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State v. Savell Appellant's Brief Dckt. 44541

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NOS. 44541 & 44579
Plaintiff-Respondent,	)	
	)	KOOTENAI COUNTY NOS. CR 2016-6233
v.	)	& CR 2016-12936
	)	
JUSTIN TYLER SAVELL,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Justin Tyler Savell pled guilty to two counts of grand theft. He received an aggregate unified sentence of ten years, with five years fixed. On appeal, he contends that this sentence represents an abuse of the district court's discretion, as it is excessive given any view of the facts. He further contends that the district court abused its discretion in failing to reduce his sentences in light of the additional information submitted in conjunction with his Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motions.

Statement of the Facts & Course of Proceedings

Supreme Court Docket No. 44541 (Kootenai County district court case number 2016-6233 (*hereinafter*, the trailer case)) and Supreme Court Docket No. 44579 (Kootenai County district court case number 2016-12936 (*hereinafter*, the ATV case)) have been consolidated for appellate purposes.

In the trailer case, in the afternoon of March 14, 2016, the owner of a concrete company called the police and reported a covered trailer containing multiple tools had been taken from a job site. (R.44541, p.8.) The trailer was recovered when a recent purchaser of the trailer tried to register it at the Department of Motor Vehicles. (R.44541, p.10.) Justin Savell was identified by the recent purchaser as the person who sold the trailer to him for $1,800. (R.44541, p.10.) The trailer contained numerous "concrete finishing tools" that Mr. Savell told the purchaser he could keep. (R.44541, p.10.) When police officers made contact with Mr. Savell, he told them a person named Brandon Dana had contacted him wanting to trade Mr. Savell the trailer as payoff for an undisclosed debt. (R.44541, p.10.) Upon further investigation, police learned that there was such a person employed at the concrete company who would have known the code for the keypad/lockbox on the tongue lock which prevented theft of the trailer. (R.44541, pp.8, 10.) When Mr. Dana was contacted by the police, he began to cry but denied taking the trailer and denied knowing Mr. Savell. (R.44541, pp.10-11.)

Based on these facts, Mr. Savell was charged by Information with one count of grand theft by possessing stolen property, one count of grand theft, and a persistent violator sentencing enhancement. (R.44541, pp.36-38.)

In the ATV case, the morning of May 8, 2015, a 2005 Yamaha four-wheeler (*hereinafter*, ATV) was reported stolen. (R.44579, p.8.) Three months later, when a man tried to get a signed

bill of sale from the ATV's true owner, the police became involved. (R.44579, p.10.) The man said he had acquired the ATV from Justin Savell, but he had been unable to title or register it without a signed-over bill of sale. (R.44579, p.10.) Mr. Savell was a former employee of the ATV's true owner. (R.44579, pp.11-12.) Two months later, the investigation resumed, but a complaint was not filed against Mr. Savell until June of 2017—over a year after the theft was reported. (R.44579, pp.12, 29.) Mr. Savell was charged by Information in the ATV case with one count of grand theft with a persistent violator sentencing enhancement. (R.44579, pp.55-57.)

Pursuant to a plea agreement encompassing both cases, as well as his probation violation in Kootenai County case number 2015-4522, Mr. Savell pled guilty to two counts grand theft.[1] (08/17/16 Tr., p.5, Ls.5-11; p.17, L.3 – p.18, L.25; R.44541, p.58; R.44579, p.60.) In exchange, the State agreed to file Amended Informations removing the grand theft of $1,800 in the trailer case and the persistent violator enhancements in both cases, and agreed to recommend a sentence of no more than ten years for the two grand thefts. (08/17/16 Tr., p.6, L.23 – p.9, L.10.) The State also agreed to recommend concurrent sentences. (08/17/16 Tr., p.9, Ls.11-18.)

At sentencing, the prosecutor recommended ten years, with four years fixed. (09/08/16 Tr., p.6, Ls.20-25.) Defense counsel recommended concurrent sentences, with the court retaining jurisdiction.[2] (09/08/16 Tr., p.11, Ls.4-7.)

Mr. Savell was sentenced to ten years, with five years fixed, for the grand theft in the trailer case and ten years, with five years fixed, for the grand theft in the ATV case. (09/08/16

[1] The document entitled Amended Pretrial Settlement Offer does appear to set forth some of the terms of the plea agreement put on the record on August 17, 2016; however, there are several critical inconsistencies, including that the offer had expired prior to Mr. Savell's signature and that the box indicating whether the plea agreement was accepted or rejected was not marked. (R., p.58.)

[2] In the probation violation case, the district court retained jurisdiction over Mr. Savell. (09/08/16 Tr., p.5, Ls.23-25; p.7, Ls.1-12.)

Tr., p.14, Ls.15-20; R.44541, pp.63-65; R.44579, pp.65-67.) The district court ordered the sentences to be served concurrently and concurrent with his other Kootenai County case.[3] (09/08/16 Tr., p.14, Ls.15-20; R.44541, pp.63-65; R.44579, pp.65-67.)

On December 14, 2016, Mr. Savell filed a Motion for Reconsideration of Sentence Pursuant to I.C.R. 35 in each of his cases. (Augmentation, pp.1-2.) Despite the fact that Mr. Savell provided new and additional information in support of his Rule 35 motions, the district court denied the motions after a hearing. (Augmentation, pp.6-7; 01/13/17 Tr., p.21, Ls.14-19.)[4] On September 21, 2016, Mr. Savell filed notices of appeal in each of his two cases. (R.44541, pp.68-71, 88-91; R.44579, pp. 68-71.)

Mr. Savell contends on appeal that the district court abused its discretion by imposing excessive sentences, and in failing to reduce his sentences pursuant to his Rule 35 motions.

ISSUES

1. Did the district court abuse its discretion when it imposed an aggregate unified sentence of ten years, with five years fixed, upon Mr. Savell following his plea of guilty to two counts of grand theft?

2. Did the district court abuse its discretion when it denied Mr. Savell's Idaho Criminal Rule 35 Motions for Reconsideration of Sentences?

[3] Mr. Savell, at the time he committed these offenses, was on probation in Kootenai County case number 2015-4522 for grand theft and misuse of public funds. He admitted to violating his probation by being charged with these two offenses. In that case, Mr. Savell was initially placed on a rider, but upon learning that his sentences were executed in these cases, the district court in that case relinquished jurisdiction. (Idaho Supreme Court Data Repository.)

[4] On March 8, 2017, the Idaho Supreme Court granted Mr. Savell's Motion to Augment the Record with the motion and the hearing minutes in which the district court heard new or additional information as to why it should reduce Mr. Savell's sentences in both cases. (Augmentation, pp.1-5.)

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Ten Years, With Five Years Fixed, Upon Mr. Savell Following His Plea Of Guilty To Two Counts Of Grand Theft

Mr. Savell asserts that, given any view of the facts, his unified sentences of ten years, with five years fixed, 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. Savell does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Savell must show that in light of the governing criteria, the sentences were 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 the mitigating factors present in this case, Mr. Savell's sentences are excessive considering any view of the facts.

Mr. Savell was only twenty-three years old when he committed the instant offenses. (Presentence Investigation Report (*hereinafter*, PSI),[5] pp.9.) In addition to his young age, Mr. Savell did not have any prior felony convictions before the string of theft offenses he committed in 2014 and early 2015.[6] (PSI, p.21.) Prior to these charges, Mr. Savell had nothing more significant than a misdemeanor providing false information to law enforcement conviction on his record. (PSI, pp.12, 21.)

The Idaho Supreme Court has "recognized that the first offender should be accorded more lenient treatment than the habitual criminal." *State v. Hoskins*, 131 Idaho 670, 673 (Ct. App. 1998) (*quoting State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227 (1971)); *see also State v. Nice*, 103 Idaho 89, 91 (1982).

Further, Mr. Savell is not in good health, he has stomach cancer for which he sees a doctor once a week for chemotherapy shots. (PSI, pp.16, 60-61.) *See State v. James*, 112 Idaho 239, 243-44 (Ct. App. 1986) (holding that "rehabilitation and health problems are factors to consider in determining the reasonableness of a sentence.")

Finally, 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). For example, in *State v. Alberts*, 121 Idaho 204 (Ct. App. 1991), the Idaho Court of Appeals noted that some leniency is required when the defendant has expressed "remorse for his conduct, his recognition of his

[5] The PSI prepared for Kootenai County case number 2015-4522 was used for sentencing in all three of Mr. Savell's cases. (08/17/16 Tr., p.20, Ls.8-23.) The designation "PSI" shall refer to the electronic file containing the presentence investigation and all attachments therein, including the substance abuse evaluation, police reports, and mental health evaluation.

[6] Mr. Savell was convicted in Spokane, Washington, of nine counts of trafficking in stolen property relating to the Kootenai County case in which he took a trailer full of aluminum and apparently sold 17 crates of aluminum. (PSI, pp.12, 20-21.)

problem, his willingness to accept treatment and other positive attributes of his character." *Id.* at 209.

Here, Mr. Savell accepted responsibility for his acts. (8/17/16 Tr., p.18, Ls.2-25.) He expressed his regret for what he had done and admitted that his actions were the result of greed. (PSI, p.11.) Mr. Savell said that he felt "horrible" and "want[s] to make it right." (PSI, pp.11, 18.) Mr. Savell regrets his criminal thinking, and wants to "[d]o what [he] was raised to do and that's to work for everything." (PSI, p.18.) At sentencing, Mr. Savell said, "I would just like to let everyone know, my victims and the families, employees, and the Court that I'm truly sorry for what happened. I do apologize to everyone, and I am trying to change the way I am." (09/08/16 Tr., p.11, Ls.12-16.)

In light of these mitigating factors, the district court abused its discretion in sentencing Mr. Savell.

II.

The District Court Abused Its Discretion When It Denied Mr. Savell's Rule 35 Motions For Sentence Reductions In Light Of The New Information Mr. Savell Offered, Including His Positive Activities While Incarcerated, And The Court's Misunderstanding Of The Timeframe In Which These Crimes Were Committed

Although Mr. Savell contends that his sentence is excessive in light of the information in front of the district court at the time of his September 8, 2016 sentencing hearing (*see* Part I, *supra*), he asserts that the excessiveness of his sentence is even more apparent in light of the new information submitted in conjunction with Mr. Savell's Rule 35 motions. Mr. Savell asserts that the district court's denial of his motions for sentence modifications represents an abuse of discretion in that the court failed to reach its decision by an exercise of reason.

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.*

In support of his motions for a sentence reduction, Mr. Savell told the district court of new or additional information since his sentencing hearing. Since his sentencing, Mr. Savell has used his time in prison to better himself. He has voluntarily completed recovery classes, and is attending religious services and AA meetings. (01/13/17 Tr., p.8, Ls.15-18; p.11, L.25 – p.12, L.12.) Mr. Savell has acknowledged that the classes and counseling are helping him work on his flaws and to understand the effects of his actions. (01/13/17 Tr., p.8, L.15 – p.9, L.23; p.12, Ls.4-12.)

At sentencing, the district court emphasized the importance of the timeline for his crimes—noting that the trailer and ATV theft occurred while Mr. Savell was on probation in the 2015 theft case (09/08/16 Tr., p.13, L.13 – p.14, L.1). The district court said, "You were in front of Judge Mitchell a year ago in his case. He put you on probation. He gave you that shot, and you turned around and picked up new charges that dealt with stolen property, and, you know, picked up serious new charges." (09/08/16 Tr., p.13, Ls.13-17.) However, at the Rule 35 hearing, Mr. Savell was able to clarify for the court that all of these crimes occurred at the same time—the older case in which Mr. Savell took the trailer full of aluminum and then sold it occurred in 2014-15, but he was not arrested for it until 2015, around the same time he was

arrested for the trailer and ATV thefts. (01/13/17 Tr., p.18, L.22 – p.19, L.9.) As defense counsel explained to the district court, "this is like a series of continuing crimes, Your Honor. It's like a crime spree." (01/13/17 Tr., p.19, Ls.14-16.) Thus, the district court that sentenced Mr. Savell did not realize that the actual incidents all took place in 2014 or 2015 and, in fact, Mr. Savell had not been arrested for the theft of the aluminum trailer until after he committed the trailer and ATV thefts at issue here.[7] In fact, the district court told Mr. Savell at sentencing, "So you've got a lifestyle of dealing with stolen property." (09/08/16 Tr., p.12, Ls.6-7.)

At the Rule 35 hearing, Mr. Savell was also able to shed additional light on his substance abuse issues—in the original sentencing hearing, the court found aggravating that he did not have a substance abuse issue when committing the multiple theft crimes (09/08/16 Tr., p.12, Ls.14-24). However, at the Rule 35 hearing, Mr. Savell's counsel clarified that he did have a substance abuse problem for which he was accepting responsibility—he had misrepresented his substance abuse issues at sentencing and to the PSI investigator such that it was inaccurately reported that he had no substance abuse problems. (PSI, pp.17, 21; 01/13/17 Tr., p.19, L.16 – p.20, L.11.)

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

[7] The district court judge who sentenced Mr. Savell in these cases was not the same district court judge who heard the Rule 35 motions.

ruled that ingestion of drugs and alcohol resulting in impaired capacity to appreciate criminality of conduct, could be a mitigating circumstance. *State v. Osborn*, 102 Idaho 405, 414 (1981).

Although not determinative when deciding on an appropriate punishment, rehabilitation is an important factor, which should be considered by the district court. *See James*, 112 Idaho at 243-44. Perhaps this is because a defendant's rehabilitation will have such a strong impact on other objectives of criminal punishment. Through rehabilitation of the offender, the individual is deterred and society is protected from further bad acts. Here, Mr. Savell was relatively young at the time of his crimes and had not yet had the benefit of programming to address his criminal thinking patterns. (09/08/16 Tr., p.8, L.23 – p.9, L.11; 01/13/17 Tr., p.7, Ls.10-15.)

Based on the foregoing, in addition to the mitigating evidence before the district court at the time of sentencing, it is clear that the district court abused its discretion in failing to reduce Mr. Savell's sentences in response to his Rule 35 motions.

CONCLUSION

Mr. Savell respectfully requests that this Court reduce his aggregate sentence to four years fixed and six years indeterminate, or as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing. Alternatively, he requests that the order denying his Rule 35 motions be vacated and the case remanded to the district court for further proceedings.

DATED this 7th day of June, 2017.

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

CERTIFICATE OF MAILING

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

JUSTIN TYLER SAVELL
INMATE #116542
ICIO
381 W HOSPITAL DRIVE
OROFINO ID 83544

CYNTHIA KC MEYER
DISTRICT COURT JUDGE
E-MAILED BRIEF

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_____/s/_____
EVAN A. SMITH
Administrative Assistant

SJC/eas