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State v. Gallegos Respondent's Brief Dckt. 43545

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43545
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2015-308
)	
ANDY DEMOSTENES GALLEGOS,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Gallegos failed to establish that the district court abused its discretion, either by imposing consecutive unified sentences of 15 years, with 12 years fixed, for one count of attempted rape, and 15 years, with eight years fixed, for a second count of attempted rape, or by denying his Rule 35 motion for reduction of his sentences?

Gallegos Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Gallegos pled guilty to two counts of attempted rape, committed on two separate dates against two separate victims, and the district court imposed consecutive unified sentences of 15 years, with 12 years fixed, for the first count, and 15 years, with eight

years fixed, for the second count. (R., pp.25-27, 96-97,101-05.) Gallegos filed a notice of appeal timely from the judgment of conviction. (R., pp.108-11.) He also filed a timely Rule 35 motion for reduction of his sentences, which the district court denied. (Motion for Reconsideration of Sentence; Order on Defendant's Rule 35 Motion to Reconsider Sentence (Augmentations).)

Gallegos asserts his sentences are excessive in light of his abusive childhood, sexual abuse, substance abuse, purported remorse, support from family and friends, and that these convictions are his first felony convictions. (Appellant's brief, pp.6-9.) The record supports the sentences imposed.

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. Id. (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)). To carry this burden 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 maximum prison sentence for attempted rape is 15 years. I.C. §§ 18-6104, -306. The district court imposed consecutive unified sentences of 15 years, with 12 years fixed, for the first count of attempted rape, and 15 years, with eight years fixed, for the second count, both of which fall well within the statutory guidelines. (R., pp.101-05.) At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Gallegos' sentences. (8/11/15 Tr., p.61, L.1 – p.69, L.2.) The state submits that Gallegos has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Gallegos next asserts that the district court abused its discretion by denying his Rule 35 motion for reduction of his sentences in light of additional letters of support from family and friends. (Appellant's brief, pp.9-13.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Gallegos must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id. Gallegos has failed to satisfy his burden.

Gallegos provided no new information in support of his Rule 35 motion. (Motion for Reconsideration of Sentence (Augmentations).) He merely reiterated his support from family and friends, which was not new information before the district court. (See 8/11/15 Tr., p.61, L.17 – p.62, L.1) Because Gallegos presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentences

were excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion.

Conclusion

The state respectfully requests this Court to affirm Gallegos' convictions and sentences and the district court's order denying Gallegos' Rule 35 motion for reduction of sentence.

DATED this 21st day of April, 2016.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of April, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

REED P. ANDERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

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1 THE COURT: Mr. Gallegos, on your plea of
2 guilty, I find you guilty. In an exercise of my
3 discretion in sentencing, I have considered the Toohill
4 factors, including the nature of the offense, the
5 character of the offender, the mitigating and aggravating
6 circumstances and facts. In fashioning a sentence, I do
7 so mindful of the objectives of, first and foremost,
8 protecting society, the need for deterrence, the
9 potential for rehabilitation, as well as the need for
10 punishment or retribution.

11 I've reviewed the lengthy PSI materials,
12 the psychosexual evaluation, the victim statements, the
13 numerous letters of support for the defendant, and I
14 have considered those, as well as the arguments of
15 counsel today and the statement of the defendant in
16 allocution.

17 In fashioning a sentence, while I consider
18 all the objectives, those that in my mind are
19 predominant are protection of the community and
20 retribution. I've considered the mitigating factors in
21 this case, some of which I'll mention, but I've
22 considered all of the mitigation, not just those I've
23 mentioned, including the defendant's age, including the
24 fact that he has family that supports him, that want to
25 be there for him, who believe that this conduct is out

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1 of character for him and that support him ultimately.
2 I've considered also the defendant's
3 indicated desire for treatment and help, although I do
4 note, and I did note this -- and I think the prosecutor
5 mentioned it also -- that the things that he said in his
6 PSI this time in this case about his desire to change,
7 his claim that alcohol increases his sexual need to act
8 out and that he intends to never drink again. Quoting
9 from the 2008 PSI it indicated that, "Mr. Gallegos
10 identified alcohol as the problematic area that
11 contributed to his criminal conduct. To mitigate this
12 problem, Mr. Gallegos said that he would give up
13 alcohol," end quotes.

14 The PSI goes on to state that Mr. Gallegos
15 submitted the following statement to the court verbatim,
16 quote, "I know what I did was wrong and I'm sorry for
17 ever doing it. I can guarantee I won't be sitting in
18 front of a judge for any legal matters again," end
19 quote.

20 And yet here you sit Mr. Gallegos. What
21 you were being sentenced on in 2008, luckily for you and
22 unfortunately, as it turns out, for the community and
23 for these victims in this case, were two misdemeanors
24 that you were convicted of of I think 13 or 15 felonies
25 that were originally charged against you for effectively

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1 groping women in public.

2 Your conduct in this case with the two
3 victims for which you're being sentenced today, as well
4 as in my mind is pretty clear the conduct with the other
5 victim, Ms. Wright I believe was her name, who
6 unfortunately the state was not able to bring charges in
7 that case because of the statute of limitations is my
8 understanding, but there certainly is strong evidence to
9 suggest that you were responsible for that attack. It
10 appears, by your statements and the investigation, that
11 you broke into a number of other homes besides those for
12 which we have information in terms of specific victims
13 in this case. The information is pretty suggestive that
14 you, in fact, are the BSU prowler responsible for at
15 least some of those break-ins; although, frankly, in my
16 sentencing today, the sentence that I'm going to give
17 you today would not likely have been -- well, would not
18 have been different, even if I were to believe your
19 claims that you're not responsible for those break-ins.
20 But I think there's some pretty strong evidence
21 suggesting that you were.

22 At the end of the day, you are,
23 Mr. Gallegos, a dangerous, violence, sexual predator,
24 there's no other way to put it. You are a would-be
25 serial rapist. Your conduct has escalated and I have no

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1 doubt that if not caught you would have continued to
2 commit these types of crimes, you would have, in my
3 mind, likely have committed additional rapes, and if
4 unchecked, ultimately I would not be surprised if you
5 would not have cost someone their life.

6 The damage that you have done to your
7 victims is immeasurable, and the pain that they have
8 endured is unsufferable. It is something that we would
9 not wish on anyone's mother, sister, daughter. I think
10 it appropriate to use in this case, because I could not
11 state it better than the victim herself, one of the
12 victims, the impact that you had on her, and I want to
13 read what the victim said.

14 "What is not easy to express is how Andy's
15 attack has affected my life and my emotional well
16 being. I still pay for that. My family and my
17 friends still pay too. This has haunted and
18 horrified me and everyone close to me. I spent
19 every day for nearly 4-1/2 years feeling alone and
20 withdrawn. I spent 4-1/2 years going over and over
21 the details of that attack in my mind, trying to
22 put the puzzle pieces together. I had no answer
23 and no hope of ever knowing who it was and why he
24 did that. I suffered years of guilt for thinking I
25 may have blamed the wrong person."

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1 And I note that your conduct created
2 another victim, in that the police focused in on the
3 person who the victim thought had committed this
4 terrible assault on her, and he had to face the fear and
5 anxiety and the trauma of being falsely accused. She
6 goes on:
7 "I suffered years of guilt and still blame
8 myself for not running when I had the chances, for
9 not calling the police when I had the chance, and
10 now I live with the guilt that I let a stranger, a
11 violent rapist, run only to attack another woman
12 two weeks later."
13 And what I would want to say to her is
14 that she's not to blame and she should not blame
15 herself, and none of those victims should in any way
16 blame themselves for what happened. You and you alone,
17 Mr. Gallegos, are to blame for the damage that you have
18 done that likely will never be remedied.
19 The damage doesn't stop there. There were
20 many, many people in this community scared to death of
21 this unknown, violent person attacking people at night
22 in their homes while they slept. And even if you are
23 not the BSU rapist, your conduct in this case magnified
24 the fear of those in the community that were being
25 victimized and were afraid of being victimized in that

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1 bed and think, oh, yeah, I want to have sex with him. I
2 don't understand that mentality, not for a second. And
3 I think it is excuse-making and justifying.
4 The psychosexual evaluation paints a
5 frightening picture of you. It concludes that you are a
6 high risk to reoffend, that you are predatory, as
7 opposed to being opportunistic; although it notes that
8 if given the opportunity you would be opportunistic in
9 your crime and your victimization, if possible, as well.
10 It concludes that you have a number of severe sexual
11 disorders, a full-fledged antisocial personality
12 disorder, which as much as counsel would indicate can be
13 addressed, personality disorders, particularly
14 antisocial personality disorder is a very difficult
15 thing to address, in fact, and it conflates the other
16 disorders and diagnoses that you have.
17 The recommendation continues that you
18 should be treated in a structured environment, meaning
19 prison. And that's not treatment begun in a structured
20 environment with treatment continuing to the community
21 after some period of time, that means treatment in total
22 in prison. The Static and Stable evaluation scores
23 indicate you are, in fact, a very high risk.
24 In consideration of all these factors, as
25 well as having considered the mitigating factors, and as

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1 series of crimes, knowing that the person that was
2 perpetrating them may have been the person that
3 violently assaulted people before. And so that is also
4 a problem.
5 I am concerned that while you say you
6 accept responsibility and that you want to apologize to
7 your victims, it appears to me that you mitigate or try
8 to mitigate in many ways your responsibility in this
9 case, as I see it. In the interviews and in the PSI,
10 you talk about only going into the victims' house
11 wanting to steal something. I don't buy that for a
12 second. I think you were stalking, I believe you were
13 hunting and you were looking for victims.
14 You talked about the fact that you didn't
15 think you were trying to force yourself sexually onto
16 these victims, including the first victim whom you gave
17 an Alford plea to, meaning you didn't admit to having
18 the intent to try to rape her. And yet everything you
19 did suggests that that is exactly what you tried to do.
20 And oddly, and inexplicably, you seem to
21 suggest that somehow in many ways you're not responsible
22 for the victim who mistook you for her boyfriend and
23 engaged in sexual intercourse with you. You seem to
24 think that somehow women would wake up in the middle of
25 the night to find you, a stranger, at the foot of their

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1 I indicated in order to protect the community from you,
2 because all best intentions aside that you have, that
3 you tell me, I believe you continue to pose, if in the
4 community, for a long time to come a very serious risk
5 to the community, and also for punishment, I sentence
6 you as follows:
7 I sentence you to the custody of the Idaho
8 State Board of Correction under the Unified Sentencing
9 Laws of the State of Idaho for an aggregate term on
10 Count II of 15 years and on Count III of 15 years. I'll
11 tell you, Mr. Gallegos, because of some circumstances
12 that arose in this case, the state had to amended one of
13 the counts from rape to attempted rape, which then
14 limited my ability to sentence you to a total of 30
15 years down from an otherwise potential total of a life
16 sentence. Had I had the opportunity to sentence you to
17 a life sentence, I would. I believe you are that big of
18 a risk to the community.
19 The court specifies on Count II a fixed
20 period of confinement of 12 years fixed, with a
21 subsequent indeterminate period of custody of three
22 years; and on Count III, the court specifies a fixed
23 period of confinement of eight years fixed, and a
24 subsequent indeterminate period of custody of seven
25 years. Those sentences will be consecutive to one

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1 another for a total unified sentence of 20 years fixed
 2 followed by ten years indeterminate.

3 I remand you to the custody of the sheriff
 4 of this county to be delivered to the proper agent of
 5 the State Board of Correction in execution of the
 6 sentence. The bail is exonerated. Credit will be given
 7 for 216 days served prior to entry of this judgment.

8 It is the further order of this court that
 9 the defendant shall provide a DNA sample, an HIV blood
 10 sample for HIV testing, a right thumbprint impression to
 11 the Department of Correction, and that the defendant
 12 shall also comply with the sexual offender registration
 13 requirements of Title 18, Chapters 83 and 84, and will
 14 register as a sex offender for the balance of his life.

15 I order that the defendant pay court
 16 costs, public defender reimbursement of \$500; a fine on
 17 Count II of \$15,000; and a fine on Count III of \$15,000.
 18 Restitution will be left open for 90 days. I am going
 19 to provisionally order that you pay, as a civil
 20 judgment, to each victim, the victim in Count II and the
 21 victim in Count III, a civil judgment in the amount of
 22 \$2,500 each.

23 I say provisionally because I'm going to
 24 give counsel seven days from today's date to submit
 25 briefing on whether the attempt carries with it the

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1 potential for that civil judgment the way that the
 2 actual completed rape would, and if I conclude that the
 3 statute does allow that, then I will sign those orders
 4 for those civil judgments in those amounts.

5 Mr. Gallegos, you have the right to
 6 appeal. If you cannot afford to hire an attorney, you
 7 can request to have one appointed at public expense.
 8 Any appeal must be filed within 42 days of the date of
 9 this order or the entry of the written order of judgment
 10 of conviction and imposition of sentence.

11 I hope, Mr. Gallegos, that you are sincere
 12 about your wanting to change, and I hope that you use
 13 the time, considerable time that is available to you now
 14 to work on yourself, and I hope that the victims that
 15 you have created can find peace. I have signed the
 16 no-contact order.

17 MS. GUZMAN: The state is returning the PSI,
 18 your Honor.

19 THE COURT: Thank you.

20 MR. FUJISTING: As has the defense.
 21 (Proceedings concluded.)
 22 * * *
 23
 24
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1 REPORTER'S CERTIFICATE

2 STATE OF IDAHO)
 3 COUNTY OF ADA)

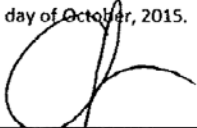
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5 I, CHRISTIE VALCICH, Certified Court
 6 Reporter of the County of Ada, State of Idaho, hereby
 7 certify:

8 That I am the reporter who transcribed the
 9 proceedings had in the above-entitled action in machine
 10 shorthand and thereafter the same was reduced into
 11 typewriting under my direct supervision; and that the
 12 foregoing transcript contains a full, true, and accurate
 13 record of the proceedings had in the above and foregoing
 14 cause, which was heard at Boise, Idaho.

15 IN WITNESS WHEREOF, I have hereunto set my
 16 hand this 30th day of October, 2015.

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 22
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 CHRISTIE VALCICH, CSR-RPR
 Ada County Courthouse
 200 West Front Street
 Boise, Idaho