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State v. Kilroy Appellant's Brief Dckt. 44102

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44102
Plaintiff-Respondent,)	
)	BONNEVILLE COUNTY NO. CR 2015-4944
v.)	
)	
JAMES PATRICK KILROY,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, thirty-two-year-old James Patrick Kilroy pleaded guilty to felony child sexual abuse of a minor under sixteen years of age. The district court imposed a unified sentence of twenty-five years, with thirteen years fixed. On appeal, Mr. Kilroy asserts the district court abused its discretion when it imposed his sentence.

Statement of the Facts & Course of Proceedings

Officer Fielding with the Bonneville County Sheriff's Office responded to a report of child sexual abuse. (Presentence Report (*hereinafter*, PSI), p.4.) The mother of

K.W., a six-year-old girl, reported that K.W. had been abused by Mr. Kilroy when Mr. Kilroy stayed the night at their house because his power had been shut off. (PSI, p.4; R., p.13.) Mr. Kilroy reportedly took K.W. upstairs, and K.W. later stated that Mr. Kilroy pulled down his pants and made her touch him. (PSI, p.4.) K.W. also reported Mr. Kilroy pulled down K.W.'s pants and touched her "bad area." (PSI, p.4.) K.W.'s mother stated she took K.W. to the hospital because her private areas looked red. (PSI, p.4.) A nurse examined K.W. and found three lacerations in her anus that were recent and consistent with penetrating injury. (PSI, p.4.)

When interviewed, Mr. Kilroy stated all he did was play with children and tickle their tummies, and he denied that he could have accidentally touched K.W. anywhere else. (PSI, p.4.) Mr. Kilroy declined to provide DNA samples and asked for an attorney. (PSI, p.4.) Detectives then interviewed Mr. Kilroy's girlfriend, Mariah Isabelle, who stated she had been in the room with Mr. Kilroy and K.W. the entire time. (PSI, p.4; see PSI, p.11.) Ms. Isabelle reported Mr. Kilroy had tickled K.W., but nothing else happened. (PSI, p.4.)

Detectives obtained a warrant to take DNA samples from Mr. Kilroy. (PSI, p.4.) The major male DNA profile found on buttocks and rectal swabs taken from K.W. at the hospital matched the DNA profile from Mr. Kilroy's samples. (See PSI, p.4; R., pp.26-27.) Mr. Kilroy subsequently refused an interview with Detective Fielding, and the detective requested a warrant for Mr. Kilroy's arrest. (PSI, p.4.) Mr. Kilroy was later arrested. (PSI, p.4.)

The State charged Mr. Kilroy by information with lewd conduct with a child under 16, felony, Idaho Code § 18-1508. (R., pp.81-82.) Mr. Kilroy entered a not guilty plea. (R., pp.102-03.)

Pursuant to a plea agreement, Mr. Kilroy later agreed to plead guilty to an amended charge of child sexual abuse of a minor under 16 years of age, felony, I.C § 18-1506. (R., pp.153-56.) The district court accepted his guilty plea. (R., p.156.)

At the sentencing hearing, Mr. Kilroy recommended that he undergo treatment in the community, and if he were ordered probation, that treatment be a requirement. (Tr., p.24, Ls.1-22.) The State recommended the district court impose a unified sentence of twenty-five years, with twelve years fixed. (Tr., p.27, L.25 – p.26, L.3.) The district court imposed a unified sentence of twenty-five years, with thirteen years fixed. (R., pp.183-85.)

Mr. Kilroy filed an Idaho Criminal Rule 35 (“Rule 35”) motion requesting the district court reduce his sentence because it was unduly harsh. (R., pp.174-75.) After conducting a hearing, the district court denied the Rule 35 motion. (R., pp.188-89.) On appeal, Mr. Kilroy does not challenge the denial of his Rule 35 motion.¹

Mr. Kilroy filed a Notice of Appeal timely from the district court’s Judgment of Conviction. (R., pp.190-93.)

¹ The Idaho Supreme Court has held that “[w]hen 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). “An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information.” *Id.*

ISSUE

Did the district court abuse its discretion when it imposed a unified sentence of twenty-five years, with thirteen years fixed, upon Mr. Kilroy following his plea of guilty to child sexual abuse of a minor under sixteen years of age?

ARGUMENT

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Twenty-Five Years, With Thirteen Years Fixed, Upon Mr. Kilroy Following His Plea Of Guilty To Child Sexual Abuse Of A Minor Under Sixteen Years Of Age

Mr. Kilroy asserts the district court abused its discretion when it imposed his unified sentence of twenty-five years, with thirteen years fixed, because his sentence is excessive considering any view of the facts.

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 “due regard to the nature of the offense, the character of the offender, and the protection of the public interest.” *State v. Strand*, 137 Idaho 457, 460 (2002).

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) (internal quotation marks omitted). Mr. Kilroy does not assert that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Kilroy 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.* An appellate court, “[w]hen reviewing the length of a sentence . . .

consider[s] the defendant's entire sentence." *State v. Oliver*, 144 Idaho 722, 726 (2007). The reviewing court will "presume that the fixed portion of the sentence will be the defendant's probable term of confinement." *Id.*

Mr. Kilroy submits that, because the district court did not give adequate consideration to mitigating factors, the sentence imposed by the district court is excessive considering any view of the facts. Specifically, the district court did not adequately consider Mr. Kilroy's remorse and acceptance of responsibility. While Mr. Kilroy's accounts of the incident were different in the psychosexual evaluation interview and full disclosure polygraph examination, he admitted to fondling K.W. for his self-gratification. (See PSI, p.5.) Mr. Kilroy also reported during the psychosexual evaluation that he "feels guilty about his offense, feels ashamed of what he did, and is sorry for the victim" (PSI, p.100.) At the sentencing hearing, Mr. Kilroy told the district court, "I am very sorry for what I did. . . . I shouldn't have done what I did. I know I did something stupid. I was human. I made a mistake. I'm sorry I did it." (Tr., p.29, Ls.1-10.)

The district court also did not give adequate consideration to Mr. Kilroy's amenability to treatment. Linda C. Hatzenbuehler, Ph.D., ABPP, the senior certified forensic psychologist who conducted Mr. Kilroy's psychosexual evaluation, concluded that Mr. Kilroy "denies that he needs help to control his sexual behaviors, but if he can be motivated, he is an appropriate treatment candidate. His treatment needs can be met in the community as long as he has structure and does not have access to young females without supervision." (PSI, p.101.) Despite Mr. Kilroy's prior conviction for lewd conduct as a juvenile and other sex offense charges as a juvenile (see PSI, pp.9,

83), Dr. Hatzenbuehler wrote that, “[b]ased on Mr. Kilroy’s responses to the psychosexual testing conducted during the evaluation, he appears to be able to exert the effort needed during treatment, and his verbal abilities are adequate for him to participate meaningfully in treatment.” (PSI, p.100.)

Additionally, the district court did not adequately consider Mr. Kilroy’s mental health issues. A district court must consider evidence of a defendant’s mental condition offered at the time of sentencing. See I.C. § 19-2523(1). Mr. Kilroy’s Idaho Standard Mental Health Assessment reported that he “appears to meet the DSM-V criteria for an Adjustment Disorder With depressed mood, a Panic Disorder . . . and a history of Attention-Deficit/Hyperactivity Disorder, Predominately inattentive presentation, as well as history of Posttraumatic Stress Disorder.” (PSI, p.73.) Mr. Kilroy stated, “I have PTSD, I have ADD due to [fetal] alcohol syndrome and I also have manic depressive disorder.” (See PSI, p.66.) Mr. Kilroy reported he had been sexually assaulted multiple times as a child. (PSI, p.68.) He stated he had been diagnosed with PTSD about a year before his mental health assessment. (PSI, p.68.) Mr. Kilroy further reported “a history of panic attacks ‘on and off my whole life’, which occur at least once a month.” (PSI, p.68.)

The district court did not adequately consider the above mitigating factors. Thus, Mr. Kilroy submits his sentence is excessive considering any view of the facts. The district court therefore abused its discretion when it imposed Mr. Kilroy’s unified sentence of twenty-five years, with thirteen years fixed.

CONCLUSION

For the above reasons, Mr. Kilroy respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 12th day of September, 2016.

_____/s/
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of September, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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DANE H WATKINS JR
DISTRICT COURT JUDGE
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_____/s/_____
EVAN A. SMITH
Administrative Assistant

BPM/eas