

5-10-2016

## State v. Turner Respondent's Brief Dckt. 43550

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 43550
Plaintiff-Respondent,	)	
	)	Ada County Case No.
v.	)	CR-2014-16159
	)	
JAMES CHARLES TURNER,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Turner failed to establish the district court abused its discretion, either by imposing a unified sentence of 15 years, with two years fixed, for attempted strangulation, or by denying his Rule 35 motion for reduction of his sentence?

Turner Has Failed To Establish The District Court Abused Its Sentencing Discretion

Turner pled guilty to attempted strangulation and the district court imposed a unified sentence of 15 years, with two years fixed. (R., pp.101-04.) Turner filed a notice of appeal timely from the judgment of conviction. (R., pp.108-10.) He also filed a

timely Rule 35 motion for reduction of his sentence, which the district court denied. (R., pp.113-14, 124-26.)

Turner asserts his sentence is excessive in light of his substance abuse issues, mental and physical health issues, and purported remorse and acceptance of responsibility. (Revised Appellant's Brief, pp.4-7.) The record supports the sentence 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 strangulation is 15 years. I.C. § 18-923. The district court imposed a unified sentence of 15 years, with two years fixed, which is within the statutory guidelines. (R., pp.101-04.) At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth

its reasons for imposing Turner's sentence. (8/24/15 Tr., p.15, L.12 – p.18, L.22.) The state submits Turner 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.)

Turner next asserts the district court abused its discretion by denying his Rule 35 motion for reduction of his sentence in light of two letters submitted from friends. (Revised Appellant's Brief, pp.8-9.) 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, Turner 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. Turner has failed to satisfy his burden.

Turner provided two letters from friends in support of his Rule 35 motion. (R., pp.115-21.) Since the district court was aware, at the time of sentencing, that Turner had support in the community, these letters present no new information. (PSI., pp.13-14.) The district court's order denying Turner's Rule 35 motion also stated the letters did not provide any new information that would show the sentence is excessive. (R., pp.124-26) Because Turner presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentence was 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 affirm Turner's conviction and sentence and the district court's order denying Turner's Rule 35 motion for reduction of sentence.

DATED this 10th day of May, 2016.

/s/ Jessica M. Lorello

JESSICA M. LORELLO  
Deputy Attorney General

ALICIA HYMAS  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of May, 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](mailto:briefs@sapd.state.id.us).

/s/ Jessica M. Lorello

JESSICA M. LORELLO  
Deputy Attorney General

# APPENDIX A

13

1 I mentioned to counsel as well he was in  
2 compliance with doing his programming, some of it, in  
3 his post-release last time. He had work in construction  
4 in Gem State Staffing and probably will be able to do  
5 that in the future.

6 Last of all, Dr. Arnold's DV evaluation,  
7 again, describes him as being cooperative with the  
8 process. He did indicate in one of his personality  
9 inventories that he seemed to almost exaggerate the  
10 negative things about him, and Dr. Arnold opined that  
11 may reflect the damage that his substance abuse issues  
12 have caused him, which is obvious, somebody that does  
13 that to their body.

14 James has a palsy called Bell's palsy,  
15 probably is not helped by substance abuse or alcohol  
16 use. And he's had a series of ministrokes at the prison  
17 that seem to have abated in the last month, so he's  
18 definitely done some damage to himself. And of course I  
19 think barriers that he suffers, he does have anger  
20 issues and he does have trust issues. And of course in  
21 Dr. Arnold report concerning his risk, he wisely looks  
22 at the background and various factors, and as I see his  
23 recommendation is James is going to need treatment in  
24 several matrices, not only the domestic violence,  
25 substance abuse, his suicidal tendencies, as well as his

15

1 still do, and my alcoholism, I would like to apologize  
2 for that, and I just, you know, since you have -- since  
3 I've been out at the prison, I graduated to the third  
4 grade in reading, and I've been working with that New  
5 Write Program with people helping me write letters back  
6 and forth, and they said they are willing, if I was to  
7 one day get out, to work with me on furthering my  
8 education and other alcohol treatment programs. And I  
9 just throw myself on your mercy, and I want to thank you  
10 for all you've done for me.

11 THE COURT: Thank you.

12 Mr. Turner, on your plea of guilty, I find  
13 you guilty. In an exercise of my discretion in  
14 sentencing, I've considered the Toohill factors,  
15 including the nature of the offense and character of the  
16 offender, as well as information in mitigation and  
17 aggravation.

18 In fashioning a sentence, I do so mindful,  
19 first and foremost, of the protection of society, but  
20 also the need for deterrence, the potential for  
21 rehabilitation and the need for retribution and  
22 punishment.

23 I've reviewed the PSI materials, the  
24 evaluation by Dr. Arnold. I've considered those, as  
25 well as the arguments and statements of counsel and the

14

1 trust issues.

2 Again, I know the court is very specific  
3 in saying that you are not obliged to follow plea  
4 bargain, now that I've done some guilty pleas with you,  
5 but I know the court also respects the fact that when  
6 attorneys in good faith try to negotiate something, we  
7 hope the court will pay serious attention to that.

8 And, again, the sentence that is  
9 contemplated certainly contemplates more time  
10 incarcerated, which counsel has argued for and the PSI  
11 recommends, and we're asking you to consider abiding by  
12 the spirit of that plea bargain and consider the longer  
13 picture as well, in terms of giving him a reason to  
14 continue his good behavior while he's incarcerated and  
15 hopefully do something that will convince the parole  
16 board to release him both on the other case as well as  
17 yours.

18 THE COURT: Thank you.

19 Mr. Turner, would you like to make a  
20 statement?

21 MR. CAHILL: Yes, your Honor. I would like to  
22 thank you, Judge Hippler, for being patient with me, and  
23 I'd like to thank the lawyers you had help me, and the  
24 DA, and I would like to apologize to my victim.  
25 I have -- I very truly did love her, I

16

1 statement you made here today, Mr. Turner.

2 First of all, I want to congratulate you  
3 on the work you're doing in the Department of Correction  
4 and working on improving your reading. I think that is  
5 commendable and I think that is great. I think that you  
6 will find that opens up a whole new world to you to be  
7 able to read and comprehend the written word. I think  
8 it will make your time in prison go more quickly and  
9 give you the ability to allow your mind to have a place  
10 to go by being able to read. I think that's great. It  
11 will also help you, I think, with the treatment that the  
12 Department of Corrections could provide for you. And so  
13 I encourage you to continue working hard at that.

14 I have to say this is a troubling case. I  
15 have no doubt that, Mr. Turner, you're probably a nice  
16 guy when you're sober. The concern that I have is that  
17 you have a long history of being unable to control your  
18 intake of alcohol; and when you are drunk, you have a  
19 history of violence that is very concerning.

20 My notes that I made for myself in going  
21 through this lengthy PSI, the conclusion that I drew is  
22 that at some point you're going to kill somebody. At  
23 some point you're going to be drunk, you're going to be  
24 unable to make decisions, and you're going to go too  
25 far, perhaps not intending to hurt somebody that badly,

17

1 but nonetheless doing so. And I'm really concerned  
2 about that.

3       If you don't get ahold of your drinking,  
4 your violence in domestic situations is frightening.  
5 Luckily your victim in this case did not have any  
6 permanent physical damage. I can't say the same about  
7 any psychological or mental damage, emotional damage.  
8 She certainly could have had far worse physical damage.

9       Your list of priors is also impressive, a  
10 number of felonies, including felonies involving  
11 firearms. And all of your felonies, frankly, are either  
12 firearm or violence felonies and there's a number of  
13 them. There is also a number of misdemeanors that are  
14 in the same sort of category.

15       It's concerning to me that this occurred  
16 almost two-thirds of the way through your 52-week course  
17 for domestic battery. Whether that's a reflection of  
18 the fact that you weren't able to get as much out of it  
19 because you couldn't read and comprehend what was going  
20 on, I've considered that and I suspect that has  
21 something to do with it, but at the end of the day I  
22 really think it has to do with your inability to control  
23 your alcohol, because I think you're unable to make  
24 decisions when you drink that don't lead to violence.

25       And so I appreciate the work that the

18

1 attorneys have done in this case and the deal that they  
2 have come up in this case, and I will be honest with  
3 you, if I were reviewing this case without an agreement,  
4 the two-years fixed term, I would almost inevitably give  
5 a significantly greater fixed term by a factor of  
6 multiple of many, many times over that.

7       What I am going to do, and this is  
8 primarily, frankly, for community protection, some  
9 punishment, but a lot of it for community protection.  
10 What I am going to do is I'm going to sentence you to  
11 the custody of the Idaho State Board of Corrections  
12 under the Unified Sentencing Laws of the State of Idaho  
13 for an aggregate term of 15 years, but I'm going to keep  
14 with the plea agreement and sentence you to two years  
15 fixed and 13 years indeterminate.

16       And the reason that I am doing that is I  
17 believe you need to be appropriately motivated to not  
18 drink, to then not get into abusive situations and  
19 violent situations, and I hope that you're able to  
20 parole out, but that you will understand you need to be  
21 supervised for a long time to come so that you don't  
22 hurt somebody.

23       THE DEFENDANT: Is there any way that you can  
24 sentence me to that program also upon my release?

25       THE COURT: I really don't have the jurisdiction

19

1 to do that. The Department of Corrections can consider  
2 that, and you can talk to the parole board about asking  
3 to be able to go into a program when you're released.

4       Because once I sentence you, it's up to  
5 the Department of Correction on what terms of release  
6 they have for you upon parole. I can certainly make a  
7 recommendation, and I don't have a problem recommending  
8 on parole you do be allowed to go into that program, but  
9 ultimately it's their decision, not mine.

10       I'm willing to go along with the two-years  
11 fixed and honor the agreement, but I just think you need  
12 a longer period of supervision. So if you do well,  
13 continue to do well in Department of Correction, you can  
14 convince them to parole you based on your conduct, and  
15 hopefully those additional years won't matter because  
16 you'll do well.

17       I'm going to therefore remand you to the  
18 custody of the sheriff of the county to be delivered to  
19 the proper agent of the State Board of Corrections in  
20 execution of the sentence. Any bail is exonerated.  
21 Credit will be given for the days served prior to the  
22 entry of judgment. The sentence will run concurrent  
23 with any other legal holds.

24       I'm going to order if you have not already  
25 done so that you do provide the DNA sample and right

20

1 thumbprint impression. I'm going to waive court costs  
2 in this case, and I will order restitution in the amount  
3 of \$100 and waive any fines.

4       MR. DINGER: Did the court sign the no-contact  
5 order?

6       THE COURT: I did sign the no-contact order that  
7 was here. I do wish you good luck. Keep up with the  
8 reading.

9       THE DEFENDANT: I will. Thank you sir.

10       THE COURT: Wait a second, I need to read you  
11 your appeal rights.

12       You have the right to appeal. If you  
13 cannot afford an attorney, you can request to have one  
14 appointed at public expense. Any appeal must be filed  
15 within 42 days of the date of this order or entry of the  
16 written order of judgment of conviction and imposition  
17 of sentence.

18       THE DEFENDANT: What's that mean?

19       THE COURT: That means you have the right to  
20 appeal this ruling. You have 42 days to file an appeal.  
21 You talk to Mr. Cahill and if you want to appeal, I'm  
22 sure the State Appellate Public Defender's office will  
23 put together an appeal for you.

24       (End of proceedings.)

25       \*\*\*