5-24-2012

State v. Baker Respondent's Brief Dckt. 39181

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39181
	)	
vs.	)	
	)	
CHARLES LEO BAKER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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STATEMENT OF THE CASE

Nature Of The Case

Charles Leo Baker appeals from the district court's judgment of conviction, challenging his concurrent unified sentences.

Statement Of The Facts And Course Of The Proceedings

On February 14, 2010, Baker, a 35-year-old man, attempted to rape a 16-year-old girl, K.S.N. (PSI, p.2.) Earlier that evening, Baker had driven his stepson to a party at a friend's house. (PSI, p.4.) Baker lingered at the party, making-out with some of the high school girls. (Id.) Baker managed to get K.S.N. back to his van, where he pulled her into the van, got on top of her, and pinned her down. (PSI, p.2.) K.S.N.'s skirt was hiked up and her panties removed. (Id.) Baker then proceeded to fondle and grope K.S.N., touching her breasts, inserting his finger into her vagina, and attempting to rape her while she screamed for him to stop. (Id.) Friends at the party, hearing K.S.N.'s cries for help, came to her rescue but found the van locked. (Id.) The stepson opened the van and they found Baker *in flagrante delicto*, thrusting down on K.S.N., attempting to have sex with her. (Id.) The friends, fighting Baker off of K.S.N., managed to pull her to safety. (Id.)

The state charged Baker with sexual battery of a minor, attempted rape, and penetration with a foreign object. (R., pp.42-43.) On the day of trial, Baker entered a plea agreement with prosecutors pursuant to which he pled guilty to Counts I and II of the Information, and the state dismissed Count III. (R., p.65; see also Tr., p.5, Ls.13-18; p.10, L.2 – p.12, L.25.) In giving his plea on the sexual battery charge, Baker disputed the factual basis, stating that he "wasn't sure if [he] did touch her breasts," though he

was "pretty sure the state [could] prove [he] did," and so pled pursuant to Alford.[1] (Tr., p.10, L.13 – p.11, L.21.) The district court entered judgments of conviction on the two charges and sentenced Baker to concurrent unified sentences of ten years with two years fixed. (R., pp.89-91.) Baker filed a timely notice of appeal. (R., pp.93-95.)

[1] North Carolina v. Alford, 400 U.S. 25 (1970).

ISSUES

Baker states the issues on appeal as:

> 1. Whether the district court imposed a vindictive sentence after Mr. Baker exercised his right to enter an *Alford* plea.
>
> 2. Whether the district court abused its discretion when it imposed concurrent unified sentences of ten years, with two years fixed, upon Mr. Baker following his plea of guilty to sexual battery of a minor, who is sixteen or seventeen years old, and attempted rape.

(Appellant's brief, p.4.)

The state rephrases the issues as:

1. Has Baker failed to establish fundamental error entitling him to review for the first time on appeal of his unpreserved claim that the district court imposed a vindictive sentence?

2. Has Baker failed to establish an abuse of the district court's discretion in imposing concurrent unified sentences of ten years with two years fixed upon Baker's convictions for sexual battery of a minor and attempted rape?

ARGUMENT

I.
Baker Has Failed To Establish Fundamental Error Entitling Him To Appellate Review Of His Unpreserved Vindictive Sentence Claim

A. Introduction

Recognizing that no presumption of vindictiveness applies to his sentence, Baker asserts that the district court's concurrent unified sentences of ten years with two years fixed, imposed on Baker's convictions for sexual battery of a minor and attempted rape, were vindictive. (Appellant's brief, pp.5-9.) Baker acknowledges that this argument was not preserved below, and can only be reviewed on appeal if imposition of his sentence constitutes fundamental error. (Appellant's brief, p.5.) Baker has failed to establish fundamental error.

B. Standard Of Review

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

C. The District Court's Sentence Is Not Vindictive

This Court will not review a claim of vindictive sentence brought for the first time on appeal unless the appellant first establishes fundamental error. State v. Grist, Docket No. 37372, 2012 Opinion No. 10 at 6-7 (Ct. App. 2012). Under the standard announced by the Idaho State Supreme Court in Perry, to establish fundamental error,

> the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

Id. at 226, 245 P.3d at 978. Baker has failed to meet this appellate burden.

1. Baker Has Failed To Show A Violation Of An Unwaived Constitutional Right

Baker argues that the district court violated his constitutional right to due process by considering the fact that Baker had entered an Alford plea. (Appellant's brief, pp.6-7.) The statement Baker relies upon to make this argument was made in the context of the district court's observation that Baker had never fully accepted responsibility for his criminal conduct. (See Tr., p.31, L.9 – p.32, L.12.) In North Carolina v. Alford, 400 U.S. 25 (1970), the United States Supreme Court held that declaration of guilt is not constitutionally required for a valid guilty plea. Id. at 37. Contrary to Baker's assertions, however, Alford did not create a constitutional right that would prohibit a district court from considering at sentencing a defendant's continued refusal to accept responsibility for his criminal conduct.

Rather, in State v. Alston, 534 S.E.2d 666 (N.C. App. 2000), the North Carolina Court of Appeals, relying in part on State v. Howry, 127 Idaho 94, 896 P.2d 1002 (Ct. App. 1995), explained in the context of a challenge to a probation revocation proceeding that an Alford plea does not result in *any* special privileges beyond the plea entry hearing:

> [A]n "Alford plea" constitutes "a guilty plea in the same way that a plea of *nolo contendere* or no contest is a guilty plea." State ex rel. Warren v.

Schwarz, 219 Wis.2d 615, 579 N.W.2d 698, 706 (1998); see Alford, 400 U.S. at 37, 91 S.Ct. at 167–68, 27 L.Ed.2d at 171 (no "material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence"); [People v.] Birdsong, 958 P.2d [1124,] 1130 [(Colo. 1998)] ("An Alford plea is to be treated as a guilty plea and a sentence may be imposed accordingly.").

As a consequence, in accepting an "Alford plea" as

> a concession to [a] defendant, [the trial court accords that defendant] no implications or assurances as to future revocation proceedings.

Birdsong, 958 P.2d at 1129. In other words, an "Alford plea" is in no way "infused with any special promises," Warren, 579 N.W.2d at 711, nor does acceptance thereof constitute "a promise that a defendant will never have to admit his guilt," id.

As the Wisconsin Supreme Court stated in Warren:

> [a] defendant's protestations of innocence under an Alford plea extend only to the plea itself.
>
> ....
>
> ... "*There is nothing inherent in the nature of an* Alford *plea that gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction.*"
>
> ... Put simply, an Alford plea is not the saving grace for defendants who wish to maintain their complete innocence. Rather, it is a device that defendants may call upon to avoid the expense, stress and embarrassment of trial and to limit one's exposure to punishment [and it is] not the saving grace for defendants who wish to maintain their complete innocence.

Id. at 707 (citations omitted) (emphasis added); see generally Smith v. Com., 27 Va. App. 357, 499 S.E.2d 11, 13 (1998) (quoting State v. Howry, 127 Idaho 94, 896 P.2d 1002, 1004 (Ct. App. 1995)) ("'[A]lthough an Alford plea allows a defendant to plead guilty amid assertions of innocence, it does not require a court to accept those assertions ... [but the court may] consider all relevant information regarding the crime, including [the] defendant's lack of remorse.'").

Alston, 534 S.E.2d at 669-670.

The principles expressed in Alston show that an Alford plea does not require preferential treatment of a defendant after the plea is entered. Adopting the language of Alston, "[Baker's] protestations of innocence under an Alford plea extend only to the plea itself." Id. (quoting Warren v. Schwarz, 579 N.W.2d 698, 707 (1998)). While Alford allows a defendant to enter a guilty plea without admitting guilt, it does not require a district court at sentencing to ignore the defendant's continued refusal to accept responsibility for his crime. Baker has failed to establish that any of his unwaived constitutional rights were violated.

2. The Alleged Error Is Not Clear On The Record

Baker argues that the district court's statement that "I am [imposing sentence] in consideration of the fact that you entered an Alford plea...." clearly demonstrates a violation of Baker's rights. (Appellant's brief, pp.7-8.) To make this argument, Baker has removed the court's statement from its context. In considering an appropriate sentence for Baker and weighing the relevant sentencing factors, the district court said:

> Rehabilitation, which is the likelihood of being able to rehabilitate the offender such that the offense does not occur again. And that dovetails with the concept of public protection.
>
> The representations in the police reports are pretty graphic, pretty troubling. And I note particularly there is a comment attributed to you which you didn't contest on page 3. It says that he stated he did not know how her panties got off. He stated he just let things get out of hand, described the situation as being, quote, the wrong place, wrong time, wrong puss. That speaks volumes to me about your attitude at the time.
>
> And you have contested the representations on page 13. I understand that. But I think the fact remains that other witnesses heard

> the victim screaming from the van and had to strike you to get you to stop. So I think protection of the public is a strong factor here, as well as rehabilitation.
>
> ...
>
> Having pled guilty, I find you are guilty. Having considered the four Toohill factors, I am going to impose a sentence as follows: I am going to impose two years fixed, eight years indeterminate, for a unified ten-year sentence. And I am doing that in consideration of the fact that you entered an Alford plea, which essentially means you dispute the conduct, but you agree that the state can probably prove most of it.
>
> You did plead guilty. That's accepting responsibility to a degree. I just don't see this as a retained jurisdiction case. I think if you are going to be rehabilitated it is going to take longer than the one-year period....

(Tr., p.31, L.5 – p.32, L.15.)

At sentencing, the district court also had the PSI wherein Baker shifted blame for his crimes to his victim (see PSI, p.4); Dr. Wert's psychosexual evaluation, which noted Baker's minimization of his criminal conduct (PSI, p.38); and Dr. Wolfe's psychosexual evaluation, in which Baker absolutely refused to take responsibility for his criminal conduct, complaining that "they railroaded me—I pled guilty to something I didn't do" (PSI, p.49).

As noted above, a major concern for the district court was Baker's rehabilitative potential in light of his refusal to take responsibility for his actions. (Tr., p.31, Ls.17-22.) Failure to acknowledge guilt may indicate a lack of rehabilitative potential. Grist, 2012 Opinion No. 10 at 12. That the district court imposed a sentence on Baker rather than retain jurisdiction solely in retaliation for Baker's entering an Alford plea, as opposed to Baker's refusal to acknowledge any responsibility for his criminal actions, is anything but clear on the record.

3. Baker Has Failed To Demonstrate Prejudice

Baker asserts as fact that he received "a more excessive sentence because he chose to make an Alford plea," because the district court chose to impose a sentence rather than follow the presentence investigator's recommendation of retaining jurisdiction. (Appellant's brief, pp.8-9.) To meet the fundamental error standard, prejudice must be predicated on error. Perry, 150 Idaho at 226, 245 P.3d at 978. The district court's considering at sentencing Baker's continued refusal to accept responsibility for his criminal actions is not error, as discussed above. The district court's exercising of its discretion to execute the sentence rather than retain jurisdiction is also not error. See I.C. § 19-2601(4); State v. Hernandez, 122 Idaho 227, 230, 832 P.2d 1162, 1166 (Ct. App. 1992). Because there is no error, there can be no prejudice predicated upon error.

Even assuming, *arguendo*, that the district court erred by considering Baker's Alford plea during sentencing, the evidence that Baker refused to take any responsibility for his crime, the very nature of that crime, and Baker's low likelihood of rehabilitation anytime in the near future, all support the court's ultimate sentencing decision. (See Argument, part II.) Even assuming error, Baker has still failed to show any prejudice.

Baker has failed to establish fundamental error in the district court's considering at sentencing his continued refusal to accept responsibility for his criminal conduct. The judgment of the district court should be affirmed.

II.

Baker Has Failed To Establish An Abuse Of The District Court's Sentencing Discretion

A. Introduction

Upon Baker's convictions for sexual battery of a minor and attempted rape, the district court imposed concurrent unified sentences of ten years with two years fixed. (R., pp.89-91.) On appeal, Baker argues that the district court abused its sentencing discretion by not retaining jurisdiction, in light of allegedly mitigating factors. (Appellant's brief, pp.9-17.) Baker has failed to establish an abuse of the district court's sentencing discretion.

B. Standard Of Review

"Sentencing decisions are reviewed for an abuse of discretion." State v. Moore, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)). "Whether to retain jurisdiction is a question left to the court's discretion." State v. Hernandez, 122 Idaho 227, 230, 832 P.2d 1162, 1166 (Ct. App. 1992) (citing I.C. § 19-2601(4); State v. Toohill, 103 Idaho 565, 567, 650 P.2d 707, 709 (Ct. App. 1982)).

C. The District Court's Sentence Is Not Excessive

Where a sentence is within statutory limits, an appellant is required to establish that the sentence 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)). To carry this burden, the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is

necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." Toohill, 103 Idaho at 568, 650 P.2d at 710. Though courts review the whole sentence on appeal, the presumption is that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). In deference to the trial judge, the Court will not substitute its view of a reasonable sentence where reasonable minds might differ. Toohill, 103 Idaho at 568, 650 P.2d at 710. "When a court has sufficient information at the time of sentencing to deny probation, its refusal to retain jurisdiction for further evaluation is not an abuse of discretion." Hernandez, 122 Idaho at 230, 832 P.2d at 1166 (citing State v. Beebe, 113 Idaho 977, 979, 751 P.2d 673, 675 (Ct. App. 1988)).

The nature of Baker's criminal conduct supports the sentence imposed by the district court. Baker drove his stepson to a party at a friend's house. (PSI, p.4.) Baker lingered at the party, making-out with high school girls. (Id.) Baker managed to get one of the girls back to his van, where he pulled her into the van, got on top of her, and pinned her down. (PSI, p.2.) The girl's skirt was hiked up and her panties removed. (Id.) Baker then proceeded to fondle and grope the girl, touching her breasts, inserting his finger into her vagina, and attempting to rape her while the girl screamed for him to stop. (Id.) Friends at the party, hearing the girl's cries for help, came to her rescue but found the van locked. (Id.) The stepson opened the van and they found Baker *in flagrante delicto*, thrusting down on the girl, attempting to have sex with her. (Id.) The friends, fighting Baker off of the girl, managed to pull her to safety. (Id.)

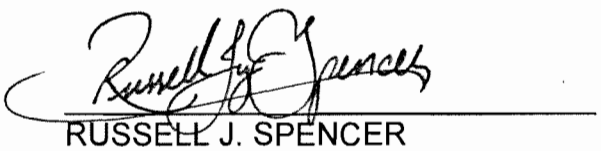
Baker's refusal to take responsibility for his criminal conduct also supports the district court's sentence. In the PSI, Baker shifted blame for his crimes to his victim. (PSI, p.4.). In his first psychosexual evaluation he minimized his criminal conduct. (See PSI, p.38). In his second psychosexual evaluation he outright refused to take responsibility for his criminal conduct, complaining that "they railroaded me—I pled guilty to something I didn't do." (PSI, p.49.) A major concern for the district court at sentencing was Baker's lack of rehabilitative potential in light of this refusal to take responsibility for his actions. (Tr., p.31, L.5 – p.32, L.15.) Failure to acknowledge guilt may indicate a lack of rehabilitative potential. State v. Grist, Docket No. 37372, 2012 Opinion No. 10 at 12 (Ct. App. 2012). Because Baker lacked rehabilitative potential, he was not a good candidate for probation. Because Baker was not a good candidate for probation, the district court cannot be said to have abused its discretion by electing to impose sentence rather than retain jurisdiction. Hernandez, 122 Idaho at 230, 832 P.2d at 1166.

Baker has failed to establish an abuse of the district court's sentencing discretion. The judgment of the district court should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm Baker's convictions and sentences.

DATED this 24th day of May, 2012.



RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of May, 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm