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State v. Dailey-Schmidt Respondent's Brief Dckt. 44669

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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|------------------------------|---|------------------|
| STATE OF IDAHO, |) | |
| |) | No. 44669 |
| Plaintiff-Respondent, |) | |
| |) | Ada Co. Case No. |
| vs. |) | CR-2015-12950 |
| |) | |
| ANTHONY REED DAILEY-SCHMIDT, |) | |
| |) | |
| Defendant-Appellant. |) | |
| |) | |

BRIEF OF RESPONDENT

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

**HONORABLE MICHAEL REARDON
District Judge**

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STATEMENT OF THE CASE

Nature Of The Case

Anthony Reed Dailey-Schmidt appeals from his judgment of conviction for aggravated battery, a deadly weapon enhancement, and a persistent violator enhancement. He claims, for the first time on appeal, that the district court erroneously imposed a separate, concurrent sentence for the deadly weapon enhancement. He also challenges the aggravated battery sentence imposed by the district court as excessive.

Statement Of The Facts And Course Of The Proceedings

Dailey-Schmidt attacked Tyson Hoelzle, cutting his throat with a knife. (PSI, pp. 4-5.) The state filed an information charging Dailey-Schmidt with “I. AGGRAVATED BATTERY, FELONY, I.C. §18-903(a), 907(a)(b) and II. USE OF A DEADLY WEAPON IN THE COMMISSION OF A CRIME, FELONY, 19-2520.” (R., pp. 103-04.) The state also filed an information part II, alleging a persistent violator enhancement. (R., pp. 142-43.)

The case proceeded to trial. (R., pp. 186-208.) At the conclusion of the trial, the jury returned verdicts finding Dailey-Schmidt guilty of aggravated battery (R., p. 209) and guilty of use of a deadly weapon in the commission of a crime (R., p. 210). Dailey-Schmidt thereafter pled guilty to the persistent violator enhancement. (R., p. 207; Tr., p. 911, L. 21 – p. 920, L. 14.)

At sentencing, the district court pronounced “an aggregate term of 35 years in custody with the Department of Correction, the first 20 years will be fixed, the final 15 years will be indeterminate.” (Tr., p. 978, Ls. 14-22.) In the judgment the district court

entered concurrent sentences of 35 years with 20 years determinate on both the aggravated battery and the deadly weapon enhancement. (R., pp. 239-41.)

Dailey-Schmidt filed a notice of appeal within 42 days of the entry of judgment. (R., pp. 239, 245.)

ISSUES

Dailey-Schmidt states the issues on appeal as:

- I. Did the district court abuse its discretion by imposing a sentence for use of a deadly weapon during the commission of a crime?
2. Did the district court abuse its discretion by imposing an excessive sentence for aggravated battery?

(Appellant's brief, p. 3.)

The state rephrases the issues as:

1. Should Dailey-Schmidt's claim of error in imposing separate sentences for the enhancement and the underlying felony be rejected because it is not properly presented or preserved?
2. Has Dailey-Schmidt failed to show an abuse of sentencing discretion?

ARGUMENT

I.

Dailey-Schmidt's Claim Of Error In Imposing Separate Sentences For The Enhancement And The Underlying Felony Is Not Properly Presented Or Preserved

A. Introduction

In this case the state charged the deadly weapon enhancement separately from the underlying crime of aggravated battery, as required by the statute. I.C. § 19-2520.¹ The district court's oral pronouncement of sentence "impose[d] an aggregate term of 35 years in custody with the Department of Correction, the first 20 years will be fixed, the final 15 years will be indeterminate." (Tr., p. 978, Ls. 14-22.) The written judgment provided:

IT IS ADJUDGED that the Defendant is sentenced pursuant to Idaho Code § 19-2513 to the custody of the Idaho State Board of Correction, to be held and incarcerated by said Board in a suitable place for a period of time as follows:

COUNT I: For a minimum fixed and determinate period of confinement of twenty (20) years; with the fixed minimum period followed by an indeterminate period of custody of up to fifteen (15) years, for a total term not to exceed thirty-five (35) years, as enhanced by the Information Part II, to run concurrently with Count II.

COUNT II: For a minimum fixed and determinate period of confinement of twenty (20) years; with the fixed minimum period followed by an indeterminate period of custody of up to fifteen (15) years, for a total term not to exceed thirty-five (35) years, as enhanced by the Information Part II, to run concurrently with Count I.

(R., p. 240.) Dailey-Schmidt did not object to the oral pronouncement of sentence nor did he file any motion to correct the judgment. (See generally Tr.; R.)

¹ Dailey-Schmidt acknowledges that the enhancement was charged separately from the underlying offense as required by statute, but "submits that it should have been labeled as an enhancement, not a charge." (Appellant's brief, p. 5 n.1.) He did not object to the charging language below, however, nor does he claim any error in the charge on appeal.

For the first time on appeal, Dailey-Schmidt contends the district court “abused its discretion by imposing a separate sentence for the enhancement.” (Appellant’s brief, p. 4.) Application of the relevant legal standards, however, shows that Dailey-Schmidt has not presented a viable appellate claim, first because he has failed to support it with any relevant legal citation and, second, because application of the correct legal authority shows that Dailey-Schmidt must challenge the judgment in the district court prior to raising the claim of error on appeal.

B. Dailey-Schmidt’s Argument Is Not Supported By Legal Authority

“A party waives an issue on appeal if either authority or argument are lacking.” State v. Freitas, 157 Idaho 257, 267, 335 P.3d 597, 607 (Ct. App. 2014) (citing State v. Zichko, 129 Idaho 257, 263, 923 P.2d 966, 970 (1996)). On appeal Dailey-Schmidt cites I.C. §§ 18-903(a), 907(a [sic 1])(b) (the statutes defining aggravated battery), I.C. § 19-2520 (the deadly weapon enhancement), and State v. Ehrlick, 158 Idaho 900, 907, 354 P.3d 462, 469 (2015) (the three-part abuse of discretion standard, in that case applied to review of evidentiary rulings). (Appellant’s brief, pp. 4-6.) He cites no authority supporting his argument that the question he presents is reviewed for an abuse of discretion, that the requested remedy of a new sentencing hearing is proper, or that what the district court did was even objectionable. Because Dailey-Schmidt has cited no relevant authority for his claim that the district court erred, that issue is not properly before the Court.

C. Dailey-Schmidt's Claim Was Not Preserved By Objection Below And Is Not Reviewable For The First Time On Appeal

Whether a court erred by imposing a separate sentence for an enhancement is a question of law. Lopez v. State, 108 Idaho 394, 395, 700 P.2d 16, 17 (1985); see also State v. Schall, 157 Idaho 488, 492, 337 P.3d 647, 651 (2014) (whether a statute provides an enhancement or a separate offense is a matter of statutory interpretation and thus presents a question of law subject to free review”). Whether a court has legally applied a sentencing enhancement is an attack on the legality of the sentence that may be brought under Rule 35. State v. Burnight, 132 Idaho 654, 658–59, 978 P.2d 214, 218–19 (1999). A claim of an illegal sentence must be pursued in the first instance through a Rule 35 motion to the district court and may not be presented for the first time on appeal. State v. Martin, 119 Idaho 577, 579, 808 P.2d 1322, 1324 (1991) (“We will not address on appeal a challenge to the legality of a sentence where the trial court was not given an opportunity to consider the issue.”). Although the state concedes that it is error to impose a sentence on an enhancement separate from the underlying felony, Burnight, 132 Idaho at 658–59, 978 P.2d at 218–19 (“enhancements are not considered to be a new offense for which there is a separate sentence. Rather, the enhancement is an additional term and is part of a single sentence for the underlying crime”), such is an issue that must be addressed to the district court prior to making a claim of error on appeal.

Alternatively, the separate sentences set forth in the written judgment may be treated as a mere clerical error. Because clerical errors are not fundamental, they may not be raised for the first time on appeal. State v. Kenner, 121 Idaho 594, 597, 826 P.2d 1306, 1309 (1991). “Under Idaho law, the only legally cognizable sentence in a criminal case is the actual oral pronouncement in the presence of the defendant. The legal sentence

consists of the words pronounced in open court by the judge, not the words appearing in the written order of commitment.” State v. Allen, 144 Idaho 875, 877–78, 172 P.3d 1150, 1152–53 (Ct. App. 2007) (internal quotations omitted). “If an order of commitment does not accurately represent the court’s oral sentence pronouncement that constitutes the judgment, it is manifestly proper to correct the error under Rule 36 so the written expression is consistent with that judgment.” State v. Wallace, 116 Idaho 930, 932, 782 P.2d 53, 55 (Ct. App. 1989).

At sentencing the district court pronounced “an aggregate term of 35 years in custody with the Department of Correction, the first 20 years will be fixed, the final 15 years will be indeterminate.” (Tr., p. 978, Ls. 14-22.) Although the phrase “aggregate term” may be ambiguous, it is singular and appears to impose a single sentence. If the oral pronouncement is of a single sentence, the separate sentences set forth in the written judgment should properly be treated as a clerical error—an error that is not fundamental and cannot be addressed for the first time on appeal.

Finally, where, as here, concurrent sentences are provided for both the underlying crime and the enhancement the remedy is to “modify the judgment” to recite that the defendant has been found guilty of both the underlying crime and the enhancement and to provide a single sentence on the substantive offense. State v. Blevins, 108 Idaho 239, 244, 697 P.2d 1253, 1258 (Ct. App. 1985). This remedy also suggests that the issue raised is not related to the district court’s discretion but the legality of its sentence, and therefore should be raised first to the district court. In any event, Dailey-Schmidt is not entitled to his requested relief of a new sentencing hearing. (Appellant’s brief, p. 6.)

Dailey-Schmidt's appellate claim of sentencing error for imposing separate sentences for the enhancement and the underlying felony is neither properly presented nor is it preserved. It is not properly presented because it is unsupported by citation to relevant authority. It is not preserved because it is a claim that must be presented first to the district court. The claim should thus be rejected, without prejudice to it being raised before the district court by appropriate motion.

II.

Dailey-Schmidt Has Failed To Show An Abuse Of Sentencing Discretion

A. Introduction

Dailey-Schmidt was convicted of aggravated battery with use of a deadly weapon and persistent violator enhancements. (R., pp. 207, 209-10; Tr., p. 911, L. 21 – p. 920, L. 14). The district court imposed “an aggregate term of 35 years in custody with the Department of Correction, the first 20 years will be fixed, the final 15 years will be indeterminate.” (Tr., p. 978, Ls. 14-22.) Dailey-Schmidt “contends the district court should have sentenced him to a lesser term of imprisonment in light of the mitigating factors, including his family support and his recognition that he had made mistakes throughout his life.” (Appellant's brief, p. 7.) Dailey-Schmidt's argument that the district court should have given more weight to family support and expressions of remorse does not withstand scrutiny.

B. Standard Of Review

“Sentencing decisions are reviewed for an abuse of discretion.” State v. Anderson, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)).

C. Dailey-Schmidt Has Shown No Abuse Of Sentencing Discretion

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, Dailey-Schmidt must show that his sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable if appropriate to achieve the primary objective of protecting society, and any or all of the related sentencing goals of deterrence, rehabilitation, or retribution. State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978). The Court reviews the whole sentence on appeal and presumes 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. State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

The district court determined that the aggravated battery with a deadly weapon crime Dailey-Schmidt committed was “very clearly a malicious, premeditated, vicious and nearly lethal attack on [the victim’s] life.” (Tr., p. 978, Ls. 4-8.) This crime was consistent with Dailey-Schmidt being a “multiple offender or a professional criminal” with a “tend[ency] to hurt people, break their property, [and] steal their property.” (Tr., p. 977, L. 12 – p. 978, L. 8.) The district court found, based on Dailey-Schmidt’s criminal record, “an undue risk that [he] will commit another crime if placed on probation.” (Tr., p. 975, Ls. 16-25.) Dailey-Schmidt’s record, including his ongoing criminal and gang activity in jail after being arrested for the aggravated battery in this

case, left the district court “not sure” that rehabilitation was “a realistic objective of any sentence.” (Tr., p. 976, Ls. 1-11.) The district court “consider[ed] strongly” the “factor of whether a lesser sentence would depreciate the seriousness of [Dailey-Schmidt’s] crime.” (Tr., p. 976, Ls. 12-17.) The district court also found that Dailey-Schmidt’s involvement with gang activity and recruitment made general deterrence weightier than it would otherwise have been. (Tr., p. 976, L. 18 – p. 977, L. 11.) Finally, the district court concluded Dailey-Schmidt had presented himself, through his criminal and gang actions, as “someone that society has a right to be afraid of.” (Tr., p. 978, Ls. 9-13.) The district court structured the sentence to give the state some degree of control over Dailey-Schmidt until his tendency toward violence and criminal activity may have “dissipated.” (Tr., p. 978, Ls. 14-22.)

On appeal Dailey-Schmidt does not dispute that the district court properly found a strong need to protect society or that he did not have a realistic chance at rehabilitation. (Appellant’s brief.) He instead restates his argument and allocution to the district court. (Appellant’s brief, pp. 7-9 (citing Tr., p. 957, L. 9 – p. 974, L. 10).) Dailey-Schmidt’s belief the district court should have found his sentencing argument and allocution more persuasive does not carry his burden of showing an abuse of discretion.

CONCLUSION

The state respectfully requests this Court to affirm the judgment and sentence for the grounds stated above.

DATED this 28th day of August, 2017.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of August, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JUSTIN M. CURTIS
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/vr