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State v. Tanner Appellant's Brief Dckt. 43981

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43981
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR 2015-16092
v.)	
)	
DANIEL LEE TANNER,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Daniel Lee Tanner appeals from the district court's Judgment of Conviction and Commitment. Mr. Tanner was sentenced to a unified term of seven years, with two years fixed. He asserts that the district court abused its discretion in sentencing him to an excessive sentence without properly considering the mitigating factors that exist in this case. Furthermore, Mr. Tanner asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence.

Statement of the Facts & Course of Proceedings

On December 1, 2015, an Information was filed charging Mr. Tanner with domestic violence. (R., pp.18-19.) The charges were the result of a report to police that Mr. Tanner had battered his partner. (PSI, pp.217-18.)¹

Mr. Tanner entered a guilty plea to the domestic violence charge. (R., p.29.) At sentencing, the prosecution requested imposition of a unified sentence of ten years, with three years fixed. (Tr. 2/16/16, p.14, Ls.11-14.) Defense counsel recommended that Mr. Tanner be screened for Veteran's Treatment or, alternately, a unified term of six years, with two years fixed, with a period of retained jurisdiction. (Tr. 2/16/16, p.18, Ls.21-23, p.22, Ls.4-7.) The district court imposed a unified sentence of seven years, with two years fixed. (R., pp.45-47.) Mr. Tanner filed a Notice of Appeal timely from the Judgment of Conviction and Commitment. (R., pp.50-51.)

Mr. Tanner also filed a timely Rule 35 motion for a reduction of sentence. (Augmentation Motion for Reconsideration of Sentence.)² The district court denied the Rule 35 motion. (Augmentation: Order Denying Rule 35 Motion.)

¹ For ease of reference, the electronic file containing the Presentence Investigation Report and attachments will be cited as "PSI" and referenced pages will correspond with the electronic page numbers contained in this file.

² A Motion to Augment was filed contemporaneously with this Appellant's Brief.

ISSUES

1. Did the district court abuse its discretion when it imposed, upon Mr. Tanner, a unified sentence of seven years, with two years fixed, following his plea of guilty to domestic violence?
2. Did the district court abuse its discretion when it denied Mr. Tanner's Idaho Criminal Rule 35 Motion for a Reduction of Sentence?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed, Upon Mr. Tanner, A Unified Sentence Of Seven Years, With Two Years Fixed, Following His Plea Of Guilty To Domestic Violence

Mr. Tanner asserts that, given any view of the facts, his unified sentence of seven years, with two 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). Mr. Tanner does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Tanner must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* citing *State v. Broadhead*, 120 Idaho 141, 145, *overruled on other grounds by State v. Brown*, 121 Idaho 385. 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.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978), *overruled on other grounds by State v. Coassolo*, 136 Idaho 138 (2001)).

Mr. Tanner asserts that the district court failed to give proper weight and consideration to the mitigating factors that exist in his case. Specifically, he asserts that the district court failed to give proper consideration to his admitted substance abuse problem and desire for treatment. Idaho courts have previously recognized that substance abuse and a desire for treatment should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982).

Mr. Tanner identifies as an alcoholic. He first consumed alcohol as a toddler, taking drinks out of his parents' beers. (PSI, p.4.) He began using alcohol at the age of 13. (PSI, p.6.) His alcohol use peaked after he was involved in a work accident fifteen years earlier. (PSI, p.4.) Although he has received treatment in the past and has been able to remain sober, he slipped back into his old habits. (PSI, p.236.) The night of the incident in the case at hand, Mr. Tanner was under the influence of alcohol and prescription medications. (PSI, p.4.) It was recommended that Mr. Tanner participate in Level I Outpatient Treatment. (PSI, pp.23, 238.)

Idaho courts have previously 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). Mr. Tanner has taken Paxil for his depression and Prozac for his anxiety. (PSI, pp.4, 234.) He has considered suicide several times

throughout his life. (PSI, p.235.) He has not received mental health counseling and would like to try it to see if it could help him. (PSI, p.235.) He has been hospitalized at Intermountain Hospital for alcohol issues and depression. (PSI, p.4.)

Recently, Mr. Tanner was diagnosed as suffering from Alcohol Use Disorder, Generalized Anxiety Disorder with Depression, Rule Out Opiate Use, Rule Out Post-Traumatic Stress Disorder, and Other Specified Personality Disorder with Passive Aggressive and Avoidant Features. (PSI, p.9.) Another evaluator diagnosed Mr. Tanner with Alcohol Dependence with Physiological Symptoms - In a Controlled Environment, Rule Out - Mood Disorder NOS, Rule Out - Generalized Anxiety Disorder, Rule Out - Posttraumatic Stress Disorder or Acute Stress Disorder or other disorder of extreme stress, and Rule Out - Attention Deficit Hyperactive Disorder - Inattentive Type. (PSI, p.15.)

Military service coupled with an honorable discharge is a compelling circumstance that should be considered as a sentencing factor. *Nice*, 103 Idaho at 91. Mr. Tanner is a veteran. He served as a Senior Airman in the U.S. Air Force for four years. (PSI, p.234.) He received an honorable discharge. (PSI, p.234.)

Additionally, Mr. Tanner has expressed his remorse for committing the instant offense. In *State v. Alberts*, 121 Idaho 204 (Ct. App. 1991), the Idaho Court of Appeals reduced the sentence imposed, "In light of Alberts' expression of remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character." *Id.* 121 Idaho at 209. Mr. Tanner has expressed his remorse for committing the instant offense:

... I want to ask the Court's forgiveness. And the probation department, I had a good example going. But with this relapse, I – I don't – I have made them look bad too.

I want to say that I'm tremendously sorry for the – Glenda, the victim, and her family. It was nothing premeditated. It was something that happened. I feel awful. I feel horrible about it. And I do want to do my best to get counseling for my alcohol. But not just that; with my seven years of sobriety, I have come to find out that I have mental and emotional issues that I need to address that I need to get help on. It's not just the drinking and drinking triggers it. It sets it off, but I have other problems that I really want to work on so I can be a better person and have a better life, and everybody else can too.

(Tr. 2/16/16, p.23, Ls.3-21.)

When asked how he felt about the incident, he noted that, "I feel terrible about it. I feel just awful. I love Glenda a lot. It just breaks my heart and I feel really really guilty because I had been drinking and I shouldn't have hit her no matter what." (PSI, p.7.) In completing the PSI, he said that he feels "[b]roken hearted, ashamed, guilty, deeply sorry, regretful, [and that he] wish[ed] [that he] would have died before this happened." (PSI, p.220.)

Based upon the above mitigating factors, Mr. Tanner 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 substance abuse, need for continued treatment, veteran status, mental health issues, and remorse, it would have crafted on a less severe sentence.

II.

The District Court Abused Its Discretion When It Denied Mr. Tanner's Rule 35 Motion For A Reduction Of Sentence

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994) (citing *State v. Forde*, 113 Idaho 21 (Ct. App. 1987) and *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984)). “The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable.” *Id.* (citing *Lopez*, 106 Idaho at 450). “If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.* (citing *State v. Hernandez*, 121 Idaho 114 (Ct. App. 1991)). “When presenting a Rule 35 motion, the defendant 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.” *State v. Huffman*, 144 Idaho 201, 203 (2007).

Mr. Tanner supplied additional information to the district in his Brief in Support of Defendant's Motion for Reconsideration of Sentence:

The defendant hopes to participate in programming made available through IDOC. Through this programming, he hopes to make himself a better candidate for parole when made available, and to take steps to assure that he does not recidivate. As IDOC determines class availability largely based upon parole eligibility, the requested modification to defendant's sentence will assist him in enrolling in these programs more quickly.

Mr. Tanner took accountability for his actions. He expressed remorse and indicated that he felt terrible. At the time of sentencing, the victim in the case did not express animosity towards Mr. Tanner. He acknowledged that his alcohol abuse has contributed to his criminal history. He noted a period of sobriety between 2008 and 2015. He has a high school diploma and was honorably discharged after a period of military service. The domestic violence evaluation noted that he was honest and open that he was seeking help with his issues. He is eligible for services through the Veterans Administration. He has previously been successful on community supervision.

(Augmentation: Brief in Support of Defendant's Motion for Reconsideration of Sentence, pp.2-3.)

Mr. Tanner asserts that in light of the above additional information and the mitigating factors mentioned in section I, which need not be repeated, but are incorporated by reference, the district court abused its discretion in denying his Rule 35 motion.

CONCLUSION

Mr. Tanner 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. Alternatively, he requests that the order denying his Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 2nd day of August, 2016.

_____/s/_____
ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of August, 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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ISCI
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RICHARD D GREENWOOD
DISTRICT COURT JUDGE
E-MAILED BRIEF

LANCE L FUISTING
ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

EAA/eas