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State v. Storm Appellant's Reply Brief Dckt. 43214

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 43214
)	
v.)	BONNER COUNTY NO. CR 2014-6824
)	
TRACY D. STORM,)	APPELLANT'S
)	REPLY BRIEF
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

In his opening brief, Mr. Storm argued the district court abused its discretion when it sentenced him to a unified term of six years, with three years fixed, for trafficking in methamphetamine. In its brief, the State argues that Mr. Storm waived his right to appeal his sentence. The State is incorrect. Mr. Storm did not waive his right to appeal his sentence and this Court must consider the merits of his appeal. Turning to the merits, the sentence imposed upon Mr. Storm by the district court was not reasonable and thus constitutes an abuse of discretion. This Court should reduce or eliminate the indeterminate portion of Mr. Storm's sentence or remand this case to the district court for a new sentencing hearing.

ISSUE

Did the district court abuse its discretion when it imposed upon Mr. Storm, a unified sentence of six years, with three years fixed, in light of the mitigating factors that exist in this case?

ARGUMENT

The District Court Abused Its Discretion When It Imposed Upon Mr. Storm, A Unified Sentence Of Six Years, With Three Years Fixed, In Light Of The Mitigating Factors That Exist In This Case

The State contends that Mr. Storm waived his right to appeal his sentence because the district court did not exceed the State's recommended sentence. (Resp. Br., p.2.) In support, the State cites to a document in the Record titled Pretrial Settlement Agreement. (R., p.84.) The Pretrial Settlement Agreement expired, by its terms, before Mr. Storm executed it and it is thus not binding. The district court did not discuss or reference an appellate waiver either at Mr. Storm's change of plea hearing or at sentencing, and the judgment specifically informed Mr. Storm of his right to appeal. Unlike in *State v. Murphy*, 125 Idaho 456, 457 (1994), which is the case relied upon by the State, the record is not clear that Mr. Storm "accepted the risks" of an appellate waiver. (Resp. Br., p.2.) On the contrary, the record is clear that Mr. Storm did not accept the risk of an appellate waiver and did not waive his right to appeal his sentence.

The Pretrial Settlement Agreement reflects that the State made a written offer to Mr. Storm on November 5, 2014, which included an appellate waiver. (R., p.84.) However, the Pretrial Settlement Agreement states that the offer contained therein "EXPIRES 14 days after Prelim date or other ()." (R., p.84.) There is no "other" date indicated, which means the offer contained in the Pretrial Settlement Agreement—and the attendant appellate waiver—expired 14 days after Mr. Storm's preliminary hearing.

Mr. Storm's preliminary hearing was held on November 12, 2014. (R., p.49.) Mr. Storm did not sign the Pretrial Settlement Agreement until February 20, 2015, which was 101 days after the preliminary hearing. (R., p.84.) Because the offer contained in the Pretrial Settlement Agreement expired before Mr. Storm executed the Agreement, the appellate waiver contained in the Agreement is not binding, and Mr. Storm did not waive his right to appeal his sentence.

As further evidence of the fact that Mr. Storm did not waive his right to appeal his sentence, the district court did not discuss or reference an appellate waiver either at Mr. Storm's change of plea hearing or at sentencing. And the judgment specifically informed Mr. Storm of his right to appeal. (R., pp.92-96.) The judgment states:

YOU ARE HEREBY NOTIFIED that you have a right to appeal this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two (42) days of the entry of the written order in this matter.

(R., p.94.) Consistent with this notice, Mr. Storm filed a notice of appeal on May 6, 2015. (R., pp.98-100.) Mr. Storm did not waive his right to appeal his sentence and this Court must consider the merits of his appeal.

The State did not address the merits of Mr. Storm's argument. As such, no reply is necessary and Mr. Storm refers the Court back to his opening brief for his argument on the merits. (See App. Br., pp.2-4.)

CONCLUSION

Mr. Storm respectfully requests that this Court reduce or eliminate the indeterminate portion of his sentence. Alternatively, he requests that this Court remand this case to the district court for a new sentencing hearing.

DATED this 28th day of March, 2016.

_____/s/_____
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of March, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

TRACY D STORM
INMATE #103821
ICIO
381 WEST HOSPITAL DRIVE
OROFINO ID 83544

BARBARA BUCHANAN
DISTRICT COURT JUDGE
E-MAILED BRIEF

JANET K WHITNEY
BONNER COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

AWR/eas