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State v. Adams Appellant's Brief Dckt. 44216

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44216
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR 2015-9070
v.)	
)	
ZACKERY DOUGLAS ADAMS,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE PATRICK H. OWEN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Zackery Adams pled guilty to one count of grand theft and one count of unlawful possession of a firearm. He received an aggregate unified sentence of nineteen years, with eight years fixed. Mr. Adams contends that his sentence represents an abuse of the district court's discretion, as it is excessive given any view of the facts. He also contends that the district court abused its discretion in awarding restitution, as he was sentenced to a lengthy period of incarceration and established that he would be unable to pay the restitution ordered by the district court due to his lengthy period of incarceration.

Statement of the Facts & Course of Proceedings

Mid-morning on March 24, 2012, officers responded to a residential area based on a report of a suspected prowler who was jumping over fences and looking into backyards. (Presentence Investigation Report (*hereinafter*, PSI), p.3.) Zachery Adams was observed near the shrubbery of a neighbor's house, acting strangely and apparently trying to hide behind bushes and plants. (PSI, p.3.) Officers saw Mr. Adams going toward a porta potty and noticed he was bleeding from his hand. (PSI, p.3.) However, when officers made contact with Mr. Adams and tried to detain him, he ran away, leaving behind a backpack containing items taken in a previous burglary. (PSI, p.3.)

Approximately five hours later, officers responded to a citizen who had just seen an unknown male inside her house. (PSI, p.4.) She also reported that she was missing two pistols. (PSI, p.4.) When an officer approached the area from which the call

originated, he saw multiple people pointing at a house and Mr. Adams in the backyard of a different house, by the homeowner's boat. (PSI, p.4.) Mr. Adams was taken into custody, and a search of his belongings revealed numerous items, including a loaded revolver and a small container containing a substance that tested positive for methamphetamine. (PSI, p.4.) Mr. Adams recalled walking into the house (from which he took the weapons) and petting a dog, and he was wearing the homeowner's yellow shirt when he was arrested. (PSI, pp.3-4.) Mr. Adams was under the influence of methamphetamine and only recalled bits and pieces of the day due to his drug use in combination with his mental health conditions. (PSI, p.7.)

Based on these facts, Mr. Adams was arrested and charged by Information with grand theft, burglary, felony possession of a controlled substance, felony unlawful possession of a firearm, misdemeanor possession of drug paraphernalia, misdemeanor resisting or obstructing, and misdemeanor providing false information. (R., pp.38-40.) Mr. Adams was also charged with a persistent violator sentencing enhancement. (R., pp.64-66.)

Pursuant to a plea agreement, Mr. Adams entered an Alford¹ plea to one count of grand theft and one count of unlawful possession of a firearm. (2/19/16 Tr., p.28, Ls.13-24.) As part of the plea agreement, the State agreed to dismiss the remaining charges and the persistent violator sentencing enhancement. (2/19/16 Tr., p.1, Ls.11-25; R., p.76.) The district court accepted Mr. Adams's guilty plea, ordered a PSI and a mental health evaluation, and set the matter for sentencing. (2/19/16 Tr., p.28, L.25 – p.29, L.15; R., pp.71-73.)

¹ See *North Carolina v. Alford*, 400 U.S. 25 (1970).

At sentencing, the State recommended a unified term of fourteen years, with ten years fixed, on the grand theft count, and five years indeterminate, on the possession of a firearm count, and asked the court to order the sentence on the grand theft count to be served consecutively to a parole hold from a 2010 conviction. (4/20/16 Tr., p.14, Ls.1-8.) Mr. Adams' counsel asked the court to retain jurisdiction to allow him "to show the court that he will take advantage of treatment." (4/20/16 Tr., p.25, L.23 – p.26, L.2.) The district court sentenced Mr. Adams to fourteen years, with eight years fixed, on the grand theft count and five years indeterminate on the possession of a firearm count. (4/20/16 Tr., p.35, L.4 – p.36, L.21; R., pp.85-89.) The district court ordered the possession sentence to be served consecutively to the grand theft sentence. (4/20/16 Tr., p.35, L.20 – p.36, L.21; R., p.86.)

Mr. Adams timely appealed from the judgment of conviction. (R., pp.91-93, 101-104.)

A hearing was held on the State's motion for restitution. Defense counsel did not disagree with the amount of restitution requested, but objected to a restitution order in light of Mr. Adams' financial circumstances—Mr. Adams would not be able to pay the restitution due to his lengthy period of incarceration. (8/15/16 Tr., p.3, L.22 - p.4, L.17.)

The district court ordered restitution in the amount of \$267.00. (R., pp.107-112.)

ISSUES

1. Did the district court abuse its discretion when it sentenced Mr. Adams to an aggregate unified sentence of nineteen years, with eight years fixed, following his pleas of guilty to grand theft and possession of a firearm?
2. Did the district court abuse its discretion in awarding restitution?

ARGUMENT

I.

The District Court Abused Its Discretion When It Sentenced Mr. Adams To An Aggregate Unified Sentence Of Nineteen Years, With Eight Years Fixed, Following His Pleas Of Guilty To Grand Theft And Possession Of A Firearm

Mr. Adams asserts that, given any view of the facts, his aggregate unified sentence of nineteen years, with eight 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. Adams does not allege that his total sentences exceed the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Adams 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. Adams’ rehabilitative potential, the district court abused its discretion in sentencing him excessively. The district court failed to fully consider the

fact that Mr. Adams was extremely remorseful and the incident was the result of his mental health conditions and use of controlled substances.

Mr. Adams has had a very difficult life. His childhood up to high school was filled with enough serious abuse that defense counsel commented that Mr. Adams had “one of the worst childhoods that I have seen.” (4/20/16 Tr., p.20, Ls.7-8.) Mr. Adams was “abused and victimized by almost every authority figure that was in charge of him” (4/20/16 Tr., p.20, Ls.9-15) and this is well documented in Mr. Adams’ PSI (PSI, pp.12-13).

The Idaho Supreme Court has 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. Adams suffers from drug addiction. (PSI, p.20.) He began using methamphetamine when he was sixteen years old, and began using opiates when he was twenty-four years old. (PSI, p.19.) Mr. Adams was using controlled substances at the time of the incident; however, he wants drug treatment. (PSI, pp.7, 20.) The day of the incident, Mr. Adams reported that he had begun seeing things that were not there

and hearing voices (due to his mental health condition) and that his methamphetamine use only made the hallucinations worse. (PSI, p.7.)

Mr. Adams has long struggled with severe mental illness. (PSI, pp.16-17.) 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). Mr. Adams describes his mental health as "shaky" and reported a history of mental illness including Bipolar Disorder, Depression, Complex PTSD, Anxiety Disorder, Antisocial Personality Disorder, Schizoaffective Disorder, and ADHD. (PSI, pp.16-17.) During the pendency of this case, the district court ordered a mental health evaluation pursuant to I.C. § 18-211 for Mr. Adams prior to his preliminary hearing. (R., p.24.) Mr. Adams was found unfit to proceed and was committed to the Idaho Department of Health and Welfare, pursuant to I.C. § 18-212. (R., pp.26-27.) Mr. Adams was sent to State Hospital South where he remained committed for two months. (2/19/16 Tr., p.4, Ls.7-18; PSI, p.18.) He wants mental health counseling and understands that he cannot cope with his problems on his own. (PSI, p.19.)

Further, Mr. Adams was extremely remorseful for his acts. Mr. Adams told the district court:

First of all, I apologize. . . I am beyond sorry for what I did. I can't even begin to express, I don't feel sorry for myself. I feel bad that I put fear in these people's lives and I took their security away from them. I didn't mean to do that. That was not my intentions. . . I felt safe. I've been running for a long time, and there's nothing I can do or say that is going to change how you guys feel. I just hope that you can know that what has been said to your from the court, from the prosecutor, is not defined who I am. I'm not a villainous person. I don't go out of my way to hurt people. I've never hurt anybody.

I'm just sorry. I really am. And I hope that you can forgive me. I don't know what is going to happen right now, but besides what the court is

going to do and I hope that you can forgive me and hope that you don't hold any grudges towards anybody else that comes along your path that may have a felony or may have -- not everybody's bad. And I'm sorry for what I did. Thank you.

(4/20/16 Tr., p.26, L.12 – p.27, L.15.)

Mr. Adams, in his PSI Questionnaire, wrote, "I feel sick. I felt I was okay. Im sick with remorse because I cant remember doing it yet I know Im responsible (sic)." (PSI, p.6.) Idaho recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *State v. Shideler*, 103 Idaho 593, 595 (1982); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

Based upon the above mitigating factors, Mr. Adams 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 drug use, mental health condition, and sincere remorse, it would have imposed a less severe sentence.

II.

The District Court Erred When It Ordered Mr. Adams To Pay \$267.00 In Restitution

A. Introduction

Mr. Adams challenges the district court's restitution order for him to pay \$267.00 to the homeowners for a pair of broken sunglasses and to rekey the locks. He asserts that the district court abused its discretion by failing to reach its decision by an exercise of reason when it failed to adequately consider his current and future inability to pay.

B. Standard Of Review

“The decision regarding whether to order restitution, and in what amount, is within the district court’s discretion,’ guided by factors in Idaho Code section 19-5304(7).” *State v. Hurler*, 158 Idaho 569, 573 (2015) (quoting *State v. Corbus*, 150 Idaho 599, 602 (2011)).

When a trial court’s discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason.

State v. Torrez, 156 Idaho 118, 120 (Ct. App. 2014).

C. The District Court Abused Its Discretion By Failing To Reach Its Decision By An Exercise Of Reason When It Ordered Mr. Adams To Pay Restitution In Light Of His Current And Future Inability To Pay

“Idaho’s restitution statute permits a court to order restitution for ‘any crime which results in an economic loss to the victim.’” *Corbus*, 150 Idaho at 602 (quoting I.C. § 19-5304(2)). “In determining an amount for restitution, a court must consider a defendant’s indigency.” *State v. Cottrell*, 152 Idaho 387, 398 (Ct. App. 2012). “Idaho Code § 19-5304(7) provides that a court “shall consider . . . the financial resources, needs and earning ability of the defendant.” *State v. Olpin*, 140 Idaho 377, 379 (Ct. App. 2004). A defendant’s inability to pay alone does not preclude or limit a restitution award, but it is a factor that the district court must consider when “it makes a discretionary restitution determination.” *Id.* The district court may consider an indigent defendant’s “future ability to pay,” such as, for example, the defendant’s “business

acumen to earn money for restitution upon his eventual release from prison.” *State v. Bybee*, 115 Idaho 541, 543 (Ct. App. 1989).

Here, Mr. Adams contends that the district court failed to adequately consider his inability to pay restitution. The State requested \$267.00 which was for the homeowner “to rekey his home for \$87, and then his wife’s sunglasses were broken, and so they replaced those sunglasses for \$180.” (8/15/16 Tr., p.6, Ls.15-18.) Defense counsel agreed that restitution was appropriate, but asked the district court to exercise its discretion and not order restitution in light of Mr. Adams’ inability to pay due to his lengthy period of incarceration. (8/15/16 Tr., p.4, L.6 – p.6, L.9.) In ordering Mr. Adams to pay restitution, the district court provided: “[T]he Court recognizes that Adams’ current financial resources and earning ability are limited. Adams also suffers from significant mental health issues. At the same time, Adams has a GED and appears to be able-bodied.” (R., p.111.) While the district court did wisely exercise discretion by ordering Mr. Adams to pay restitution only to the homeowners, and not for drug testing, Mr. Adams asserts that the district court erred by giving little weight to his current inability to pay due to his incarceration and by expecting that he could obtain work because he “appears able-bodied.” (R., p.111.) Mr. Adams has neither the present nor future ability to pay \$267.00 in restitution.

As shown by the presentence investigation, Mr. Adams does not have the financial resources or current earning ability to pay restitution. While Mr. Adams completed the 10th grade and obtained his GED, Mr. Adams has severe mental health conditions which cause him problems with holding steady employment. (PSI, pp.15-17.) As a result, Mr. Adams has had several jobs, but only works each job for a maximum of

one month. (PSI, p.16.) In this case, Mr. Adams was sentenced nineteen years, with eight years fixed. He will be incarcerated for at least the next eight years, with no opportunity to pay his restitution. This information demonstrates that Mr. Adams lacks any current or future financial resources to pay restitution.

Further, there is little hope that Mr. Adams will develop the future ability to pay the restitution in full. Unlike the defendant in *Bybee*, who possessed some “business acumen,” Mr. Adams has no such skills. In light of Mr. Adams’ situation, the district court should have exercised its discretion to decline to award restitution.

CONCLUSION

Mr. Adams respectfully requests that this Court remand his case to the district court for a new sentencing hearing. Mr. Adams also requests that this Court vacate the district court’s restitution order.

DATED this 7th day of February, 2017.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of February, 2017, 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:

ZACKERY DOUGLAS ADAMS
INMATE #73334
ISCI
PO BOX 14
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PATRICK H OWEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

NICOLE OWENS
ADA COUNTY PUBLIC DEFENDER
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_____/s/_____
EVAN A. SMITH
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