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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 43592**
Plaintiff-Respondent,	)	
	)	**Twin Falls Co. Case No.**
v.	)	**CR-2015-218**
	)	
DAWN MARIE ORR,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE RANDY J. STOKER
District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATEMENT OF THE CASE

Nature Of The Case

Dawn Marie Orr appeals from her judgment and conviction for five counts of grand theft by embezzlement.

Statement Of The Facts And Course Of The Proceedings

During the summer of 2014, accountants at the College of Southern Idaho recognized some large discrepancies in their accounts. (Tr., p.7, Ls.1-22.) They began an internal investigation to reconcile the accounts. (Tr., p.7, L.23 – p.10, L.15.) On July 30, Orr came into her supervisor's office to complain that she was being unfairly treated and felt that she might have a nervous breakdown. (Tr., p.10, L.16 – p.11, L.18.) She was invited to go home and talk to someone. (Tr., p.11, Ls.19-23.) No one at that time suspected that Orr had stolen the money. (Tr., p.11, L.24 – p.12, L.4.)

The following day, Orr met with administrators at the College of Southern Idaho and indicated that she had stolen between $50,000.00 and $100,000.00. (PSI, p.3.) Orr considerably underestimated her theft. A later investigation revealed that from 2008 through 2014, Orr had embezzled at least $677,735.58 from the College of Southern Idaho. (PSI, p.5.) The state charged Orr with five counts of grand theft, one count per year, for embezzlements occurring between 2010 and 2014. (R., pp.70-72.) Pursuant to a plea agreement, Orr pleaded guilty to the charges. (R., pp.79, 125.) The district court entered judgment against Orr and sentenced her to 14 years with 10 years fixed on the first count of grand theft, and consecutive sentences of 14 years indeterminate on each of the remaining counts, for a total unified sentence of 70 years with 10 years fixed. (R., pp.123-29.) Orr filed a timely notice of appeal. (R., pp.158-59.)

ISSUES

Orr states the issues on appeal as:

> A. The Prosecutor breached the plea agreement by impliedly disavowing and expressing reservation about the sentencing recommendation set forth in the plea agreement.
>
> B. The District Court abused its discretion in imposing an excessive and unduly harsh sentence that was unsupported by the facts in the record….

(Appellant's brief, p.2.)

The state rephrases the issues as:

1. Has Orr failed to show fundamental error entitling her to review of her claim that the prosecutor breached the plea agreement?

2. Has Orr failed to establish an abuse of the district court's sentencing discretion?

ARGUMENT

I.
Orr Has Failed To Show Fundamental Error Entitling Her To Review Of Her Claim That The Prosecutor Breached The Plea Agreement

A. Introduction

Below, the state and Orr entered into a plea agreement under which, among other things, the state agreed to limit its sentencing recommendation to concurrent terms of 14 years with five years fixed on the multiple counts of embezzlement. (R., p.79.) As part of his argument in support of the sentencing recommendation, the prosecutor relied on Orr's prior criminal conduct involving multiple counts of forgery. In making that argument, the prosecutor acknowledged that, because that criminal conduct had been resolved through a withheld judgment, he "quite frankly, was not aware of the [1993] convictions until [he] saw the PSI, and [he] went back and looked at the NCIC and looked and could not see where there's any indication that she had been charged with those forgery counts." (Tr., p.27, Ls.12-15.) The state went on to note that Orr's

> prior record, her actions in this case, all point to the State's recommendation being as a reasonable recommendation, that it addresses the good order and protection of society to protect others from the criminal conduct by this defendant, and while—and I shared this with Mr. McRae earlier, that we had discussed in the office whether, based on what we had learned from the PSI, whether we should change any recommendation to the Court. The State decided that the recommendation of the 14 years, five fixed, with nine years indeterminate, is appropriate, and that's what we stand by in this case, but that she should serve that in prison and that the counts should run concurrently.

(Tr., p.27, L.16 – p.28, L.4.)

Now, for the first time on appeal, despite the prosecutor specifically affirming the agreed upon sentencing recommendation, Orr claims that the prosecutor's statements constitute a breach of the plea agreement. (Appellant's brief, pp.3-5.) Review of the record, however, shows that Orr has failed to show error, much less fundamental error entitling her to review of this unpreserved issue.

B. Standard Of Review

Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

C. The Prosecutor Did Not Breach The Plea Agreement

For the first time on appeal, Orr asserts that the prosecutor breached the plea agreement by, she alleges, expressing reservations and impliedly disavowing the state's sentencing recommendations. (Appellant's brief, pp.3-5.) Because she did not preserve this issue below, she is required to show fundamental error on appeal. Perry, 150 Idaho at 226, 245 P.3d at 978. To establish fundamental error,

> the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

Id. at 228, 245 P.3d at 980. Because review of the record shows that the prosecutor's argument did not repudiate the parties' plea agreement, Orr has failed to show error, much less fundamental error entitling her to review of this unpreserved claim.

The plea agreement specifically allowed the prosecutor to (1) "argue … the facts of the dismissed case(s) and/or unfiled charge(s) in aggravation at sentencing" and to (2) alter its sentencing recommendation if "[t]he defendant has additional juvenile or adult convictions beyond those provided in discovery in the NCIC report, juvenile history, and driving record." (R., p.79.) As explained by the prosecutor, after reviewing the PSI, he discovered the earlier forgery charges and conviction. (Tr., p.27, Ls.9-15; see also PSI, p.10.)[1] Orr does not dispute that this was new or additional information previously unknown to the state. As shown above, the prosecutor acknowledged the discovery of Orr's prior criminal conduct, and then asked the district court to follow the sentencing recommendation *notwithstanding* that new and additional information. (See Tr., p.27, L.16 – p.28, L.4.) That is not a breach of the plea agreement.

Furthermore, even if the prosecutor's comments could conceivably be read as "impliedly" repudiating the plea agreement, as Orr suggests (see Appellant's brief, p.3), the prosecutor's statement certainly does not *clearly* repudiate the plea agreement, which is what fundamental error requires. Perry, 150 Idaho at 228, 245 P.3d at 980.

Orr has failed to show error in this case. She has therefore necessarily failed to show fundamental error entitling her to review of this issue for the first time on appeal. Orr's conviction and sentence for five counts of grand theft should be affirmed.

[1] While Orr was granted a withheld judgment on her two forgery charges, (PSI, p.10), withheld judgments are convictions. See United States v. Sharp, 145 Idaho 403, 404-05, 179 P.3d 1059, 1060-61 (2008).

II.
Orr Has Failed To Establish An Abuse Of The District Court's Sentencing Discretion

A. Introduction

Orr argues that, in light of allegedly mitigating factors, the district court abused its discretion by imposing a unified term of 14 years with 10 years fixed on her first count of grand theft, and consecutive indeterminate sentences of 14 years on each subsequent count, for a total unified sentence of 70 years with 10 years fixed. (Appellant's brief, pp.5-12.) Orr has failed to establish an abuse of the district court's sentencing discretion.

B. Standard Of Review

"Sentencing decisions are reviewed for an abuse of discretion." State v. Moore, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)).

C. The District Court Did Not Abuse Its Discretion By Imposing Five Consecutive 14 Year Sentences, With Only The First 10 Years Fixed, On Orr's Convictions

Where a sentence is within statutory limits, an appellant is required to establish that the sentence 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, Orr must show that her sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable if appropriate to achieve the primary objective of protecting society, and any or all of the related sentencing goals of deterrence, rehabilitation, or retribution. State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978). While the Court reviews the whole sentence

on appeal, it presumes that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). In deference to the trial judge, the Court will not substitute its view of a reasonable sentence where reasonable minds might differ. State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

In imposing sentence, the district court carefully weighed the statutory factors set forth in Idaho Code § 19-2521. (Tr., p.41, L.2 – p.48, L.24.) The district court weighed the Toohill policy factors. (Tr., p.49, L.1 – p.50, L.7.) And the district court considered the nature of Orr's offense and her history of criminality. (See Tr., p.44, Ls.13-19; p.45, Ls.12-20; p.48, Ls.16-24.) The district court recognized, in light of Orr's arguments that the College of Southern Idaho bore some responsibility for her embezzlements because they failed to supervise her, Orr had not really accepted responsibility for the seriousness of her wrongdoing. (Tr., p.42, L.25 – p.43, L.21.) The district court concluded that Orr's crime was "outrageous" and explained:

> It is an affront to this community, it is the most—one of the most serious offenses I have seen as a judge while I have sat on the bench in this case. The conduct mandates a severe punishment for the good order and protection of society. It will give the Idaho State Department of Corrections [sic] the rest of your natural life to monitor you. I think you'll make parole someday. But I want that board of corrections to have the power to immediately, immediately reimpose the balance of that sentence if you as much as flinch in terms of criminal conduct. It will also give the Idaho State Board of Corrections [sic] and the parole board the ability to monitor you for the rest of your natural life, to collect the restitution that will be ordered in this case….

(Tr., p.51, L.21 – p.52, L.9.)

On appeal, Orr argues that "the Court attempts to paint a picture of Ms. Orr as a persistent violator and repeat offender but such a classification is not supported by the

record." (Appellant's brief, pp.7-8.) Contrary to Orr's claims, such a classification *is* supported by the record. For at least seven years, she repeatedly embezzled from her employer, the College of Southern Idaho. (See PSI, pp.4-5.) The school only keeps the financial records for seven years, and a reasonable inference could be made that the embezzlement lasted much longer. And Orr had previously embezzled from an employer in her "forgery" case, which involved her writing out checks to herself on the company's account. (See PSI, p.10.)

Orr argues that the district court's classification of Orr as a "professional criminal" was unsupported by the record. (Appellant's brief, pp.8-10.) In fact, once again, that classification is fully supported by the record. An investigation revealed that in 2014, Orr embezzled $137,535.50 from the college; in 2013 she embezzled $102,858.50; in 2012 she embezzled $129,335.80; in 2011 she embezzled $100,694.49; in 2010 she embezzled $71,248.58; in 2009 she embezzled $81,190.71; in 2008 she embezzled $54,872.00. (PSI, p.5.) For at least seven years, a substantial part of Orr's annual income—if not the lion's share—was derived from embezzlement. The district court's classification of Orr as a professional criminal is supported by the record.

Orr argues that the district court failed to acknowledge in mitigation her mental health disorders and a gambling addiction, and her efforts to address those issues. (Appellant's brief, pp.10-11.) In fact the district court did note that those things could be considered provocations to commit the crime. (Tr., p.42, Ls.8-11.) But, as the court noted, Orr could have addressed these problems before she got caught (Tr., p.42, Ls.12-18), and they certainly do not outweigh the seriousness of Orr's offense.

Finally, Orr argues that the district court incorrectly categorized embezzlement as the "absolute worst of the theft offenses." (Appellant's brief, pp.11-12.) Orr instead contends that the legislature has decided that extortion is worse than embezzlement. (Id.) Of course, the district court's statement was clearly phrased as an opinion, not a legal fact; and it was a well-supported opinion. In her truncated version of the district court's statement (see Appellant's brief, pp.11-12), Orr omits the court's rationale:

> [Embezzlement] is, in my view, the absolute worst of the theft offenses that can occur in this country, and the reason for that is exactly what has happened in this case. Embezzlement occurs, in my view, in 99 percent of every embezzlement case because of trust between employer and employee, and that's exactly what happened here. Exactly what happened here. You know it, and you took advantage of it.

(Tr., p.47, Ls.10-16.) Orr has failed to show an abuse of the court's discretion.

The district court properly exercised its discretion when it sentenced Orr to a total unified sentence of 70 years with 10 years fixed on her five convictions for grand theft by embezzlement. Because Orr has failed to show that her sentence is excessive, she has failed to show an abuse of the court's discretion. Her sentence should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm Orr's conviction and sentence for five counts of grand theft.

DATED this 5th day of April, 2016.

_/s/ Russell J. Spencer _
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of April, 2016, served two true and correct copies of the foregoing BRIEF OF RESPONDENT by placing the copies in the United States mail, postage prepaid, addressed to:

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_/s/ Russell J. Spencer _
RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd