4-26-2016

State v. Age Appellant's Brief Dckt. 43757

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 43757
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR 2015-9625
v.	)	
	)	
MICHAEL DUANE AGE,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Michael Age appeals, contending the district court abused its discretion when it imposed and executed his sentence, particularly because it made the entire five-year term fixed based on the assertion: "we don't have the ability to supervise Mr. Age on parole. But that's the best I can do." (Tr., p.49, Ls.4-12.) Mr. Age asserts there are three problems with that conclusion. First, it misconstrues the scope of the district court's discretion. Second, it is clearly erroneous, as it is disproved by the record and the district court's own actions at the sentencing hearing. Third, the district court improperly based its decision primarily on disputed reports from Mr. Age's criminal

history that are at least eight years old without giving sufficient consideration to Mr. Age's current actions and character.

For any and all of those reasons, this Court should reduce Mr. Age's sentence as it deems appropriate, or, alternatively, remand this case for a new sentencing hearing.

Statement of Facts and Course of Proceedings

Mr. Age does not have any alcohol or substance abuse issues. (Presentence Investigation Report (*hereinafter*, PSI), pp.15, 159.) And, while he does not have any specific mental health disorders, he receives social security disability based on a diagnosed mild intellectual disability.[1] (PSI, pp.9, 168-69.) As a result of that diagnosis, Mr. Age participated in an individual education program. (PSI, p.8.) While he graduated with the aid of that program, he remained illiterate. (PSI, pp.8-9; Tr., p.11, Ls.16-17.) He also has issues with anger management and appropriate responses to stressors. (*See, e.g.*, PSI, p.7 (PSI author recounting statements by Mr. Age's sister, who talked about Mr. Age's need for anger management treatment).)

Those issues came to a head when Mr. Age got into an argument with a neighbor. While he was removing a tree branch with a chainsaw, the neighbor confronted Mr. Age because he had parked his trailer against her garbage can. (PSI, p.4.) According to Mr. Age, he had parked there because of the branch he was removing. (PSI, p.5.) According to the PSI author, as the argument escalated, "neither

[1] The documentation of Mr. Age's diagnosis, dating back to his elementary school days, uses the term "mild mental retardation." (*See, e.g.*, PSI, p.105.) However, as the Court of Appeals has pointed out, the Legislature has since adopted a provision which favors using the term "intellectual disability" rather the term "mental retardation" in such circumstances. *State v. Hamlin*, 156 Idaho 307, 309 n.1 (Ct. App. 2014) (citing I.C. § 73–114A).

party took the initiative to disengage and/or fully retreat to their residence and contact police." (PSI, p.14.) The neighbor was belittling Mr. Age during the argument. (*See, e.g.*, PSI, p.4.) Mr. Age dropped the chainsaw and picked up a baseball bat in response. (Tr., p.38, Ls.1-3; PSI, p.4.) The neighbor was "making the gesture of 'bring it on, come on, bring it on.'" (Tr., p.40, Ls.6-15; PSI, p.4; *see also* Tr., p.38, Ls.8-9 (defense counsel acknowledging the neighbor's behavior, while explaining Mr. Age's actions, did not excuse them).) The State ultimately charged Mr. Age with two counts of aggravated assault for allegedly threatening the neighbor with the chainsaw and the baseball bat, and also charged an enhancement for use of a deadly weapon. (R., pp.42-43.)

While defense counsel represented there was a potential trial defense based on the neighbor's behavior, Mr. Age decided he wanted to take responsibility for his actions. (Tr., p.37, Ls.17-23.) As a result, he pled guilty to one count of aggravated battery for the baseball bat and the State agreed to dismiss the other count and the weapon enhancement. (Tr., p.6, Ls.15-18.) The State also agreed to recommend the district court impose a unified sentence of five years, with two years fixed, and to recommend it suspend that sentence for a period of probation. (Tr., p.6, Ls.18-25.) The prosecutor explained that agreement was the product of Mr. Age's situation – while the prosecutor felt a rider program would be best for Mr. Age, his illiteracy would prevent him from completing such a program. (Tr., p.34, L.22 - p.35, L.2.) As such, the prosecutor recommended probation with the understanding that Mr. Age would work on becoming literate and otherwise rehabilitating during the period of probation. (*See* Tr., p.35, Ls.2-10.)

In that regard, Mr. Age reported that he had been working with a tutor while in jail to learn to read and write, and he also had materials about programs available out of custody to continue those efforts. (Tr., p.11, Ls.16-21; Tr., p.39, Ls.14-16.) He also expressed a desire to begin anger management programs. (Tr., p.42, Ls.12-15; *see also* PSI, pp.168-69 (the mental health evaluation recommending the same).) As such, defense counsel also recommended probation. (Tr., p.46, Ls.16-21.)

The PSI author also concluded that Mr. Age would be a "good candidate for probation." (PSI, p.15.) Specifically, she highlighted the fact that he has strong familial support, the fact that this was his first felony conviction, and the fact that there were no records of any probation violations from Mr. Age's previous periods of misdemeanor probation as indicative of his ability to succeed on supervised release. (PSI, pp.14-15.) The PSI author also noted that Mr. Age's LSI-R score was 14, which placed him in the "low" category for risk to reoffend. (PSI, p.12.)

The district court, however, rejected the recommendations for probation. Its comments while imposing sentence focused primarily on Mr. Age's criminal history and the police reports from two prior cases originally charged as felonies, but subsequently reduced to misdemeanors, particularly one addressing an allegation of rape. (Tr., p.45, L.4 - p.47, L.12.) However, in the PSI, Mr. Age explained the rape charge arose when he kicked his girlfriend out of his house after learning she was using drugs. (PSI, p.5.) According to Mr. Age, she physically assaulted him, left, and reported that he had raped her. (PSI, p.5.)

Based on its comments about the "violent" offenses in Mr. Age's criminal record, and apparently misunderstanding the terms of the plea agreement regarding the

weapon enhancement, the district court originally pronounced a unified sentence of twenty years, with five years fixed. (Tr., p.47, Ls.13-21.) When both attorneys pointed out that the weapons enhancement had been dismissed as part of the plea agreement, the district court reevaluated and imposed a five-year sentence. (Tr., p.48, L.7 - p.49, L.7.) However, it explained there would be no indeterminate term because "[w]e don't have the ability to supervise Mr. Age on parole. But that's the best I can do." (Tr., p.49, Ls.4-12.) Mr. Age filed a notice of appeal timely from the judgment of conviction. (R., pp.58-66.)

ISSUE

Whether the district court abused its discretion when it imposed and executed Mr. Age's sentence, especially by making the entire sentence fixed time.

ARGUMENT

The District Court Abused Its Discretion When It Imposed And Executed Mr. Age's Sentence, Especially By Making The Entire Sentence Fixed Time

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. Age 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*.

The district court's sentencing decision in this case is an abuse of discretion for three reasons: (1) it was based on a misunderstanding of the scope of its discretion; (2) the finding upon which that decision was based is clearly erroneous; and (3) it failed to sufficiently consider the mitigating factors, focusing instead on facts from cases resolved at least eight years previously.

First, the district court's statement – that the fixed term of five years was "the best I can do" (Tr., p.49, Ls.11-12) – indicates the district court did not feel it could impose an indeterminate term in Mr. Age's case. That does not properly understand the scope of the district court's discretion. *See State v. Anderson*, 152 Idaho 21, 22 (Ct. App. 2011) (explaining that the first of the inquiries for an exercise of discretion "is satisfied only if the trial court correctly perceived the full scope of its discretion"). It was certainly within the outer limits of the district court's discretion to impose the five-year fixed term.[2] *See, e.g.*, *State v. Ransom*, 137 Idaho 560, 567 (Ct. App. 2002) (finding no abuse of discretion in imposing a sentence of fifteen years fixed for voluntary manslaughter, based in part on a consideration of the defendant's past violent behavior), *abrogated on other grounds by State v. Porter*, 142 Idaho 371, 375 (2005). However, it was also within the outer limits of the district court's discretion to impose a sentence with an indeterminate period and allow the parole board to determine whether it could, in fact, supervise Mr. Age on release. *See, e.g.*, *State v. Knight*, 114 Idaho 923, 924-25

[2] While the five-year fixed sentence may have been within the outer limits of the district court's discretion, as discussed *infra*, it was not a proper exercise of discretion in this case.

(Ct. App. 1988) (discussing the nature of Idaho's sentencing scheme under the Unified Sentencing Act). Therefore, the sentence with no indeterminate time because the department did not have the ability to supervise Mr. Age was not "the best I can do." Since the district court's statements reflects a misunderstanding of the scope of its discretion, its resulting decision did not constitute a valid exercise of its discretion. *See Anderson*, 152 Idaho at 22.

Second, the district court's reason for making the entire term fixed – "We don't have the ability to supervise Mr. Age on parole" (Tr., p.49, Ls.10-11) – is clearly erroneous as it is disproved by the record and the district court's own actions at the sentencing hearing. *State v. Henage*, 143 Idaho 655, 659 (2007) (reiterating that a finding is clearly erroneous when it is "unsupported by substantial and competent evidence"). At the sentencing hearing, the district court was initially operating under a misunderstanding of the terms of the plea agreement, and so pronounced a sentence as though the weapons enhancement, which had been dismissed as part of the plea agreement, was still in play. (*See* Tr., p.47, L.13 - p.49, L.5.) To that end, the district court articulated a sentence for a term of five years fixed, "followed by 15 years indeterminate." (Tr., p.47, Ls.17-20.) As such, the district court obviously believed that the system *does have* the ability to supervise Mr. Age on parole. And yet, when its mistake was pointed out, and the district court reformulated the sentence to comply with the plea agreement, only then did it decide the system was not able to supervise Mr. Age on parole. (Tr., p.49, Ls.4-12.) Thus, the district court's actions belie its justification for the sentence it ultimately imposed.

The record also reveals the district court's justification to be clearly erroneous. Specifically, the record shows Mr. Age has served periods of misdemeanor probation in the past. (*See, e.g.*, PSI, p.10.) And, as the PSI author's comments show, there is no evidence contradicting Mr. Age's statement that he successfully completed that probation without any reported violations. (*See* PSI, pp.6, 15.) Thus, the record shows the system *does have* the ability to supervise Mr. Age on release from custody. Not only that, the record shows such supervised release is likely to be successful, as Mr. Age was determined to be a "low" risk for recidivism. (PSI, p.12 (reporting Mr. Age's LSI-R score as 14).) As such, based on all the facts in the record, the PSI author explained, "Mr. Age appears to be a *good candidate*" for supervised release on the proper terms and conditions. (PSI, p.15 (emphasis added).) Since the district court's justification – that "we don't have the ability to supervise Mr. Age on parole" – is clearly erroneous, its sentencing decision based on that conclusion is a clear abuse of discretion.

Third, the district court improperly focused on facts from a previous, unrelated case, rather than sufficiently considering Mr. Age's current actions and character. *See State v. Findeisen*, 133 Idaho 228, 230 (Ct. App. 1999) (vacating a sentence because the district court had improperly focused on an offense for which the defendant had already been sentenced when it was imposing sentence in a different, though related, case). Based on a consideration of Mr. Age's current actions and character, the prosecutor, the PSI author, and defense counsel all recommended that the district court suspend Mr. Age's sentence for a period of probation. (Tr., p.34, L.11 - p.35, L.10; Tr., p.41, Ls.16-21; PSI, p.15.) For example, Mr. Age demonstrated amenability to that

sort of rehabilitation-focused sentence as he had been working with a tutor to learn to read while in jail, and had received information about programs available out of custody to continue those efforts. (Tr., p.11, Ls.16-21.) He also expressed amenability to anger management treatment that was available on probation. (Tr., p.42, Ls.12-15; *see also* PSI, pp.168-69 (the mental health evaluation recommending that sort of programming for Mr. Age).) Therefore, a period of probation to promote those rehabilitative efforts would best serve the goals of sentencing.

It is not as if Mr. Age had other issues that might cause problems during a period of probation. He was evaluated as a low risk to reoffend on probation. (PSI, p.12.) Additionally, the GAIN-I concluded that Mr. Age did not have any alcohol or substance abuse concerns. (PSI, pp.15, 167.) With the support of his family, Mr. Age developed a living arrangement which would address the particular facts of this case: he would live with his sister and told his parents, if they wanted to see him, they would have to visit him at his sister's home. (Tr., p.43, Ls.14-21.) That way, he would not be in situation to potentially violate the no-contact order between him and his parent's neighbor, the victim.

Despite all this information about Mr. Age's current character, the district court's comments at sentencing focused primarily on disputed facts from incidents that resolved over eight years prior. (Tr., p.45, L.4 - p.47, L.12 (discussing Mr. Age's prior record); *see also* Tr., p.44, L.1 - p.47, L.12 (the district court's entire comments prior to the imposition of sentence).) For example, the district court relied on the facts in the police reports in the case originally charged as rape, but which was ultimately reduced to misdemeanor domestic battery, to conclude Mr. Age was a risk to society.

(Tr., p.46, Ls.6-21.) However, as Mr. Age explained in the PSI interview, those reports were disputed. (*See* PSI, p.5.) More important, though, to determining a proper sentence in this case, the PSI information reveals that Mr. Age did not have any further charges after that case resolved until the instant offense. (PSI, pp.4-5, 10.) Furthermore, the instant offense constituted his first felony conviction. (PSI, p.14.) Thus, the record shows that the risk he may or may have posed based on the prior offense has been reduced in the intervening years. (*See* PSI, p.112) (concluding Mr. Age currently presents a "low" risk to society).)

As such, Mr. Age's criminal history, while it does contain some "violent" offenses, does not justify a five-year, all-fixed, sentence in this case, particularly in light of all the other mitigating information which has developed in the intervening years. That sentence, like the one vacated in *Findeisen*, essentially and impermissibly seeks to resentence Mr. Age for an offense which has already been addressed. *See Findeisen*, 133 Idaho at 230. Rather, in such cases, "while the district court may properly take into consideration [the defendant's] other criminal conduct, . . . sentence must be rendered with the recognition that [the defendant] has already been sentenced for those related offenses, and *the court's focus at resentencing must be on determination of the appropriate sentence for the* [*offense*] *that is before the court*." *Id*. (emphasis added). Since the district court's focus at the sentencing hearing in this case was not on the offense before it, but on the prior, unrelated convictions in Mr. Age's record, the sentence in this case, like the sentence in *Findeisen*, constituted an abuse of the district court's discretion.

For all the foregoing reasons, the district court abused its discretion when it imposed a five-year, entirely-fixed sentence on Mr. Age.

CONCLUSION

Mr. Age 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 new sentencing hearing.

DATED this 26th day of April, 2016.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of April, 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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BRD/mal