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State v. McNearney Appellant's Brief Dckt. 43876

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43876
Plaintiff-Respondent,)	
)	KOOTENAI COUNTY NO. CR 2014-16626
v.)	
)	
MICHAEL JAMES)	
MCNEARNEY, JR.,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Michael McNearney, Jr., pled guilty to two counts of grand theft and one count of rape. He received a unified sentence of seven years, with three years fixed. On appeal, Mr. McNearney contends that this sentence represents an abuse of the district court's discretion, as it is excessive given any view of the facts.

Statement of the Facts & Course of Proceedings

In 2012 and 2013, Michael McNearney borrowed money from several different women with whom he had a dating relationship. (Presentence Investigation Report

(*hereinafter*, PSI),¹ pp.21-22.) He obtained the money by telling the women he would pay them back with money he planned to earn from gambling or by working a job. (PSI, pp.21-22.) He also borrowed or took without permission their debit or credit cards and withdrew money which he kept. (PSI, pp.21-22.) Over the course of two years, Mr. McNearney obtained approximately \$26,000 from three women. (PSI, pp.21-22; R., pp.452-453.) Mr. McNearney failed to repay the money as promised, and utilized the funds for his own personal purposes. (PSI, pp.21-22.) During the course of his relationships with these women, he had sexual intercourse with them. (PSI, pp.21-22.) While none of the women immediately reported him to the authorities following the sexual acts, some of them felt the encounters were forced and they were unwilling participants, and told Mr. McNearney to stop and/or physically resisted during the encounters. (PSI, pp.21-22.)

Based on these facts, Mr. McNearney was charged by Information with two counts of grand theft by deception, two counts of grand theft of a financial transaction card, and seven counts of rape. (R., pp.141-146.) Pursuant to a plea agreement, Mr. McNearney pled guilty to an amended information charging him with two counts of grand theft by deception and entered an Alford² plea to one count of rape. (9/1/15 Tr., p.23, Ls.4-20; p.27, L.10 – p.28, L.1; R., pp.424-427.) In exchange, the State agreed to dismiss the remaining charges so long as Mr. McNearney agreed to pay restitution on all counts, including those dismissed. (9/1/15 Tr., p.3, Ls.17-25; p.12, L.7 – p.13, L.22; R., p.427.) The State also agreed not to file additional charges related to

¹ Appellant's use of the designation "PSI" includes the electronic file containing the PSI, including the Addendum to the PSI, the Substance Abuse Evaluation, and the Psychosexual Evaluation.

the discovered materials. (9/1/15 Tr., p.13, Ls.10-14; R., p.427.) As for sentencing, if the results of the psychosexual evaluation were to find Mr. McNearney is a high risk to reoffend, the parties agreed that the sentences for the three charges would be an imposed seven years, with three years fixed, concurrent with each other. (9/1/15 Tr., p.12, Ls.20-25.) If the psychosexual evaluation were to find Mr. McNearney was a low or moderate risk to reoffend, the parties agreed that they could recommend any underlying sentence, but would jointly recommend that the district court retain jurisdiction. (9/1/15 Tr., p.13, Ls.4-9.) The plea agreement was binding on the district court, pursuant to I.C.R. 11(f)(1)(B). (9/1/15 Tr., p.12, L.20 – p.13, L.9.)

At the sentencing hearing, the parties asked the district court to follow the plea agreement. (11/12/15 Tr., p.106, Ls.10-20; p.112, Ls.1-6.) The district court sentenced Mr. McNearney to a total unified sentence of seven years, with three years fixed. (11/12/15 Tr., p.120, Ls.13-18; R., pp.452-455.) Mr. McNearney filed a timely notice of appeal. (R., pp.461-464.)

ISSUE

Did the district court abuse its discretion when it imposed a unified sentence of seven years, with three years fixed, upon Mr. McNearney following his plea of guilty to two counts of grand theft and one count of rape?

² See *North Carolina v. Alford*, 400 U.S. 25 (1970).

ARGUMENT

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Seven Years, With Three Years Fixed, Upon Mr. McNearney Following His Plea Of Guilty To Two Counts Of Grand Theft And One Count Of Rape

Mindful that the district court imposed the sentence negotiated pursuant to a plea agreement and recommended by defense counsel, Mr. McNearney asserts that, given any view of the facts, his unified sentence of seven years, with three years fixed, is excessive. 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 (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. McNearney does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. McNearney must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

In light of Mr. McNearney’s rehabilitative potential, and the other mitigating facts present in this case, the district court abused its discretion in sentencing him

excessively. The district court failed to consider the fact that Mr. McNearney was aware of his alcohol problem, was interested in seeking treatment for his addiction, and that, with programming, Mr. McNearney could likely be successful in the community. (PSI, pp.38-39, 43.)

Another fact to be taken into consideration by the district court was that Mr. McNearney has been diagnosed with anti-social personality disorder, ADHD, and bipolar disorder. (PSI, pp.36-38, 43.) The Idaho Supreme Court has recognized that Idaho Code § 19-2523 requires the trial court to consider a defendant's mental illness as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581 (1999).

The Idaho Supreme Court has also held that substance abuse should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982). In *Nice*, the Idaho Supreme Court reduced a sentence based on Nice's lack of prior record and the fact that "the trial court did not give proper consideration of the defendant's alcoholic problem, the part it played in causing defendant to commit the crime and the suggested alternatives for treating the problem." *Id.* at 91. Additionally, the Idaho Supreme Court has ruled that ingestion of drugs and alcohol resulting in impaired capacity to appreciate the criminality of conduct, could be a mitigating circumstance. *State v. Osborn*, 102 Idaho 405, 414 (1981).

Mr. McNearney committed the crimes while under the influence of alcohol. (11/12/15 Tr., p.99, L.18 – p.100, L.12.) He described "going day-to-day in an alcoholic stupor." (11/12/15 Tr., p.99, Ls.18-24.) Mr. McNearney first used alcohol at age 12 and knows he has an alcohol issue. (PSI, pp.38, 43.) However, Mr. McNearney has realized he needs to stop drinking alcohol and wants treatment. (PSI, pp.38-39, 43.)

Mr. McNearney explained to the presentence investigator that “the accountability and structure of an Intensive Outpatient program would keep him on track.” (PSI, p.38.)

Further, Mr. McNearney expressed remorse and accepted responsibility for his actions. (PSI, pp.23; 11/12/15 Tr., p. 99, L.18 – p.102, L.2; 9/1/15 Tr., p.27, L.10 – p.28, L.1.) Regarding the circumstances surrounding his offense, Mr. McNearney expressed that he felt “like a user and a sinner.” (PSI, p.23.) Mr. McNearney also wanted the court to know “I let my selfishness and instant gratification ruin my life and not caring how it affects other[s].” (PSI, p.23.) He wanted the court to know that he was “too dependent on other people and took advantage of other people for their money and regrets it every day.” (PSI, p.23.) At his sentencing hearing, Mr. McNearney apologized to the victim present in the courtroom for his actions. (11/12/15 Tr., p.101, L.23 – p.102, L.2.) Mr. McNearney wanted the court to know that his goal was to spend every day of the rest of his life making up for the damage he caused. (11/12/15 Tr., p.101, Ls.2-5.) Idaho recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *Shideler*, 103 Idaho at 595; *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

Mindful that the district court followed the recommendations of defense counsel, Mr. McNearney asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his remorse, substance abuse, and mental health conditions, it would have imposed a less severe sentence.

CONCLUSION

Mr. McNearney 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 6th day of October, 2016.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of October, 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:

MICHAEL JAMES MCNEARNEY JR
INMATE #110063
ICIO
381 W HOSPITAL DRIVE
OROFINO ID 83544

LANSING L HAYNES
DISTRICT COURT JUDGE
E-MAILED BRIEF

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E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

SJC/eas