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State v. Schwindt Respondent's Brief Dckt. 44187

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LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 44187 & 44188
)	
Plaintiff-Respondent,)	Bingham County Case Nos.
)	CR-2014-5510 & CR-2015-3032
v.)	
)	
MICHAEL SCHWINDT,)	RESPONDENT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

Has Schwindt failed to show that the district court abused its sentencing discretion when it imposed concurrent sentences of 25 years with four years determinate and 18 years with three years determinate upon Schwindt's convictions on two counts of sexual abuse of a child?

ARGUMENT

Schwindt Has Failed Show That The District Court Abused Its Sentencing Discretion

A. Introduction

Schwindt sexually abused his girlfriend's six-year-old daughter by having her perform oral sex on him in exchange for chocolate. (PSI, p. 3.) The state charged him

with one count of lewd conduct with a child. (R., pp. 82-83.) Schwindt sexually abused his half-sister starting when she was six or seven and continuing until she was ten, by touching her vagina, having her perform oral sex on him, and culminating in penetrating her vagina with his penis. (PSI, pp. 3-4.) The state charged Schwindt in a separate case with three counts of lewd conduct with a child. (R., pp. 269-70.)

Schwindt pled guilty to two counts of sexual abuse of a minor pursuant to a plea agreement that resolved both cases. (R., pp. 156-58, 174-76, 283-85, 301-03.) The district court imposed concurrent sentences of 18 years with three years determinate and 25 years with four years determinate, respectively. (R., pp. 207-09, 334-36.) Schwindt filed notices of appeal timely from the entry of judgment. (R., pp. 221-23, 350-52.)

On appeal Schwindt argues the district court abused its sentencing discretion by “fail[ing] to give proper consideration and weight to the mitigating factors that exist in this case.” (Appellant’s brief, p. 4.) Application of the proper legal standards to the record shows this argument is without merit.

B. Standard Of Review

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant’s entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant’s probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear

abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)).

C. Schwindt Has Shown No Abuse Of The District Court's Discretion

To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). To establish that the sentence was excessive, he must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Farwell, 144 Idaho at 736, 170 P.3d at 401. In determining whether the appellant met his burden, the court considers the entire sentence but, because the decision to release him on parole is exclusively the province of the executive branch, presumes that the determinate portion will be the period of actual incarceration. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

The record shows the district court considered all the evidence presented and the legal factors relevant to its sentencing discretion. (Tr., p. 45, L. 22 – p. 47, L. 1.¹) The district court specifically considered Schwindt's military service and family circumstances, although the latter it balanced out against the harm he caused his victims. (Tr., p. 47, Ls. 2-12.) The district court emphasized the problems with thinking errors identified in the psychosexual evaluation as both explanations for the deviant sexual behavior and as impediments to rehabilitation. (Tr., p. 47, L. 21 – p. 51, L. 23.)

¹ All citations to the "Tr." are to the transcript containing the sentencing hearing.

The court then imposed sentence “based on all of these factors.” (Tr., p. 51, L. 24 – p. 52, L. 7.) The court explained that it was giving a relatively low fixed portion of the sentence in hope that Schwindt would be successful in rehabilitation, but a long indeterminate portion to protect the community in case rehabilitation was not as successful. (Tr., p. 52, L. 7 - p. 53, L. 2.) Because the district court specifically considered the evidence, applied the correct legal standards, and imposed a reasonable sentence, Schwindt has failed to show any abuse of discretion.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 23rd day of November, 2016.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of November, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

ELIZABETH ANN ALLRED
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd