It Imposed A Sentence Of Fifteen Years With Five Years Determinate Upon His Conviction For Felony Domestic Violence In The Presence Of A Child

A. Introduction

The district court imposed a sentence of 15 years with five years determinate upon McCoggle's conviction for domestic battery in the presence of a child. (R., p. 20.) McCoggle contends this was excessive (Appellant's brief, pp. 7-9), but has failed to show an abuse of discretion.

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.

[2] The state also submits that McCoggle has failed to show error on the grounds he challenges: that the record disproves the claim that McCoggle was in fact disputing the physical abuse of the victim's son. (R., pp. 101-03.) When personally given the chance at sentencing, McCoggle did not dispute the evidence and even in post-conviction McCoggle presented no *evidence* he disputed that the abuse occurred.

C. McCoggle Has Failed To Show An Abuse Of Sentencing Discretion

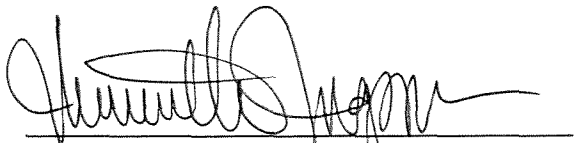
To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence is excessive. Farwell, 144 Idaho at 736, 170 P.3d at 401. To establish that the sentence is excessive, he must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Id. Idaho appellate courts presume that the fixed portion of a sentence will be the defendant's probable term of confinement. State v. Trevino, 132 Idaho 888, 896, 980 P.2d 552, 560 (1999).

McCoggle contends his sentence is excessive, adopting as his appellate argument the argument his trial counsel asserted at sentencing. (Appellant's brief, pp. 7-9.) The district court had the benefit of that argument and imposed a sentence in accordance with its persuasiveness. Moreover, the Idaho Court of Appeals held that the sentence was not unreasonable even with the benefit of additional information presented in a Rule 35 motion. State v. McCoggle, 2013 Unpublished Opinion No. 672, Docket Nos. 40610 & 40906 (Idaho App., September 20, 2013) (copy attached). McCoggle has failed to demonstrate an abuse of discretion.

CONCLUSION

The state respectfully requests this Court to affirm the partial summary dismissal of McCoggle's post-conviction petition and the sentence imposed in the criminal case.

DATED this 7th day of October, 2015.



KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of October, 2015, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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KKJ/dd

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 40610 & 40906

STATE OF IDAHO,	2013 Unpublished Opinion No. 672
Plaintiff-Respondent,	Filed: September 20, 2013
v.	Stephen W. Kenyon, Clerk
MARIO KOWAM McCOGGLE,	THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY
Defendant-Appellant.	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Appeal from judgment of conviction and unified sentence of fifteen years, with a minimum period of confinement of five years, for domestic violence in the presence of a child, dismissed; order denying I.C.R. 35 motion for reduction of sentence, affirmed.

Sara B. Thomas, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

Before GUTIERREZ, Chief Judge; LANSING, Judge; and MELANSON, Judge

PER CURIAM

Mario Kowam McCoggle pled guilty to domestic violence in the presence of a child. I.C. §§ 18-903(a), 18-918(2), and 18-918(4). In exchange for his guilty plea, an additional charge was dismissed. The district court sentenced McCoggle to a unified term of fifteen years, with a minimum period of confinement of five years. McCoggle appealed his judgment of conviction and sentence in Docket No. 40610. McCoggle filed an I.C.R 35 motion, which the district court denied. McCoggle appealed the denial of his Rule 35 motion in Docket No. 40906.

In his appellant's brief on appeal, McCoggle's only issue listed is whether the district court erred in denying his Rule 35 motion in Docket No. 40906. The failure of an appellant to

include an issue in the statement of issues required by I.A.R. 35(a)(4) will eliminate consideration of the issue from appeal. *State v. Crowe*, 131 Idaho 109, 111, 952 P.2d 1245, 1247 (1998). This rule may be relaxed, however, where the issue is argued in the briefing and citation to authority is provided. *Id.* A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Because McCoggle listed no issue and presented no argument or authority with regard to his appeal from his judgment of conviction or sentence, we dismiss his appeal in Docket No. 40610.

In Docket No. 40906, McCoggle asserts the district court erred in denying his Rule 35 motion. A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). Upon review of the record, including the new information submitted with McCoggle's Rule 35 motion, we conclude no abuse of discretion has been shown.

Therefore, the appeal from McCoggle's judgment of conviction and sentence is dismissed. The district court's order denying McCoggle's Rule 35 motion is affirmed.