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State v. Povalawski Appellant's Brief Dckt. 43467

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 43467
	)	
v.	)	TWIN FALLS COUNTY
	)	NO. CR 2015-3261
PAUL POVALAWSKI,	)	
	)	APPELLANT'S BRIEF
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Paul Povalawski was sentenced to a unified term of ten years, with two years fixed, after he pled guilty to driving while under the influence of alcohol (DUI), having a prior felony DUI conviction within fifteen years. He contends the district court abused its discretion when it imposed this sentence and when it denied his motion pursuant to Idaho Criminal Rule 35 ("Rule 35") for a reduction of sentence.

Statement of Facts and Course of Proceedings

On April 5, 2015, Mr. Povalawski lost control of the vehicle he was driving and drove into a ditch. He was arrested for DUI and transported to the jail, where his breath

alcohol content was measured at .207 and .205. (R., pp.11-12, 15.) Mr. Povalawski was charged by Information with operating a motor vehicle while under the influence of alcohol, having one prior felony DUI conviction within fifteen years. (R., pp.74-76.) Mr. Povalawski pled guilty (without the benefit of a plea agreement) and was sentenced to a unified term of ten years, with two years fixed. (5/26/15 Tr., p.3, Ls.11-16, p.7, Ls.7-14; R., p.100.) The judgment was entered on July 6, 2015. (R., pp.98-103.)

Mr. Povalawski filed a Rule 35 motion on July 27, 2015. (R., pp.106-07.) He requested the district court reduce his sentence to ten years, with one year fixed, and pointed out that he had successfully completed probation without a single violation in the past, and would not present a safety concern on probation. (R., p.107.) The district court denied Mr. Povalawski's motion, concluding it was untimely. (R., p.124.) Mr. Povalawski filed a motion to reconsider and/or clarify, asking the district court to reconsider its ruling because the motion "was filed in a timely manner under Rule 35." (R., pp.126-28.) On August 2, 2015, the district court issued an order denying Mr. Povalawski's Rule 35 motion. (R., p.129.) The court stated it had erroneously concluded the motion was untimely but, upon reconsideration, nonetheless exercised its discretion to deny the motion. (R., pp.129-30.) Mr. Povalawski filed a timely notice of appeal on August 6, 2015. (R., pp.131-35.)

ISSUES

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

2. Did the district court abuse its discretion when it denied Mr. Povalawski's Rule 35 motion?

ARGUMENT

I.

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

Mr. Povalawski asserts that, given any view of the facts, his unified sentence of ten years, with two years fixed, is excessive. Where, as here, the sentence imposed by the district court is within statutory limits, "the appellant bears the burden of demonstrating that it is a clear abuse of discretion." *State v. Miller*, 151 Idaho 828, 834 (2011) (quoting *State v. Windom*, 150 Idaho 873, 875 (2011)). "When a trial court exercises its discretion in sentencing, 'the most fundamental requirement is reasonableness.'" *Id.* (quoting *State v. Hooper*, 119 Idaho 606, 608 (1991)). "A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution." *Id.* (citation omitted). "When reviewing the reasonableness of a sentence this Court will make an independent examination of the record, 'having regard to the nature of the offense, the character of the offender and the protection of the public interest.'" *Id.* (quoting *State v. Shideler*, 103 Idaho 593, 594 (1982)).

The sentence imposed upon Mr. Povalawski is not reasonable considering the nature of the offense, the character of the offender and the protection of the public interest. Looking first at the nature of the offense, Mr. Povalawski was driving while under the influence of alcohol, but was not driving with anyone else in his vehicle, and caused damage only to his vehicle—he did not injure himself or anyone else. Driving while under the influence of alcohol is always a potentially dangerous crime, but, in this case, Mr. Povalawski harmed only himself. His conduct does not warrant a unified sentence of ten years, with two years fixed.

The next factor for this Court to independently examine is the character of the offender. The record reflects that Mr. Povalawski is a hardworking, earnest individual struggling with addiction. Mr. Povalawski admitted at sentencing that he "made a mistake" but he had been doing well—very well—for four years. (7/6/15 Tr., p.10, Ls.22-23.) Mr. Povalawski successfully completed a CAPP rider in 2011, and was placed on probation for a period of four years beginning on January 24, 2011. (Conf. Exs., p.7.) He was discharged from probation without any violations on January 23, 2014. (Conf. Exs., p.7.) To everyone's regret, Mr. Povalawski relapsed in February 2015, and he was arrested for the instant offense just two months later. (Conf. Exs., p.13.) The district court focused on the fact of Mr. Povalawski's relapse, but the fact that Mr. Povalawski was sober for four years is far more telling. At sentencing, Mr. Povalawski told the district court, "I just don't want to go away and lose my job." (7/6/15 Tr., p.11.) Mr. Povalawski was—and is—motivated to remain sober and the sentence imposed by the district court is not reasonable.

The final factor for this Court to consider is the protection of the public interest. There is every indication that the public could have been protected here if Mr. Povalawski was given a lesser sentence of incarceration or placed on probation. Mr. Povalawski was determined to present a moderate risk to re-offend and, at sentencing, his attorney recommended that Mr. Povalawski serve time in county jail or be placed in a retained jurisdiction program. (Conf. Exs., p.16; 7/6/15 Tr., p.10, Ls.13-16.) The presentence investigator likewise recommended a retained jurisdiction program and the GAIN evaluator recommended intensive outpatient treatment. (Conf. Exs., pp.16, 17, 35.) Mr. Povalawski underwent a DUI evaluation prior to sentencing and that evaluation is probably the most important. (Conf. Exs., pp.42-54.) The DUI evaluator recommended outpatient treatment and programming:

> Due to the number of DUI's and his drinking after attending the CAPP program and aftercare I recommend he attend a MADD victims's [sic] panel to address what could have happened while driving under the influence, an Intensive Outpatient program to address his not being able to remain abstinent and an MRT class to address his continuing maladaptive thinking.

(Conf. Exs., .p.46.) Looking at all of the factors together, the sentence the district court imposed upon Mr. Povalawski was not reasonable.

II.

The District Court Abused Its Discretion When It Denied Mr. Povalawski's Rule 35 Motion

Mr. Povalawski asserts that the district court abused its discretion when it denied his Rule 35 motion. "A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe."

State v. Trent, 125 Idaho 251, 253 (Ct. App. 1994) (citations omitted). "The denial of a motion for modification of a sentence will not be disturbed absent a showing that the court abused its discretion." *Id.* "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction." *Id.*; *see also State v. Huffman*, 144 Idaho 201, 203 (2007).

In support of his Rule 35 motion, Mr. Povalawski submitted to the district court printouts from his prior cases from the iCourt Portal. (R., p.108-18.) These printouts reflect that Mr. Povalawski was successful on probation in the past and would not present a safety concern if placed on probation again. (R., p.107.) The district court denied the motion without any discussion—stating only that "although the motion was timely, it is still denied within the Court's discretion." (R., p.129.) This represents an abuse of discretion as it is clear that the sentence the district court imposed on Mr. Povlwski should have been reduced.

CONCLUSION

Mr. Povalawski respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 29th day of February, 2016.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of February, 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:

PAUL POVALAWSKI
PO BOX 14
BOISE ID 83707

RANDY J STOKER
DISTRICT COURT JUDGE
E-MAILED BRIEF

ALAN J BOEHME
OFFICE OF THE PUBLIC DEFENDER
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_____/s/_____
EVAN A. SMITH
Administrative Assistant

AWR/eas