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State v. Fisher Appellant's Brief Dckt. 43242

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43242
Plaintiff-Respondent,)	
)	BONNEVILLE COUNTY NO. CR 2014-5161
v.)	
)	
JOSEPH DEE FISHER,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Joseph Fisher appeals from his judgment of conviction stemming from his guilty pleas to lewd conduct with a child under 16, and sexual abuse of a child under 16. Mr. Fisher asserts that the district court erred by failing to retain jurisdiction in light of the mitigating information present in his case.

Statement of the Facts & Course of Proceedings

The State filed a complaint alleging that Mr. Fisher had committed four total felonies: counts I and II alleging lewd conduct with a child under 16 and sexual abuse of a child under 16 naming E.B. as the victim; and counts III and IV alleging lewd conduct

with a child under 16 and sexual abuse of a child under 16 naming K.N. as the victim. (R., pp.7-17.) Mr. Fisher waived his right to a preliminary hearing, was bound over into the district court, and an information was filed charging him with the above crimes. (R., pp.25-19.) Pursuant to an agreement with the State, Mr. Fisher pled guilty to counts III and IV (the crimes naming K.N. as the victim), agreed to participate in a psychosexual evaluation, and was free to argue the appropriate sentence; in exchange, the State agreed to dismiss counts I and II (the crimes alleging E.B. as the victim)¹, and agreed to recommend no more than eight years of fixed time but reserved the right to argue for an indeterminate life sentence. (R., pp.36-45.)

During the sentencing hearing, the State requested that the district court impose a total unified term of 30 years, with eight years fixed, while defense counsel requested that the court retain jurisdiction, but did not offer a specific underlying sentence. (Tr. 1/20/15, p.8, Ls.8-10; p.11, Ls.20-23.) The district court sentenced Mr. Fisher to a unified term of 31 years, with six years fixed, for the lewd conduct conviction, and concurrent unified term of 25 years, with six years fixed, for the sexual abuse conviction. (R., pp.71-73; Tr. 1/20/15, p.16, L.17 – p.17, L.4.) After the court pronounced its sentence, but two days before the district court entered the judgment of conviction, Mr. Fisher filed a *pro se* Rule 35 motion, seeking leniency. (R., pp.68-73.) The district court heard argument on the Rule 35 motion 11 weeks after it was filed and denied the

¹ While Mr. Fisher acknowledged he committed the charged crimes against K.N., he denied committing any crimes against E.B. Mr. Fisher participated in a polygraph examination and the results indicated he was truthful in his denials of abusing E.B. (Tr. 1/20/15, p.6, Ls.13-16; see *also* Psychosexual Eval., p.1.)

motion.² (R., pp.89-90; Tr. 4/13/15.) Mr. Fisher filed a Notice of Appeal timely from the Minute Entry reflecting the court's denial of his Rule 35 motion. (R., pp.89-94.)

ISSUE

Did the district court abuse its discretion when it failed to retain jurisdiction in light of the mitigating factors that exist in this case?

ARGUMENT

The District Court Abused Its Discretion When It Failed To Retain Jurisdiction In Light Of The Mitigating Factors That Exist In This Case

Mr. Fisher asserts that, given any view of the facts, the district court abused its discretion by failing to retain jurisdiction. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. See *State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, “[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.” *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Fisher does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Fisher must show that, in light of the governing criteria, the sentence

² Mr. Fisher did not add any new or additional information in support of his Rule 35 motion and does not seek appellate review of that decision. However, because his Rule 35 motion was filed within 14 days of the judgment of conviction being entered, his Notice of Appeal is deemed timely from the entry of his original judgment of conviction. See I.A.R. 14(a).

was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978), *overruled on other grounds by State v. Coassolo*, 136 Idaho 138 (2001)).

Mr. Fisher was 43 at the time he committed the present crimes; unfortunately, this was not his first sexual based offense. (PSI, pp.1-3, 4.) When he was 20, he had a sexual relationship with an 11 year-old girl, pled guilty to lewd conduct with a minor under 16, and began sex offender treatment. (PSI, pp.7, 10.) Unbeknownst to the treatment providers, Mr. Fisher suffers from “significant neurocognitive limitations” that made it difficult for him to truly engage in the treatment process. (Psychosexual Eval., p.17.) While the psychosexual evaluator opined the Mr. Fisher needs to begin sex offender treatment in a secured facility due to his current risk to the community, the evaluator noted that Mr. Fisher is much more mature and motivated now than he was the first time he attempted treatment, he now recognizes that “he cannot control his deviant sexual interests and actions,” and he understands that he needs treatment. (Psychosexual Eval., pp.1-2, 17-18, 32.)

Mr. Fisher readily admits to the conduct he pled guilty to and he expressed his sincere remorse for having committed those acts. (PSI, p.3; Psychosexual Eval., p.24.) During his sentencing hearing, Mr. Fisher stated, “I am sorry for what I’ve done, and I hope the Court will do what they feel is the best they need to do for me.” (Tr. 1/20/15,

p.13, Ls.9-11.) Idaho Courts recognize that acceptance of responsibility, remorse, and willingness to seek treatment, are all mitigating factors that should counsel a district court into imposing a less severe sentence. See *State v. Alberts*, 121 Idaho 204 (Ct. App. 1991); *State v. Sanchez*, 117 Idaho 51 (Ct. App. 1990); *State v. James*, 112 Idaho 239 (Ct. App. 1986). Retaining jurisdiction would have allowed Mr. Fisher to begin treatment in a prison setting, giving him the opportunity to demonstrate to the district court that he could safely continue treatment outside of prison. In light of the mitigating information present in this case, Mr. Fisher asserts that the district court abused its discretion by failing to retain jurisdiction.

CONCLUSION

Mr. Fisher respectfully requests that this Court vacate his sentence and remand his case to the district court with the instructions for the district court to retain jurisdiction, or for whatever relief this Court deems appropriate.

DATED this 19th day of January, 2016.

_____/s/_____
JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of January, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

JOSEPH DEE FISHER
INMATE #34762
BONNEVILLE COUNTY JAIL
605 N CAPITAL
IDAHO FALLS ID 83402

DANE H WATKINS JR
DISTRICT COURT JUDGE
E-MAILED BRIEF

TRENT GRANT
BONNEVILLE COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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

_____/s/_____
EVAN A. SMITH
Administrative Assistant

JCP/eas