11-22-2016

State v. Schwindt Appellant's Brief Dckt. 44187

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MICHAEL SCHWINDT, Defendant-Appellant.	)	NOS. 44187 & 44188 BINGHAM COUNTY NOS. CR 2014-5510 & CR 2015-3032 APPELLANT'S BRIEF

STATEMENT OF THE CASE

Nature of the Case

Mr. Schwindt appeals from the district court's Judgment of Conviction Order of Commitment in both case numbers CR 2014-5510 (Supreme Court Docket Number 44187) and CR 2015-3032 (Supreme Court Docket Number 44188). He entered a guilty plea to one count of sexual abuse of a child, in each case, and was sentenced to unified sentences of 18 years, with 3 years fixed, and 25 years, with 4 years fixed, to be served concurrently. Mr. Schwindt asserts that the district court abused its discretion in sentencing him to excessive sentences without giving proper weight or consideration to the mitigating factors that exist in his cases.

Statement of the Facts & Course of Proceedings

On January 12, 2015, a Prosecuting Attorney's Information was filed, in CR 2014-5510, charging Mr. Schwindt with one count of lewd conduct with a child under the age of sixteen. (R., pp.82-83.) The charge was later amended to sexual abuse of child. (R., pp.167-168.) The charge was the result of a report to police that Mr. Schwindt had molested an ex-girlfriends daughter, M.B. (PSI, p.3.)[1]

On July 7, 2015, another Prosecuting Attorney's Information was filed, in CR 2015-3032, charging Mr. Schwindt with three counts of lewd conduct with a child under the age of sixteen. (R., pp.269-270.) The charges were later amended to one count of sexual abuse of a child. (R., pp.294-295.) The charges were the result of report to police that Mr. Schwindt had molested his step-sister, J.S. (PSI, p.3.)

Mr. Schwindt entered guilty pleas to the amended charges in both cases. (R., pp.174-176, 301-302.) At sentencing, the prosecution requested the imposition of unified sentences of 20 years, with 8 years fixed. (Tr., p.43, Ls.3-4.) Defense counsel recommended that Mr. Schwindt be placed on probation or a period of retained jurisdiction. (Tr., p.37, Ls.18-19.) The district court imposed unified sentences of 18 years, with 3 years fixed, and 25 years, with 4 years fixed, to be served concurrently. (R., pp.207-209, 334-336.) Mr. Schwindt filed a Rule 35 Motion – Plea for Leniency, in both cases. (R., pp.211, 338.) The motions were denied.[2] (R., pp.219, 346.)

[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] Mr. Schwindt does not address the denial of his Rule 35 motions on appeal because he did not provide new information in support of the motions, as is required by *State v. Huffman*, 144 Idaho 201, 203 (2007).

Mr. Schwindt filed Notices of Appeal timely from the Judgment of Conviction Order of Commitment in each case.[3] (R., pp.221-223, 350-352.)

ISSUE

Did the district court abuse its discretion when it imposed, upon Mr. Schwindt, unified sentences of 18 years, with 3 years fixed, and 25 years, with 4 years fixed, to be served concurrently, following his pleas of guilty to two charges of sexual abuse of a child?

ARGUMENT

The District Court Abused Its Discretion When It Imposed, Upon Mr. Schwindt, Unified Sentences Of 18 Years, With 3 Years Fixed, And 25 Years, With 4 Years Fixed, To Be Served Concurrently, Following His Pleas Of Guilty To Two Charges Of Sexual Abuse Of A Child

Mr. Schwindt asserts that, given any view of the facts, his unified sentences of 18 years, with 3 years fixed, and 25 years, with 4 years fixed, to be served concurrently, are 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. Schwindt does not allege that

[3] Mr. Schwindt filed both Rule 35 motions within fourteen days of the Judgment of Conviction Order of Commitment. As such, his time to appeal was tolled until an order was issued on the Rule 35 motions. I.A.R. 14(a).

his sentences exceed the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Schwindt must show that in light of the governing criteria, the sentences were excessive considering any view of the facts. *Id*. (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). 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. Schwindt asserts that the district court failed to give proper consideration and weight to the mitigating factors that exist in his case. Specifically, he asserts that the district court failed to give proper consideration to his mental health concerns. 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. Schwindt presents symptoms consistent with a mood disorder and stress disorder. (PSI, pp.14, 34.) It was recommended that he participate in individual and/or group therapy to minimize any risk of deterioration of daily functioning. (PSI, pp.14, 42.)

Additionally, Mr. Schwindt asserts that the district court did not give proper weight to his military service. The Idaho Supreme Court has held that an honorable discharge from the military was a mitigating circumstance that supported the reduction of a sentence. *State v. Nice*, 103 Idaho 89, 91 (1982). Mr. Schwindt served in the National Guard from October of 2004 through October of 2010, and the Army Reserves from

October of 2012 through September of 2013. (PSI, p.10.) He served in Iraq from 2006 through 2007. (PSI, p.10.) He received an Honorable discharge. (PSI, p.10.)

Additionally, Mr. Schwindt 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. Schwindt has expressed his remorse for committing the instant offense stating, "I know that nothing I ever say or do will change what happened. I still apologize from every part of my heart for what happened. I cannot change or take back what happened, but if I could I would." (PSI, p.13.)

Mr. Schwindt again expressed his remorse at the sentencing hearing and discussed why he believed he could be successful on probation stating:

> I would like to begin by apologizing to the victim and her family. I know that no amount of apology can change what I did. But I truly am sorry.
>
> I – I've known that I've had a problem for a while. I didn't know how to get the help that I needed. I'm hoping that the Court will allow me to get the treatment I need without punishing me to prison. . . . I have a lot of incentive to complete a probation program where I have counseling. I have a family that needs my support. . . . I was in the military for nine years. And I'm not trying to say that is – I'm a good person because of that, but I was honorably discharged, and I am used to being told what I can and cannot do and how to do it.
>
> And I believe that a probation program – I know it will be extremely strict, but I believe that I can follow those rules that are set.

(Tr., p.44, Ls.3-25.) While Mr. Schwindt acknowledges that he is classified in the Moderate-High range for re-offense, he is capable of participating in treatment and the

psychosexual evaluator noted that 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.15.)

Further, as Mr. Schwindt noted, he has a family that needs his support. Mr. Schwindt's young son suffers from kidney failure because of a blockage from before birth. (R., p.10.) He has had to spend significant time hospitalized and requires full-time care. (Tr., p.36, Ls.3-10.) Mr. Schwindt was the sole financial support for his family because his wife must tend to their son around the clock. (Tr., p.36, Ls.11-16.) The Idaho Supreme Court has previously found that working to help support children is a mitigating factor in sentencing. *Nice*, 103 Idaho at 91.

Based upon the above mitigating factors, Mr. Schwindt asserts that the district court abused its discretion by imposing excessive sentences upon him. He asserts that had the district court properly considered his mental health issues, military service, remorse, potential for success on probation, and his family's unique financial needs, it would have crafted a less severe sentence.

CONCLUSION

Mr. Schwindt respectfully requests that this Court reduce his sentences as it deems appropriate. Alternatively, he requests that his cases be remanded to the district court for new sentencing hearings.

DATED this 22nd day of November, 2016.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of November, 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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_____/s/_____
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EAA/eas