1-12-2012

# State v. McGiboney Respondent's Brief Dckt. 35937

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| STATE OF IDAHO,<br><br>Plaintiff-Respondent,<br><br>vs.<br><br>JOSHUA LEE MCGIBONEY,<br><br>Defendant-Appellant. | ) | NO. 35937 |

# 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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## STATEMENT OF THE CASE

### Nature Of The Case

Joshua Lee McGiboney appeals from the sentences imposed for aggravated battery, robbery, unlawful possession of a firearm and burglary and the application of a firearm enhancement.

### Statement Of The Facts And Course Of The Proceedings

McGiboney, on felony probation and armed with a gun, invaded a home with an accomplice, robbed the occupants, and pistol-whipped one of the victims while escaping. (PSI, p. 2.) The state charged him with two counts of aggravated battery, robbery, being a felon in possession of a firearm, burglary, and a weapons enhancement. (R., pp. 35-37.) A jury found McGiboney guilty of aggravated battery, robbery, unlawful possession of a firearm, and burglary and found that he had used a firearm in the commission of aggravated battery, robbery and burglary. (R., pp. 101-06.) The district court imposed concurrent sentences of 30 years with 15 years fixed for aggravated battery, life with 15 years fixed for robbery, five years fixed for unlawful possession of a firearm, and 25 years with 15 years fixed for burglary. (R., pp. 118-29; Tr., p. 1396, L. 16 – p. 1398, L. 11.) McGiboney filed a notice of appeal timely from the entry of judgment. (R., pp. 117, 125.)

## ISSUES

McGiboney states the issues on appeal as:

A. Was the indeterminate life sentence for robbery and the concurrent 15 year fixed terms for the robbery, burglary and aggravated battery counts excessive?

B. Should this case be remanded under *State v. Peregrina*, 151 Idaho 538, 540, 261 P.3d 815, 817 (2011), for an explicit finding as to whether the crime arose out of divisible courses of conduct because the court imposed multiple firearm enhancements at sentencing?

(Appellant's brief, p. 7.)

The state rephrases the issues as:

1. Has McGiboney failed to show fundamental error where the district court made no specific finding of fact as to whether the crimes subject to the firearm enhancement were or were not part of an indivisible course of action?

2. Has McGiboney failed to show an abuse of the district court's sentencing discretion?

## ARGUMENT

### I.
### McGiboney Has Failed To Show Fundamental Error In The Lack Of A Specific Finding As To Whether His Convictions Subject To The Firearm Enhancement Were Committed In A Continuous Course Of Conduct

### A. Introduction

The district court applied the firearm enhancement to the aggravated battery and the burglary convictions, but did not apply it to the robbery or unlawful possession of a firearm convictions. (Tr., p. 1396, Ls. 16-20; p. 1397, Ls. 3-16, 22-24; p. 1398, Ls. 4-7.) It did not, however, make a specific determination of whether the aggravated battery and the burglary arose out of the same indivisible course of conduct. (Tr., p. 1389, L. 21 – p. 1400, L. 10.) Because the district court did not make a specific finding related to whether the two crimes arose out of a continuous course of conduct, McGiboney contends the case must be remanded for such a finding. (Appellant's brief, p. 15.) This argument fails because the record shows that the issue of whether there was a continuous course of conduct was not raised to the district court and the lack of a finding on the unraised issue is not fundamental error.

### B. Standard Of Review

"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). Absent a timely objection, the appellate courts of this state will only review an alleged error

under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

C. McGiboney Does Not Allege, And Has Not Demonstrated, Fundamental Error

The appellate court will address an issue raised for the first time on appeal only if the appellant demonstrates fundamental error. State v. Perry, 150 Idaho 209, ___, 245 P.3d 961, 979 (2010). To demonstrate fundamental error the appellant must show that the alleged error "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Id. at ___, 245 P.3d at 980. Application of this standard in this case shows McGiboney has failed to demonstrate fundamental error.

First, the right McGiboney asserts is strictly a statutory right. There is no constitutional bar to applying two firearm enhancements to crimes committed during an indivisible course of conduct. Rather, that prohibition arises solely by operation of statute. I.C. § 19-2520E. McGiboney's claim fails on the first prong.

Second, it is not clear from the record that there was error or that lack of an objection was not from defense choice. McGiboney asks for a remand for a factual finding precisely because it is not clear on the record that error has been committed. (Appellant's brief, p. 15.) In addition, the lack of an objection below may be the result that McGiboney gets no actual benefit from raising the objection. McGiboney cannot challenge the robbery sentence of life with 15

years fixed because the district court did not apply the enhancement to that sentence. (Tr., p. 1397, Ls. 11-16.) Because the challenged sentences (burglary and aggravated assault) are both smaller and served concurrently with the robbery sentence (Tr., p. 1396, L. 16 – p. 1397, L. 2; p. 1398, Ls. 4-11), reducing either the aggravated battery or the burglary sentence will not result in a single day less prison for McGiboney. It is not clear on such a record that waiver of the objection was not a reasonable and conscious decision.

Finally, because the resolution of this issue will not result in any actual reduction of the time McGiboney must serve in prison, McGiboney has shown no prejudice.

In addition, McGiboney has failed to show that he will prevail on any claim that the burglary and the aggravated battery were part of an indivisible course of conduct. In State v. Johns, 112 Idaho 873, 881-82, 736 P.2d 1327, 1335-36 (1987), this Court addressed a claim that because the robbery and murder committed by Johns were committed on the same date and place they were part of an indivisible course of conduct. This Court concluded, however, that where the robbery was not John's motive for murder, but the intent to rob and actual theft from the victim occurred only after the murder was accomplished, the robbery and the murder were not part of an *indivisible* course of conduct. Johns, 112 Idaho at 881-82, 736 P.2d at 1335-36. As in Johns, in this case the evidence at trial showed that the burglary was completed and that McGiboney had in fact left the house before he pistol-whipped the victim, who had followed and attempted to apprehend him. (Tr., p. 491, Ls. 12-23; p. 495, Ls. 10-15; p.

495, L. 22 – p. 500, L. 6.) The evidence shows that McGiboney formed the intent to batter and committed the act of battery well after having completed the burglary. McGiboney even admits on appeal that the aggravated battery did not occur until after the burglary "had been completed." (Appellant's brief, p. 10.) Although still potentially deemed a single course of conduct, the course of conduct was divisible because neither the mental state nor the physical acts of either crime overlapped.

To make his argument, McGiboney relies primarily on State v. Peregrina, 151 Idaho 538, 540, 261 P.3d 815, 817 (2011). (Appellant's brief, p. 15.) In that case the Court determined that "I.C. § 19-2520E is a mitigating factor that acts to reduce the penalty for 6the crime" on which it is "within the inherent authority of the trial judge to make a finding" of fact. Id. at ___, 261 P.3d at 817. At no point, however, did the Court relieve the defense of its obligation to raise the issue of mitigation to the trial court or indicate that this issue may be raised for the first time on appeal. Thus, while Peregrina would certainly control if the issue before this Court were whether the question of indivisible course of conduct is a question for the judge or the jury, it is silent on the question of whether the issue being raised is preserved for appellate review.

McGiboney did not preserve this issue for appeal. He has further failed to demonstrate fundamental error because there is no error, the issue is not of constitutional magnitude, there is no error clear on the record, and there is no demonstrated prejudice.

II.

McGiboney Has Failed To Show An Abuse Of Sentencing Discretion

A. Introduction

On all four counts—robbery, burglary, unlawful possession of a firearm, and aggravated battery—the district court gave concurrent sentences resulting in an aggregate life sentence with 15 years fixed, the same sentence imposed for the robbery alone. (Tr., p. 1396, L. 16 – p. 1398, L. 11.) The stated reasons for the district court's exercise of sentencing discretion were that home-invasion robbery is a particularly dangerous crime (Tr., p. 1392, Ls. 6-13); McGiboney's demonstrated contempt for authority (Tr., p. 1392, Ls. 14-20); his refusal to acknowledge any culpability for any of his crimes (Tr., p. 1392, L. 21 – p. 1393, L. 8); his ongoing threat to the community (Tr., p. 1393, L. 9 – p. 1394, L. 5); the adverse affect of the crimes on the victims (Tr., p. 1394, L. 6 – p. 1395, L. 15); and McGiboney's "well below-average rehabilitation potential" (Tr., p. 1395, L. 25 – p. 1396, L. 8).

Despite the district court's specific conclusion that the jury had found McGiboney "was not telling the truth" in his trial testimony, the district court's specific concurrence with the jury's finding, and the district court's conclusion that McGiboney "appears to be incapable of telling the truth" (Tr., p. 1391, Ls. 10-19; p. 1396, Ls. 6-7), McGiboney relies extensively upon his own trial testimony in asserting the facts on appeal (Appellant's brief, pp. 1-3, 5-6). He then disputes each of the other factual findings made by the district court at sentencing. (Appellant's brief, pp. 10-14.) McGiboney has failed to show clear error in the district court's factual findings or an abuse of discretion in the sentences.

B. Standard Of Review

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Oliver, 144 Idaho at 726, 170 P.3d at 391 (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)).

When a finding of fact is challenged on appeal the appellant must demonstrate that the finding is unsupported by substantial and competent evidence. State v. Thomas, 133 Idaho 682, 686, 991 P.2d 870, 874 (Ct. App. 1999) ("Factual findings will not be set aside on appeal unless there is a showing that they are clearly erroneous. Findings are clearly erroneous only when unsupported by substantial and competent evidence in the record.") (citation omitted).

C. McGiboney Has Failed To Show The District Court's Factual Findings Were Clearly Erroneous

To bear the burden of demonstrating an abuse of discretion, the appellant must show that the sentence is excessive under any reasonable view of the

facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The evidence supported the district court's findings that McGiboney committed a dangerous crime, displayed contempt for authority, refused to recognize his culpability, is an ongoing threat to the community, inflicted trauma on the victims, and had below average rehabilitation potential. McGiboney was convicted of four felonies related to a home-invasion robbery. (PSI, pp. 1-2.) He denied having any involvement in the crime despite overwhelming evidence to the contrary. (PSI, p. 2; Tr., p. 1391, Ls. 10-19.) He had been placed on probation for felony aggravated assault, misdemeanor battery and misdemeanor battery on a law enforcement officer only one year before committing the instant crimes. (PSI, p. 3.) In the prior felony case he had tried to leave Olive Garden Restaurant without paying then punched the manager when confronted, sprayed four other restaurant employees with pepper spray, and spit on and hit a police officer attempting to arrest him. (4/17/07 PSI, pp. 1-2.) He denied any wrongdoing in relation to that crime as well. (4/17/07 PSI, p. 2.)

Before his first felony he had misdemeanor convictions for resisting and obstructing an officer, DUI, and possession of paraphernalia. (4/17/07 PSI, p. 3-4.) Besides his criminal record, he had a history of breaking rules while incarcerated. (PSI, p. 4.) This evidence demonstrates that all of the district court's findings are supported by evidence.

McGiboney first argues that the district court erred in finding home invasion robbery to be a dangerous crime because "the physical violence against [the victim] was no more than necessary to effect Mr. McGiboney's escape," and even that level of violence would not have happened if the victims had not elected to protect their property by trying to apprehend him. (Appellant's brief, pp. 10, 14.) McGiboney's attempt to portray the victims as responsible for the violence inherent in McGiboney's crimes fails to show error by the district court.

McGiboney also claims to be a person of good character. (Appellant's brief, pp. 10-12.) McGiboney's five felony convictions, uncountable lies, and aggressively anti-social behavior say otherwise.

McGiboney next argues that his sentence was "much more than is needed to protect society" and deter McGiboney and others. (Appellant's brief, pp. 12-13.) Obviously felony probation created neither societal protection from nor deterrence of McGiboney. McGiboney has shown no abuse of discretion related to this factor.

McGiboney finally admits that he cannot be rehabilitated for the crimes at issue in this case, but argues that because a miniscule number (in relation to the total number of felony convictions) of criminal convicts have been proven innocent by DNA evidence, the district court erred in concluding that McGiboney has minimal rehabilitation potential. (Appellant's brief, pp. 13-14.) There is no reason to believe that McGiboney would be exonerated by DNA evidence. McGiboney has failed to show error in the district court's findings.

McGiboney committed serious crimes while already on felony probation. The district court's factual findings that home invasion robbery is a dangerous crime; that McGiboney has repeatedly shown contempt for authority, no recognition of culpability, and is an ongoing threat to society; that the crimes had long-lasting negative effects on the victims; and that McGiboney demonstrated low potential for rehabilitation are all supported by evidence and have not been shown to be clearly erroneous. McGiboney's attempt on appeal to blame the victims and his assertion that he may be exonerated by nonexistent evidence is baseless. McGiboney has failed to demonstrate any abuse of discretion on the record.

## CONCLUSION

The state respectfully requests this Court to affirm McGiboney's sentences.

DATED this 12th day of January, 2012.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of January, 2012, 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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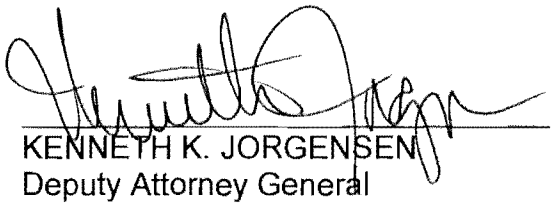

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