

8-1-2017

## State v. Blair Respondent's Brief Dckt. 44637

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/not\\_reported](https://digitalcommons.law.uidaho.edu/not_reported)

---

### Recommended Citation

"State v. Blair Respondent's Brief Dckt. 44637" (2017). *Not Reported*. 3697.  
[https://digitalcommons.law.uidaho.edu/not\\_reported/3697](https://digitalcommons.law.uidaho.edu/not_reported/3697)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

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

LORI A. FLEMING  
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,	)	
	)	NO. 44637
Plaintiff-Respondent,	)	
	)	Ada County Case No.
v.	)	CR-FE-2016-1990
	)	
BLAINE LEE BLAIR,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Blair failed to establish that the district court abused its discretion by imposing concurrent unified sentences of 20 years, with five years fixed, upon his guilty pleas to two counts of sexual exploitation of a child, with a persistent violator enhancement?

Blair Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Blair pled guilty to two counts of sexual exploitation of a child, with a persistent violator enhancement, and the district court imposed concurrent unified sentences of 20

years, with five years fixed. (R., pp.45, 68-72; 7/19/16 Tr., p.26, Ls.4-7.) Blair filed a notice of appeal timely from the judgment of conviction. (R., pp.73-75.)

Blair asserts his sentences are excessive in light of his “unique life situation (including his intellectual deficits and mental illness), the circumstances under which his pedophilia was apparently cultivated, and the relative non-egregiousness of the present offense.” (Appellant’s brief, pp.6-8 (parenthetical notation original).) The record supports the sentences imposed.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed 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 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). “In deference to the trial judge, this

Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, “[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The penalty for sexual exploitation of a child, with a persistent violator enhancement, is not less than five years, up to life in prison. I.C. §§ 18-1507(3), 19-2514. The district court imposed concurrent unified sentences of 20 years, with five years fixed, which fall well within the statutory guidelines. (R., pp.68-72.)

On appeal, Blair—who was 54 years old at the time of sentencing—contends his sentences are excessive because he became a pedophile after being abused as a child and because, although he “will likely always be” a pedophile, possessing child pornography is less serious than his numerous prior sex offenses against children that involved physical contact. (Appellant’s brief, p.7; PSI, pp.3-6, 379.<sup>1</sup>) However, the instant offenses are egregious in their own right, particularly because Blair admitted that he had been viewing child pornography for the past *six years* and he “downloaded a considerable amount of child pornography of both genders, generally in the pre-pubertal developmental stage,” and because the offenses represent a continuation of Blair’s lifelong pattern of sexually victimizing children. (PSI, pp.41, 384.) Blair stated that “he has sexually offended over 100 children. This includes crimes such as exposing himself

---

<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file “Blair 44637 psi.pdf.”

to children at the park, touching children's genitals when they are at the park, performing oral sex on the genitals of female children and having sexual intercourse with children." (PSI, p.41.) Furthermore, Blair previously "failed in the SANE treatment program," repeatedly violated probation and parole – often by committing new sex crimes, and eventually topped out his prison sentences. (PSI, pp.3-6, 389.) The psychosexual evaluator reported that Blair "is in the high end of the **'High'** likelihood to commit a sexual offense in the future" and "is not amenable for outpatient sex offender treatment as he cannot be safely managed in an outpatient setting." (PSI, pp.379-80 (emphasis original).)

Blair's "unique life situation," the supposed reason he became a pedophile, and that his most recent sexual offenses are "less egregious than having physical contact with a child" do not reduce the extreme risk Blair poses to society, nor do these factors preclude his continued sexual offending against children. (Appellant's brief, pp.7-8.) The district court acknowledged Blair's "intellectual and memory issues" and that the instant offenses did not involve physical contact, but explained that it had "very serious concerns...particularly given the ongoing pattern and the results of the [psychosexual] evaluation," and that the "huge issue here" is the risk Blair presents to the community. (10/11/16 Tr., p.48, Ls.3-9, 20-21; p.49, Ls.14-20.)

At sentencing, the state articulated in greater detail Blair's "significantly concerning history" of sexually offending against children, failure to abide by the terms of community supervision, high risk to sexually reoffend, and failure to rehabilitate or be deterred. (10/11/16 Tr., p.32, L.23–p.41, L.15.) The state submits that Blair has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the

sentencing hearing transcript, which the state adopts as its argument on appeal.  
(Appendix A.)

Conclusion

The state respectfully requests this Court to affirm Blair's convictions and sentences.

DATED this 1st day of August, 2017.

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of August, 2017, served a true and correct copy of the attached RESPONDENTS BRIEF by emailing an electronic copy to:

ERIK R. LEHTINEN  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

## APPENDIX A

30	31
<p>1 defendant was arrested on a complaint filed  2 February 16th, 2016. An amended complaint was  3 filed on February 29th, and on that date the  4 defendant waived preliminary hearing, was bound  5 over to district court.</p> <p>6 The information filed on March 1st  7 charged the defendant with one -- excuse me --  8 charged the defendant with two counts of sexual  9 exploitation of a child. Each count is a felony.</p> <p>10 On July 19th, the defendant -- the State  11 filed an Information Part II charging the defendant  12 with being a persistent violator of the law. On  13 that same date, the defendant appeared before the  14 Court, tendered a guilty plea to all counts  15 pursuant to a non-binding plea agreement, the  16 material provisions of which were the State agreed  17 to recommend a sentence of no more than ten years  18 fixed on Count I, no more than two -- five years  19 fixed on Count II, with an indeterminate portion as  20 to each count left open for argument at the time of  21 sentencing. The State is requesting that the fixed  22 portions be served consecutively. And the State  23 further agreed that it would refrain from filing  24 persistent sexual offender charges against the  25 defendant.</p>	<p>1 After inquiry, the -- all other matters  2 were left open for argument at the time of  3 sentencing, and the defendant is free to ask for a  4 lesser sentence.</p> <p>5 After inquiry, the Court accepted the  6 plea and set the matter for sentencing on today's  7 date following preparation of a presentence report  8 as well as a psychosexual evaluation.</p> <p>9 There was some issue with the  10 psychosexual evaluation with Dr. Engle's office  11 reporting that the defendant did not return or fill  12 out the written portion -- defendant, through  13 counsel -- saying that he had done so, and that  14 they must have been lost.</p> <p>15 After inquiry of the Court, the Court  16 requested the report to be completed with the  17 information available, and I now have that report  18 from Dr. Engle which does not contain the typical  19 psychological testing but did include, from the  20 content of the report, an extensive interview by --  21 with Dr. Engle as well as the previous reports  22 contained in previous presentence reports.</p> <p>23 I have received and reviewed that  24 material. I further note that no GAIN evaluation  25 was done -- excuse me -- was completed, and</p>
32	33
<p>1 apparently, due to memory issues involving the  2 defendant, his inability to properly relate to the  3 evaluator the chronological events or historical  4 events. At least that was the reason given by the  5 GAIN evaluator. But I have received and read those  6 materials.</p> <p>7 Have the parties received them?  8 MS. SLAVEN: Yes, Your Honor.  9 MR. FUISTING: Yes.  10 THE COURT: Mr. Blair, have you had a chance  11 to review the presentence report?  12 THE DEFENDANT: Yes, I have.  13 THE COURT: Are there corrections or  14 additions?  15 MS. SLAVEN: Not from the State.  16 MR. FUISTING: No.  17 THE COURT: Does either side intend to  18 present testimony?  19 MS. SLAVEN: Just argument.  20 MR. FUISTING: Just argument.  21 THE COURT: Comments of counsel.  22 Ms. Slaven?  23 MS. SLAVEN: Thank you, Your Honor.  24 Your Honor, the defendant comes before  25 the Court on his third conviction for a felony sex</p>	<p>1 offense. The PSI certainly details a significantly  2 concerning criminal history dating back to the '70s  3 that involves this defendant offending against  4 numerous, numerous children in our community. And  5 there is no other conclusion from this material but  6 that the defendant is a sexual predator who needs  7 to be incarcerated for a significant period of time  8 in order for the Court to protect the children in  9 our community.</p> <p>10 He was convicted, first as juvenile, in  11 the '70's for molesting a child and it appears  12 spent some time incarcerated in the Department of  13 Juvenile Corrections in the State of Michigan.  14 That was his first sex offense.</p> <p>15 Then he came to Idaho, Your Honor, and  16 in the '80s is when he committed the two felony sex  17 offenses that he ended up serving prison for. The  18 first sexual offense that he committed is detailed  19 in the police reports the State provided, as well  20 as the PSI materials from those cases. It  21 indicates that, at the time he offended in the  22 '80s, he was living with a family. He victimized  23 their six-year-old daughter. He estimates it was  24 approximately 20 to 30 times. He also indicates  25 that he molested that little girl's friend</p>

34

1 approximately ten times. And, then, she ultimately  
2 disclosed and he was charged with a crime.  
3 He was given the benefit of a withheld  
4 judgment on that crime by Judge Bail back in the  
5 '80s. And, then, it was only three months after  
6 that that he re-offended by molesting yet more  
7 children. He, at this point in time, ran into some  
8 old friends who had young daughters. He freely  
9 acknowledges to molesting the eight-year-old  
10 daughter and also acknowledges molesting two  
11 friends of those girls, as well, by putting his  
12 hands in all of their pants. And that ended up  
13 getting disclosed when one of the girls was in  
14 counseling.  
15 And so he was -- his probation was  
16 violated. He was brought back to court on new  
17 criminal charges. And at that point in time, he  
18 was sentenced to a concurrent rider on both of  
19 those cases.  
20 He got back from the rider. And the  
21 rider report indicates, Your Honor, that he was  
22 classified to be high risk to re-offend at that  
23 time. And there was a significant amount of  
24 discussion on those PSI materials about his  
25 fantasies involving young children and his overall

36

1 He, again, began re-offending when he  
2 got out of prison. He was convicted twice in 2000  
3 for indecent exposure. Again, from what I can  
4 tell, that involved exposing himself to children.  
5 He violated his no-contact order with  
6 all minor children two times, in 2000 and 2001.  
7 You have those police reports. They are extremely  
8 concerning. It indicates that he was spending  
9 quite a bit of time at various parks in the area.  
10 And, actually, there is some concerning information  
11 there that he -- actually, a witness saw him  
12 appearing to molest a child in Ann Morrison Park.  
13 It sounds like they were never actually able to  
14 track down that child. And so he was never charged  
15 for that, but it was written up as a sexual  
16 battery. And there is information in those reports  
17 that he was using money to entice a little girl to  
18 sit next to him on the bench, doing all these  
19 things while he had a no-contact order with all  
20 minor children.  
21 When he -- when he was investigated for  
22 those no-contact order violations, again, he  
23 reaffirmed to the detectives in that case that he  
24 had fantasies about little girls. He refers to  
25 them as, quote, uncontrollable urges, and he

35

1 obsession with female children who are  
2 prepubescent.  
3 He, also, in those materials admitted to  
4 fantasizing about young girls and, again, admitted  
5 that he had also taken down his pants and exposed  
6 his penis to young girls approximately ten times.  
7 He returned from the period of retained  
8 jurisdiction, and it indicates they fashioned some  
9 sort of supervision where he would be closely  
10 monitored. But, then, it didn't take long for him  
11 to re-offend again after the rider. He was  
12 convicted of obscene conduct. From what I can  
13 tell, again, that involved him exposing himself to  
14 a child.  
15 He ultimately ended up going to prison  
16 on both of those cases and topping out his  
17 sentence. I believe he was in prison until 1998  
18 and served approximately ten to 13 years in prison.  
19 The PSI materials indicated that he was  
20 re-offending while out in the community while he  
21 was actively enrolled in the SANE Solutions program  
22 or in counseling -- one-on-one counseling. And so,  
23 apparently, the treatment that he was receiving in  
24 the community didn't do anything to stop him from  
25 re-offending.

37

1 admitted to fantasizing about the little girl that  
2 he was watching in a park and later going home and  
3 masturbating thinking about that little girl.  
4 In 2003, Your Honor, there is, again, a  
5 police report. I don't believe charges were filed,  
6 but there is a police report that you have in the  
7 record about him, again, having unauthorized  
8 contact with children in his apartment. At that  
9 point in time, his roommate told law enforcement  
10 that he was concerned because the way in which this  
11 defendant watched little girls on TV led this  
12 roommate to believe that he had not at all been  
13 rehabilitated.  
14 Again, you have a report from 2008; it's  
15 written up as a disorderly conduct. I don't  
16 believe charges were filed as a result of that  
17 either. But that indicated that he was watching a  
18 little girl in her yard. Her mom became concerned  
19 and called the police.  
20 The detective details in graphic detail  
21 about the conversation he had with the defendant in  
22 2008. He indicates the defendant almost got  
23 excited when talking about his sexual attraction to  
24 children. At that time, he says that he is --  
25 prefers children under the age of 10. He admitted

<p style="text-align: center;">38</p> <p>1 to watching children, fantasizing about them, and,  2 at times, admitted to masturbating while watching  3 kids.</p> <p>4       Then, Your Honor, he has this crime  5 wherein he went to the mobile store because his  6 phone wasn't working. And the people at the store  7 uncovered photographs and images of nude children  8 on the phone, also searches that indicated he was  9 searching for nude children. And the defendant was  10 later interviewed where he acknowledged that he's  11 been looking -- looking a child pornography for the  12 last six years. It has increased in frequency  13 lately because he previously lived in a group home  14 and indicated he didn't have as much privacy in the  15 group home. But when he moved out and started  16 living by himself, that's when the viewing of child  17 pornography increased in frequency.</p> <p>18       Again, he said that he did this because  19 he still has these sexual fantasies of kids. He  20 had a lot of stress related to the fact that he was  21 sexually attracted to children, and that's why he  22 was viewing child pornography.</p> <p>23       And, again, he says similar statements  24 to Detective Brady, that he's attracted to kids  25 under the age of ten. He tells Detective Brady</p>	<p style="text-align: center;">39</p> <p>1 that he believes he sexually offended over 100  2 kids. It's not really clear what his definition of  3 sexual offending means, but we certainly have it  4 well-documented in here about the victims we do  5 know about. But it sounds like there are other  6 victims that we don't know about.</p> <p>7       And, of course, Your Honor, all of this  8 material leads Dr. Engle to the conclusion that  9 this defendant is at the high end of high risk to  10 re-offend and that he cannot safely be treated in  11 the community. He admitted to Dr. Engle that he's  12 been sexually attracted to children most of his  13 life, which, again, is consistent with the history  14 before the Court.</p> <p>15       Dr. Engle read him the definition of  16 what a pedophile is. The defendant agrees that he  17 does, indeed, meet that definition. Dr. Engle asks  18 him, on a scale of one to ten, how likely he is to  19 molest a child in our community. He says a five or  20 a six.</p> <p>21       I will note that he was also diagnosed  22 as a pedophile back when he was going through the  23 system in the '80s and had those sex offenses.  24       He has little to no support in the  25 community. It appears that all of his family</p>
<p style="text-align: center;">40</p> <p>1 members are deceased or live in other areas. He  2 was able to come up with the name of one friend  3 who, I believe, talked to the PSI investigator.  4 But other than that, he has no support in the  5 community.</p> <p>6       He has no stable work history. He's  7 been receiving disability as a result of his  8 cognitive functioning. But I say that because it  9 appears that he doesn't have much of anything to  10 keep him busy in the community besides engaging in  11 these very concerning activities that he's been  12 engaging in in this community.</p> <p>13       Based on all of that, Your Honor, it is  14 very clear that this defendant is basically a  15 ticking time bomb. There is some -- some mention  16 in here that he had a period where he wasn't  17 committing crimes, but I will note that -- I would  18 say that we know of or that he was convicted for.  19 He acknowledges to viewing child pornography for  20 six years. And so that would obviously bleed into  21 this period of time where he wants to maintain that  22 he wasn't violating the law or didn't have any  23 criminal convictions.</p> <p>24       But from the State's standpoint, it's  25 only a matter of time before another child in this</p>	<p style="text-align: center;">41</p> <p>1 community is victimized.</p> <p>2       So for that reason, Your Honor, I'm  3 asking you to follow the State's recommendations  4 and impose a significant period of incarceration.  5 On Count I, we are asking for ten years fixed with  6 a life indeterminate. He did plead to the  7 Information Part II allowing the State to request  8 up to a life sentence. And I think that's  9 certainly appropriate in this case. Ten to life.</p> <p>10       On Count II, we are asking that you  11 impose five years fixed with life indeterminate and  12 run that consecutively to Count I for a total of 15  13 to life. If this defendant does make his way back  14 out into the community, he does need to be  15 supervised for the rest of his life.</p> <p>16       And, Your Honor, we are also asking, of  17 course, for a no-contact order with all minor  18 children in the community with no exceptions.</p> <p>19       I also have an order to forfeit the  20 electronic devices that he had as part of this  21 investigation. That has been, I believe, filed  22 electronically, but I don't know if that's made it  23 to your queue yet. But I did file that  24 electronically. And I will hand up the no-contact  25 order here momentarily.</p>