

1-14-2016

State v. Lopez Appellant's Brief Dckt. 43426

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Lopez Appellant's Brief Dckt. 43426" (2016). *Not Reported*. 2660.
https://digitalcommons.law.uidaho.edu/not_reported/2660

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

SARA B. THOMAS
State Appellate Public Defender
I.S.B. #5867

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
P.O. Box 2816
Boise, ID 83701
(208) 334-2712

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 43426 & 43427
Plaintiff-Respondent,)	
)	CANYON COUNTY NOS. CR 2013-10940 &
v.)	CR 2015-5335
)	
FRANCISCO ARTEAGA LOPEZ,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Francisco Lopez appeals contending the district court abused its discretion when it imposed and executed his sentences in these cases rather than retaining jurisdiction. He also contends the district court abused its discretion when it denied his motion for sentence reduction. Specifically, he contends the district court failed to sufficiently consider rehabilitation as an objective in its decision, and it also did not sufficiently consider the mitigating factors present in this case. In either case, this Court should reduce his sentence as it deems appropriate or, alternatively, remand the case for a new sentencing determination.

Statement of the Facts & Course of Proceedings

Mr. Lopez has struggled in dealing with his alcohol dependence. For example, he informed the presentence investigator that he had tried to get into treatment programs, but he was unable to afford that treatment on his own and was unable to get financial assistance. (Presentence Investigation Report (*hereinafter*, PSI), p.19.)¹ However, he noted that, when he is able to maintain his sobriety, he is able to maintain gainful employment. (PSI, p.16.) He also suffers from symptoms of major depression. (PSI, pp.57, 81.) Nevertheless, these two cases constituted Mr. Lopez's first felony convictions, though he had a history of misdemeanor charges. (PSI, pp.4-12.)

In the two cases at issue here, Mr. Lopez's continuing struggles resulted in charges for driving while intoxicated (DUI). In the first case, the 2013 case, Mr. Lopez was charged with DUI with an enhancement for multiple prior DUI convictions. (R., pp.26-29.) Mr. Lopez entered a plea agreement whereby he would plead guilty as charged on the DUI and a misdemeanor charge of open container, with the remaining misdemeanor charges to be dismissed. (11/14/13 Tr., p.4, L.14 - p.5, L.1.)² There were no recommendations for sentencing. (See 11/14/13 Tr., p.4, L.22 - p.5, L.1; R., pp.39-40.) However, Mr. Lopez failed to appear at the subsequent sentencing hearing. (R., p.52.)

¹ PSI page numbers correspond with the page numbers of the electronic PDF file "Lopez Exhibits #43426." Included in this file are the PSI report and all the documents attached thereto (police reports, substance abuse evaluations, etc.).

² Unless otherwise indicated, transcript citations will be to the volume containing the transcripts of the change of plea hearing held on June 2, 2015, and the sentencing hearing held on June 12, 2015.

Mr. Lopez was subsequently arrested on a failure to appear warrant at the same time he was arrested in the second case, the 2015 case. (See R., p.57 (certification of warrant return); R., pp.100-01 (the Information in the 2015 case)). In the 2015 case, Mr. Lopez was charged with aggravated DUI based on the allegation that, while driving under the influence, he hit a pedestrian causing great bodily harm. (R., pp.100-01.) Pursuant to a plea agreement, Mr. Lopez agreed to plead as charged and, in exchange, the State would dismiss the associated misdemeanor charges, and it agreed to not file any additional charges in the 2015 case. (Tr., p.5, Ls.18-20.) The State also agreed to limit its sentencing recommendation to no more than three and one-half years fixed time. (Tr., p.5, Ls.20-23.) At the ensuing hearing, Mr. Lopez informed the district court that he was on misdemeanor probation in Utah. (Tr., p.14, Ls.13-16.)

The presentence evaluations recommended Mr. Lopez participate in intensive outpatient treatment as to address his alcohol issues. (PSI, pp.67, 79.) A mental health evaluation also recommended counselling and medication to help Mr. Lopez deal with symptoms of depression. (PSI, p.81.) To allow him the opportunity to get that sort of treatment, the presentence investigator recommended that the district court retain jurisdiction so that Mr. Lopez might participate in a rider program. (PSI, p.22.)

The prosecutor recognized that a period of retained jurisdiction might be appropriate for Mr. Lopez, but, in light of the particular facts surrounding the 2015 charge, decided to recommend that the district court execute the sentence instead. (Tr., p.22, Ls.6-11.) Mr. Lopez's attorney pointed out that the presentence investigator considered the facts of both cases, and still determined the best sentencing option, "[b]ased on the level of assessed need and risk, and other protective factors as

discussed above,” was a period of retained jurisdiction. (PSI, p.22; Tr., p.28, L.24 - p.29, L.6.) Mr. Lopez also expressed his remorse, apologized to the victim from the 2015 case and her family, and accepted responsibility for his actions. (Tr., p.30, Ls.1-6.)

Nevertheless, the district court determined Mr. Lopez “is too much of a risk . . . even to consider for a retained jurisdiction program.” (Tr., p.31, L.25 - p.32, L.2.) Therefore, it imposed and executed a unified sentence of seven years, with three years fixed, in the 2013 case, and a concurrent unified sentence of ten years, with four years fixed, in the 2015 case. (Tr., p.32, L.24 - p.33, L.25.) Mr. Lopez filed a notice of appeal timely from both judgments of conviction. (R., pp.132-34.)

At the same time, he filed a motion for reconsideration of the sentences in both cases. (R., pp.139-43.) In that motion, he argued that the district court had not given sufficient consideration to various mitigating factors present in his case. (R., pp.139-43.) The district court denied that motion, pointing out that Mr. Lopez had a significant misdemeanor record and was reportedly not cooperative with the presentence process. (R., pp.75, 149.)

ISSUES

- I. Whether the district court abused its discretion when it imposed and executed Mr. Lopez's sentence rather than retaining jurisdiction.
- II. Whether the district court abused its discretion when it denied Mr. Lopez's motion for sentence reduction.

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed And Executed Mr. Lopez's Sentence Rather Than Retaining Jurisdiction

The governing criteria, or sentencing objectives, 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. *State v. Charboneau*, 124 Idaho 497, 500 (1993). The protection of society is the primary objective the court should consider. *Id.* Therefore, a sentence that protects society and also accomplishes the other objectives will be considered reasonable. *Id.*; *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). This is because the protection of society is influenced by each of the other objectives, and as a result, each must be addressed in sentencing. *Charboneau*, 124 Idaho at 500; I.C. § 19-2521. However, the Idaho Supreme Court has also held that rehabilitation "should usually be the initial consideration in the imposition of the criminal sanction." *State v. McCoy*, 94 Idaho 236, 240 (1971), *superseded on other grounds as stated in State v. Theil*, 158 Idaho 103 (2015).

The presentence investigator recognized that, despite the facts of both cases, rehabilitation was still a viable option in Mr. Lopez's case: "Based on the level of assessed need and risk, and other protective factors as discussed above, Mr. Lopez

appears to be a good candidate for an order of retained jurisdiction.” (PSI, p.22.) That conclusion was consistent with the other presentence evaluations, which recommended intensive outpatient treatment as Mr. Lopez would likely benefit from such treatment. (PSI, pp.67, 79.) In fact, as the most recent such evaluation noted, Mr. Lopez expressed amenability to that sort of treatment. (PSI, p.79.)

Opting for a more rehabilitative alternative at this time was also the better option since these were Mr. Lopez’s first felony offenses. (PSI, pp.4-12.) As Mr. Lopez had explained, he had not been able to get effective treatment previously. (PSI, p.19.) In dealing with Mr. Lopez’s first felony sentences, the district court had the opportunity to provide that sort of treatment through a period of retained jurisdiction. That alternative would allow the district court to assess Mr. Lopez’s ability to effectively participate in such a treatment program, and if he was unsuccessful in those efforts, the district court could relinquish jurisdiction and execute the prison sentence knowing that all the sentencing objectives had been properly addressed.

To that point, trial counsel explained, “[t]he best way to avoid recidivism as far as their IDOC’s [sic] standards would be . . . a retained jurisdiction.” (Tr., p.29, Ls.2-6.) By decreasing the risk of recidivism through treatment, the sentence would also better protect society in the long term. Furthermore, both the Idaho Supreme Court and the Idaho Court of Appeals have recognized that the timing of rehabilitative programming is an important consideration at sentencing. See, e.g., *State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971); *State v. Nice*, 103 Idaho 89, 91 (1982); *Cook v. State*, 145 Idaho 482, 489 (Ct. App. 2008); *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988). Therefore, by rejecting the

opportunity to provide timely rehabilitation, the sentence imposed by the district court fails to promote two of the goals of sentencing. As such, it constitutes an abuse of the district court's discretion.

II.

The District Court Abused Its Discretion When It Denied Mr. Lopez's Motion For Sentence Reduction

In his motion for the district court to reconsider the sentences, Mr. Lopez highlighted several mitigating factors which he contended the district court had insufficiently considered. (R., pp.139-43.) In regard to one of those factors, trial counsel offered additional information, that "Frank has the strong support of his family members and friends." (R., pp.140-41; *compare, e.g.*, PSI pp.13-15 (discussing Mr. Lopez's family history without going into detail about continuing support).)

The district court determined that the sentences were appropriate based on the fact that Mr. Lopez had a long misdemeanor record and was "reportedly non-compliant with the presentence process." (R., pp.75, 149.) Neither of those points actually address Mr. Lopez's arguments in support of his motion – that the district court had not given sufficient consideration to the other circumstances, which showed, even in light of the points the district court highlighted, the sentences imposed, particularly the decision to forego rehabilitative alternatives, did not support the goals of sentencing in this case. (See R., pp.140-41.) Therefore, the district court abused its discretion in denying the motion to reconsider the sentences. For the reasons articulated in the motion, as well as those discussed in Section I, *supra*, that decision also constituted an abuse of the district court's discretion.

CONCLUSION

Mr. Lopez respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing.

DATED this 14th day of January, 2016.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of January, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

FRANCISCO LOPEZ
INMATE #110088
BONNEVILLE COUNTY JAIL
605 N CAPTIAL
IDAHO FALLS ID 83402

GEORGE A SOUTHWORTH
DISTRICT COURT JUDGE
E-MAILED BRIEF

RYAN DOWELL
CANYON COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BRD/eas