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State v. Queen Appellant's Brief Dckt. 43566

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 43566
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR 2015-4684
v.	)	
	)	
KENNETH ALAN QUEEN,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Kenneth Queen appeals contending the district court abused its discretion when it imposed his sentence in this case. Specifically, he contends the sentence it imposed is excessive in light of an adequate consideration of the mitigating factors. Therefore, this Court should reduce Mr. Queen's sentence as it deems appropriate, or, alternatively, remand this case for a reduction of sentence.

Statement of the Facts & Course of Proceedings

Mr. Queen was raised in the foster care system. (Presentence Investigation Report (*hereinafter*, PSI), p.19; *see, e.g.,* PSI, p.7 (Mr. Queen reporting he was in the foster care system or State custody from the age of 6); PSI, p.19 (indicating he was

placed in a foster home at age 10, when his parents' rights were terminated, and he stayed there until he turned 18).)[1] He was also determined to have learning disabilities and attention deficit hyperactivity disorder (*hereinafter*, ADHD) while in elementary school. (PSI, p.11.) As a result, Mr. Queen had an individual education program, which included special education classes, through high school. (PSI, p.11.) One of his foster parents also reported that Mr. Queen had been sexually abused. (PSI, p.7 (noting that report was supported by "collateral information obtained from [Health & Welfare]").) During the presentence evaluations in this case, Mr. Queen was diagnosed with moderate ADHD, moderate persistent depressive disorder, mild post-traumatic stress disorder, mild marijuana use disorder,[2] and also received a provisional diagnosis of a mild autism-spectrum disorder. (PSI, p.116.) Mr. Queen reported using marijuana to self-medicate the symptoms, particularly of his ADHD. (PSI, p.14.)

The presentence diagnosis also included a diagnosis of child sexual abuse as a result of the guilty plea and collateral information. However, while the alleged victim had also made allegations of sexual abuse against Mr. Queen, the charges related to that report were dismissed as part of the plea agreement. (*See* Tr., Vol.1, p.5, Ls.6-10; R., pp.5-6, 66-67.)[3] According to the prosecutor, there was some concern about the accuracy of the victim's account in that regard. (Tr., Vol.1, p.22, Ls.1-18; *see also*

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[1] PSI page numbers correspond with the page numbers of the electronic PDF file "Queen 43566 psi."

[2] The GAIN-I evaluation conducted during the presentence process determined that Mr. Queen did not meet the criteria for substance use or abuse diagnoses, and so, made no recommendation for treatment in that regard. (PSI, p.199.)

[3] The transcripts in this case are provided in two separately bound and paginated volumes. To avoid confusion, "Vol.1" will refer to the volume containing the transcript of the Change of Plea hearing held on July 20, 2015, and "Vol.2" will refer to the volume containing the transcript of the Sentencing hearing held on September 14, 2015.

Tr., Vol.2, p.10, L.6 - p.11, L.1 (defense counsel explaining those issues in more detail).) Given the victim's issues with autism, neither party was keen to put her through a trial. (Tr., Vol.1, p.22, L.1 - p.23, L.6; *see* PSI, p.103 (noting the victim's diagnosis of high functioning autism).) However, as defense counsel explained, Mr. Queen wanted to accept responsibility for the improper acts he had, in fact, committed. (Tr., Vol.1, p.23, Ls.2-6.) As such, Mr. Queen admitted to spanking the victim in a manner exceeding acceptable disciplinary bounds. (*See* R., p.67.)

In exchange for Mr. Queen's guilty plea, the State agreed to cap its sentencing recommendation at ten years, with two years fixed, and Mr. Queen agreed to participate in a psychosexual evaluation (*hereinafter*, PSE) as part of the presentence process. (Tr., Vol.1, p.5, Ls.13-14.) If the PSE returned with a conclusion that Mr. Queen presented a low to moderate risk to reoffend, the State also agreed to recommend a suspended sentence, and could ask for a term of local jail time as part of the terms of probation. (Tr., Vol.1, p.5, Ls.14-16.) Mr. Queen's guilty plea advisory form also notes the defense was free to argue for a more lenient sentence. (R., p.61.)

The PSE author explained, based on the tests administered to Mr. Queen, he would normally present a low risk to reoffend. (PSI, p.124.) In fact, on the STATIC-99 test, Mr. Queen scored a 1. (PSI, p.119; Tr., Vol.2, p.13, L.20 - p.14, L.6 (defense counsel arguing that score showed Mr. Queen was particularly amenable to treatment, as it revealed there are no unchangeable factors that would be likely to hamper his rehabilitation efforts).) However, the PSE author made an upward adjustment on that assessment, describing Mr. Queen as a moderate risk, based on "the severity of his psychological issues, coupled with substance use issues, and extreme minimization of

his sexual offense." (PSI, p.125.) The prosecutor admitted the minimization was not surprising given the basis for the plea Mr. Queen had entered. (Tr., Vol.2, p.8, L.24 - p.9, L.1.) Nevertheless, the PSE author concluded Mr. Queen was moderately amenable to treatment, meaning he was as amenable as most other offenders, and he was as likely as most to comply with supervision. (PSI, pp.131, 136.)

Based on that PSE, both parties recommended the district court suspend Mr. Queen's sentence. (Tr., Vol.1, p.7, Ls.2-6; Tr., Vol.1, p.15, Ls.2-3.) Defense counsel also pointed out that Mr. Queen had begun developing a treatment plan to help him address his issues in parenting and disciplining his children. (Tr., Vol.2, p.12, Ls.11-14.) As such, defense counsel argued that local incarceration time during the period of probation would hamper Mr. Queen's rehabilitative efforts because his rehabilitation plans depended on being able to get a job to pay for the classes; "he simply isn't going to be able to afford the programming the State is asking for and he is not going to be making that positive progress moving forward," if local incarceration were a part of his sentence. (Tr., Vol.2, p.14, Ls.13-18.)

However, the district court rejected the recommendation for probation because it was not confident Mr. Queen was amenable to sex offender treatment. (Tr., Vol.2, p.16, Ls.17-24.) As a result, it decided to retain jurisdiction to try and "get some additional information about whether he is amenable to supervision and to counselling." (Tr., Vol.2, p.17, Ls.11-14.) It imposed a unified term of ten years, with two years fixed as the underlying sentence. (Tr., Vol.2, p.18, Ls.4-7; R., pp.72-73.) Mr. Queen filed a notice of appeal timely from the judgment of conviction. (Tr., Vol.2, pp.76-77.)

ISSUE

Whether the district court abused its discretion by imposing an excessive sentence in this case.

ARGUMENT

The District Court Abused Its Discretion By Imposing An Excessive Sentence In This Case

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771, 772 (Ct. App. 1982). The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Queen does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, he must show that, in light of the governing criteria, the sentence is excessive considering any view of the facts. *Id*.

Specifically, Mr. Queen contends the district court abused its discretion by imposing an excessive sentence of ten years, with two years fixed. There are several mitigating factors evident in this record which demonstrate that sentence is excessive. For example, Mr. Queen had been making arrangements to address the conduct to which he had admitted in this case. (Tr., Vol.2, p.12, Ls.11-14.) The PSE indicated he was amenable to treatment. (PSI, p.136.) And, as defense counsel pointed out, Mr. Queen's admission to that conduct demonstrated his desire to accept responsibility

for the problematic acts in which he had actually engaged. (Tr., Vol.1, p.23, Ls.2-6.) He also expressed remorse for those actions. (Tr., Vol.2, p.15, L.17.) Those factors all indicate Mr. Queen has taken the first steps toward rehabilitation. *See State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010). And, as defense counsel pointed out, incarceration would prevent Mr. Queen from following up on those rehabilitation plans. (*See* Tr., Vol.2, p.14, Ls.13-18 (directing this argument specifically at the prosecutor's request for local incarceration as part of the suspended sentence).)

Additionally, the tests conducted on Mr. Queen during the presentence process revealed he would likely present a low risk of reoffending. (PSI, p.124.) The PSE author's upward adjustment in that regard is not justified, as two of the three reasons it gave for that adjustment are not borne out by the rest of the record. (PSI, p.125.) The GAIN-I evaluation concluded Mr. Queen did not present substance use or abuse issues requiring treatment. (PSI, p.199.) The prosecutor also admitted, "to be fair," the minimization was not a surprise because Mr. Queen was only ultimately charged with, and pled guilty to, physical abuse. (Tr., Vol.2, p.8, L.24 - p.9, L.1; *see also* Tr., Vol.2, p.10, L.6 - p.11, L.1 (defense counsel discussing the problems in the allegations of sexual abuse against Mr. Queen).)

Furthermore, this was Mr. Queen's first felony conviction. (PSI, pp.5-6, 18.) Defense counsel also highlighted the fact that Mr. Queen had been an inmate worker for a longer period than most, which meant he was able to follow the rules. (Tr., Vol.2, p.12, L.24 - p.13, L.9.) That was consistent with the PSE author's conclusion that Mr. Queen was as likely as most to comply with the rules while on supervision. (PSI, p.136.)

As such, an adequate consideration of the mitigating factors in this case demonstrate that the ten-year sentence, as initially imposed in this case, is excessive. As such, it constitutes an abuse of the district court's discretion.

CONCLUSION

Mr. Queen 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 reduction of sentence.

DATED this 22nd day of March, 2016.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of March, 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:

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DEBORAH A BAIL
DISTRICT COURT JUDGE
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E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BRD/eas