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State v. Hart Appellant's Brief Dckt. 44709

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NOS. 44709 & 44712
Plaintiff-Respondent,	)	
	)	KOOTENAI COUNTY NO. CR 2015-19290
v.	)	& BOUNDARY COUNTY NO. CR 2016-122
	)	
DENVER JOHN HART,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Denver John Hart pleaded guilty to felony lewd conduct, and he pleaded guilty to felony murder in the second degree in another case. In each case, the district court imposed a unified sentence of life imprisonment, with ten years fixed, to be served consecutively. Mr. Hart filed an Idaho Criminal Rule 35 (Rule 35) motion for a reduction of sentence in each case, and the district court denied the Rule 35 motions. In this consolidated appeal, Mr. Hart asserts the district court abused its discretion when it imposed his sentences, and when it denied his Rule 35 motions.

Statement of the Facts & Course of Proceedings

In Kootenai County No. CR 2015-19290 (*hereinafter*, the Kootenai County case), the State charged Mr. Hart by Information with one count of lewd conduct with a minor, felony, I.C. § 18-1508, one count of rape, felony, I.C. § 18-6101(1), and a persistent violator sentencing enhancement under I.C. § 19-2514. (No. 44709 R., pp.67-69.) The lewd conduct count stemmed from genital to genital contact Mr. Hart allegedly had with A.B. when she was thirteen to fifteen years old, while the rape count stemmed from Mr. Hart allegedly penetrating the vaginal opening of A.B. with his penis. (*See* No. 44709 R., pp.67-68.) During the presentence investigation, Mr. Hart indicated he had been dating A.B.'s mother when he developed a relationship with A.B. (No. 44712 Presentence Report (*hereinafter*, PSI), p.8.)[1] Mr. Hart reported he began having sexual intercourse with A.B. when she was fourteen years old.[2] (PSI, p.8.) He stated he eventually moved into A.B.'s bedroom.[3] (PSI, p.8.)

In Boundary County No. CR 2016-122 (*hereinafter*, the Boundary County case), the State charged Mr. Hart by Information with one count of murder in the second degree, felony, I.C. §§ 18-4001, 18-4002, and 18-4003. (No. 44712 R., pp.92-93.)[4] The charge stemmed from Mr. Hart allegedly shooting Michael David Rocha with a black powder rifle, resulting in Mr. Rocha's death. (No. 44712 R., pp.92-93.) Mr. Rocha had reported to the Boundary County Sheriff's Dispatch that Mr. Hart, his stepson, had threatened to shoot him. (PSI, p.3.) After law enforcement officers were unable to make further contact with or locate Mr. Rocha, an

[1] All citations to the PSI refer to the 147-page PDF version of the presentence report filed in the Boundary County case, No. 44712, and its attachments.
[2] An officer report attached to the PSI indicated A.B. had autism. (*See* PSI, p.63.)
[3] The officer report also indicated living conditions in the residence were squalid. (*See* PSI, pp.63-64.)
[4] All citations to the record in the Boundary County case refer to the 159-page PDF version of the Clerk's Record on Appeal.

investigation into his whereabouts led officers to conclude that Mr. Hart had shot and killed Mr. Rocha, before burning his body. (*See* PSI, p.3.) When questioned about the incident, Mr. Hart stated he had been angry with Mr. Rocha, but shot him by accident. (PSI, p.3.)

After mediation in the Boundary County case, Mr. Hart agreed to plead guilty to murder in the second degree. (*See* No. 44712 R., pp.94-108.) Under the plea agreement in the Boundary County case, the State agreed to limit its sentencing recommendation to a unified sentence of twenty years, with ten years fixed, to be served consecutively to the sentence imposed in the Kootenai County case. (*See* No. 44712 R., p.108.) The defense would be free to argue for a lesser sentence. (*See* No. 44712 R., p.108.) The district court accepted Mr. Hart's guilty plea in the Boundary County case. (No. 44712 R., p.95.)

Mr. Hart subsequently agreed to plead guilty to amended charges of one count of lewd conduct in the Kootenai County case. (*See* No. 44709 R., pp.80-95.) Under the plea agreement in the Kootenai County case, the State agreed to dismiss the rape count and persistent violator sentencing enhancement. (*See* No. 44709 R., p.86.) The State's sentencing recommendation would be open, but concurrent with the sentence imposed in the Boundary County case. (*See* No. 44709 R., p.86.) The district court accepted Mr. Hart's guilty plea in the Kootenai County case. (No. 44709 R., p.82.)

At the joint sentencing hearing for both cases,[5] the State notified the district court that Mr. Hart had testified against another defendant in an unrelated case, and that Mr. Hart had admitted to being responsible for the death of his infant child in 2000 in Oregon. (*See* Tr. Nov. 21, 2016, p.7, L.11 – p.9, L.9.) In the Boundary County case, the State recommended the district court impose a unified sentence of twenty years, with ten years fixed. (Tr. Nov. 21,

2016, p.15, Ls.14-18.) Mr. Hart recommended the district court impose a unified sentence of fourteen years, with six years fixed, to run concurrently with the sentence imposed in the Kootenai County case. (Tr. Nov. 21, 2016, p.24, Ls.10-20.)

In the Kootenai County case, the State recommended the district court impose a fixed life sentence. (Tr. Nov. 21, 2016, p.34, Ls.3-18.) Mr. Hart recommended the district court impose a unified sentence of twenty years, with ten years fixed, to run concurrently with the sentence imposed in the Boundary County case. (Tr. Nov. 21, 2016, p.36, Ls.5-21.)

In the Boundary County case, the district court imposed a unified sentence of life imprisonment, with ten years fixed. (No. 44712 R., pp.138-41.) In the Kootenai County case, the district court imposed a unified sentence of life imprisonment, with ten years fixed. (No. 44709 R., pp.104-07.) The sentences were to be served consecutively. (*See* No. 44709 R., p.105; No. 44712 R., p.139.)

In each case, Mr. Hart filed a Notice of Appeal timely from the district court's Felony Judgment (Sentence Imposed). (No. 44709 R., pp.108-11; No. 44712 R., pp.142-44.)

Mr. Hart also filed, in each case, an Idaho Criminal Rule 35 (Rule 35) motion for a reduction of sentence. (No. 44709 R., pp.117-18; Boundary County No. CR 2016-122, Rule 35 Motion, Mar. 3, 2017.) At the hearing on the Rule 35 motions, Mr. Hart requested that the district court reduce his sentences in both cases to unified sentences of twenty years, with ten years fixed, to run concurrently with each other. (Tr. Apr. 20, 2017, p.9, L.14 – p.10, L.7.) The district court denied the Rule 35 motions. (Kootenai County No. CR 2015-19290, Order

[5] At the sentencing hearing, Mr. Hart had different counsel for each case. (*See* Tr. Nov. 21, 2016, p.2, L.23 – p.3, L.6.)

Denying Defendant's Rule 35 Motion, Apr. 28, 2017; Boundary County No. CR 2016-122, Order Denying Defendant's Rule 35 Motion, Apr. 24, 2017.)[6]

The Idaho Supreme Court granted Mr. Hart's motion to consolidate the appeals in both cases. (Order Granting Motion to Consolidate, May 26, 2017.)

ISSUES

I. Did the district court abuse its discretion when it imposed consecutive unified sentences of life imprisonment, each with ten years fixed, upon Mr. Hart following his pleas of guilty to murder in the second degree and lewd conduct?

II. Did the district court abuse its discretion when it denied Mr. Hart's Idaho Criminal Rule 35 motions for a reduction of sentence?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed Consecutive Unified Sentences Of Life Imprisonment, Each With Ten Years Fixed, Upon Mr. Hart Following His Pleas Of Guilty To Murder In The Second Degree And Lewd Conduct

Mr. Hart asserts the district court abused its discretion when it imposed his consecutive unified sentences of life imprisonment, each with ten years fixed, because his sentences are excessive considering any view of the facts. The district court should have followed Mr. Hart's recommendations and imposed a unified sentence of fourteen years, with six years fixed, in the Boundary County case, and a unified sentence of twenty years, with ten years fixed, in the Kootenai County case, to be served concurrently with each other.

[6] The Rule 35 motion in the Boundary County case, transcript of the Rule 35 motions hearing on April 20, 2017, and the orders denying the Rule 35 motions in both cases, were some of the subjects of Mr. Hart's motion to augment the record, which the Idaho Supreme Court granted. (Order Granting Motion to Augment and Suspend the Briefing Schedule, June 7, 2017.)

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 "due regard to the nature of the offense, the character of the offender, and the protection of the public interest." *State v. Strand*, 137 Idaho 457, 460 (2002).

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) (internal quotation marks omitted). Mr. Hart does not assert that his sentences exceed the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Hart 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.* An appellate court, "[w]hen reviewing the length of a sentence . . . consider[s] the defendant's entire sentence." *State v. Oliver*, 144 Idaho 722, 726 (2007). The reviewing court will "presume that the fixed portion of the sentence will be the defendant's probable term of confinement." *Id.*

Mr. Hart asserts his sentences are excessive considering any view of the facts, because the district court did not adequately consider mitigating factors. Specifically, the district court did not adequately consider Mr. Hart's mental health issues. A district court must consider evidence of a defendant's mental condition offered at the time of sentencing. *See* I.C. § 19-2523(1). During the presentence investigation, Mr. Hart described his mental health as "poor." (PSI, p.13.) Mr. Hart stated he had been diagnosed with ADHD in 1991, and currently suffered

from PTSD and severe depression. (PSI, p.13.) He also stated he had attempted suicide, and considered suicide daily. (PSI, p.13.)

Philip A. Hanger, Ph.D., conducted a mental health evaluation of Mr. Hart pursuant to I.C. § 19-2524. (PSI, pp.137-47.) Dr. Hanger reported Mr. Hart had an overall IQ score of 79, "which is considered within the *Borderline* impaired range of abilities." (PSI., p.144.) Dr. Hanger also diagnosed Mr. Hart with "Persistent Depressive Disorder (Dysthymia)." (PSI., p.146.) However, Dr. Hanger stated Mr. Hart "was exaggerating his level of distress and may have been fabricating some of his symptoms," and did not consider Mr. Hart to have a psychotic disorder, PTSD, or a specific personality disorder. (*See* PSI., pp.145-46.) Nonetheless, Dr. Hanger observed, "Mr. Hart's chronic depressive condition may be considered to have a mild, yet pervasive impact on his daily functioning." (PSI., p.146.)

Mr. Hart claimed he had last attempted suicide about nine months before Dr. Hanger's examination, by slitting his wrists. (*See* PSI, p.142.) Dr. Hanger stated that Mr. Hart's "suicidal expressions and gestures are considered to be the product of his poor planning and an inappropriate attempt to gain attention for his needs." (PSI, p.146.) But Dr. Hanger also wrote that Mr. Hart "may be considered to be at a heightened risk for self-harm, as his intent to gain attention appear[s] to exceed his awareness of the dangers he may expose himself to through his suicide-like actions." (PSI., p.146.) Dr. Hanger reported, "Mr. Hart continues to express suicidal ideation, and while this is considered an attention-seeking mechanism, his actions should be considered to represent a valid risk requiring continued monitoring of his mood state and expression of suicidal ideation." (PSI., p.147.)

Mr. Hart is now ready to treat his mental health issues. At the sentencing hearing, Mr. Hart's counsel for the Kootenai County case explained Mr. Hart "was off his medication

when this happened. Now, through the jail doctor he's on six different medications including two antidepressants." (Tr. Nov. 21, 2016, p.20, Ls.14-17.) Mr. Hart's Idaho Standard Mental Health Assessment stated Mr. Hart "seems ready to engage in treatment" and "appears ready to develop a treatment plan," but he also admitted "he struggles with following treatment recommendations." (PSI, p.35.) Dr. Hanger wrote that, because Mr. Hart's "mood disorder limits his psychological wherewithal to persevere in the face of constant life stressors, such as may be encountered by an individual in extended incarceration. . . . it may be considered that he will require continue[d] mental health intervention to support him in his adaptive deficiency, including medication management and counseling." (PSI, p.146.) Dr. Hanger also stated, "continued monitoring of his mood state and suicidal ideation is warranted, to minimize his experience of distress and reduce his risk of self-harm." (PSI, p.146.)

The district court also did not adequately consider Mr. Hart's problems with substance abuse. The Idaho Supreme Court has recognized substance abuse as a mitigating factor in cases where it found a sentence to be excessive. *See, e.g.*, *State v. Nice*, 103 Idaho 89, 91 (1982). At the sentencing hearing, Mr. Hart's counsel for the Kootenai County case told the district court that Dr. Harper's "report indicates that Denver is a person who's trying to get treatment. He'll go to the doctor, he'll try to get medications, he'll try to get some help for himself." (Tr. Nov. 21, 2016, p.37, Ls.14-17.) Counsel also stated, "[U]nfortunately, throughout Denver's life, he's helped himself with drugs from the streets too. And that doesn't help, that doesn't let the proper medications be the most effective that they can be for him." (Tr. Nov. 21, 2016, p.37, Ls.18-22.)

Mr. Hart's GAIN-I Recommendation and Referral Summary (G-RRS) stated Mr. Hart self-reported symptoms sufficient to meet criteria for alcohol dependence, amphetamine

dependence, cannabis dependence, and opioid dependence, all with physiological symptoms. (PSI, pp.22-23.) Mr. Hart reported starting amphetamine and opioid use at age sixteen, alcohol use at age fourteen, and cannabis use when he was only two years old. (PSI, pp.22-23.) Dr. Harper's report stated Mr. Hart "admitted to having previous suicidal attempts and recurrent periods of suicidal ideation over the past 6 years, with at least one hospitalization following an overdose on prescription medication and alcohol." (PSI, p.142.)

Mr. Hart tied his substance abuse to his criminal record, including the offense in the Boundary County case. The presentence report indicated Mr. Hart had been convicted of three misdemeanors and seven felonies before the instant offenses. (*See* PSI, pp.4-8.) The presentence report stated, "[a]ccording to the Defendant, his crimes are directly related to his upbringing and being surrounded by drug use, alcohol abuse and criminal activity." (PSI, p.8.) Mr. Hart further reported, "he had been drinking, smoking marijuana, methamphetamine and crack, when he accidentally shot his stepfather while pushing him out the door of a residence." (PSI, p.4.)

Mr. Hart is also now ready to address his problems with substance abuse. The G-RRS stated, "Mr. Hart's responses indicate high motivation for treatment, which suggests that motivational problems are of low clinical significance for treatment planning, and no/minimal barriers/peer resistance to treatment." (PSI, p.26.) Additionally, "Mr. Hart reported that he has quit using substances and is about 100% ready to remain abstinent." (PSI, p.26.)

Further, the district court did not give adequate consideration to Mr. Hart's own history of being a victim of abuse. In the presentence questionnaire, Mr. Hart wrote he had been sexually abused by his uncle. (PSI, p.9.) He reported he was physically and sexually abused as a child. (PSI, p.9.) In his clinical interview with Dr. Hanger, Mr. Hart attributed his PTSD

symptoms "to the allegedly abusive treatment he received at the hands of his father. He indicated that he was primarily raised by his father, who he characterized as 'pretty violent with (the defendant) and with other people.'" (PSI, p.142.) Mr. Hart also noted he would have recurrent, distressing thoughts related to his physically and emotionally abusive upbringing. (*See* PSI, pp.142-43.) He stated his uncle sexually abused him when he was seven years old, in several episodes over the course of a couple of years. (PSI, p.143.)

Additionally, the district court did not adequately consider Mr. Hart's remorse and acceptance of responsibility. At the sentencing hearing, Mr. Hart told the district court, "I know all this is wrong. I know what I did is wrong." (Tr. Nov. 21, 2016, p.40, Ls.13-14.) Mr. Hart stated, "I apologize to the victim of the Kootenai County case. I know she's gone through problems over all of this and she's been taken away from her mother, she's been put through counseling and all that other stuff. I deeply apologize to her and I apologize to her family and her mother." (Tr. Nov. 21, 2016, p.40, Ls.15-20.) Mr. Hart also stated, "[t]he Boundary County case, that was my dad. He was my only dad even though he's my step-dad. I didn't want to kill him. I didn't do it on purpose. I wouldn't kill anybody on purpose." (Tr. Nov. 21, 2016, p.41, Ls.1-4.) Mr. Hart felt "really bad and truly sorry about everything." (Tr. Nov. 21, 2016, p.41, Ls.5-6.)

Mr. Hart's counsel for the Boundary County case informed the district court that Mr. Hart had written "a letter to law enforcement saying he knew all of the details of Mr. Rocha's death and essentially turned himself in." (Tr. Nov. 21, 2016, p.16, L.24 – p.17, L.2.) Counsel also outlined how Mr. Hart had testified for the State in another case, "knowing that could put him at risk," and had voluntarily offered information about what had happened to his infant daughter in Oregon. (*See* Tr. Nov. 21, 2016, p.19, Ls.10-16.) Mr. Hart's counsel explained that Mr. Hart

"has been very much wanting to clear his conscience." (Tr. Nov. 21, 2016, p.19, Ls.17-18.) Mr. Hart's actions to clear his conscience told counsel "that even though this was terrible, that he is someone who wants to do the right thing, that deep down inside he is [cap]able of rehabilitation." (Tr. Nov. 21, 2016, p.20, L.23 – p.21, L.3.)

Because the district court did not adequately consider the above mitigating factors, the sentences imposed by the district court are excessive considering any view of the facts. Thus, Mr. Hart asserts the district court abused its discretion when it imposed his sentences.

II.

The District Court Abused Its Discretion When It Denied Mr. Hart's Idaho Criminal Rule 35 Motions For A Reduction Of Sentence

Mr. Hart asserts that the district court abused its discretion when it denied his Idaho Criminal Rule 35 motions for a reduction of sentence. "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) (citation omitted). "The denial of a motion for modification of a sentence will not be disturbed absent a showing that the court abused its discretion." *Id.* "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.*

Mr. Hart asserts his sentences are excessive in view of the new and additional information presented with the Rule 35 motions. Mr. Hart presented new and additional

information on his mental health issues. During the Rule 35 motions hearing, Mr. Hart testified that he had been diagnosed with PTSD and depression with suicidal ideation, at the prisons in Boise and Orofino. (*See* Tr. Apr. 20, 2017, p.10, Ls.8-18.) He further testified, "[t]hey have me on medications for the PTSD and the depression, and I have been doing groups and therapy sessions." (Tr. Apr. 20, 2017, p.10, Ls.19-23.)

Mr. Hart also presented new information on where he had been placed in custody. He testified he had been transferred from Boise to Orofino, because other inmates had been violent towards him in Boise on account of his lewd conduct conviction. (*See* Tr. Apr. 20, 2017, p.11, Ls.6-9.) Mr. Hart testified he had not been violent to other inmates. (Tr. Apr. 20, 2017, p.11, Ls.10-11.) In Orofino, Mr. Hart was housed in a dormitory setting, and was getting along okay with the other inmates. (Tr. Apr. 20, 2017, p.11, Ls.13-21.)

Additionally, Mr. Hart presented new information on the educational opportunities he had been pursuing while incarcerated in prison. The presentence report stated that Mr. Hart's last formal education was in the sixth grade, and he obtained his GED in 1991. (PSI, p.11.) At the Rule 35 motions hearing, Mr. Hart testified, "I'm currently enrolled in the Microsoft classes, MOS for certification. And I am studying arithmetic, getting arithmetic advanced." (Tr. Apr. 20, 2017, p.11, L.24 – p.12, L.1.) He also testified he was in a mood management class. (Tr. Apr. 20, 2017, p.12, Ls.12-14.)

When asked if he was in any sex offender treatment classes, Mr. Hart replied, "they won't let me take any until I'm two years short on one sentence or the other." (Tr. Apr. 20, 2017, p.12, Ls.7-11.) He testified that if his sentences were changed, he would be closer in time to get to take the sex offender treatment classes. (*See* Tr. Apr. 20, 2017, p.12, Ls.15-21.) Mr. Hart testified he wanted to take sex offender classes "to find out what's happening, where

my head was at, and to make things better for myself and to apply what I'm supposed to do." (Tr. Apr. 20, 2017, p.12, L.22 – p.13, L.2.)

Mr. Hart's sentences are excessive in view of the above new and additional information presented with the Rule 35 motions. Thus, the district court abused its discretion when it denied his Rule 35 motions for a reduction of sentence.

CONCLUSION

For the above reasons, Mr. Hart respectfully requests that this Court reduce his sentences as it deems appropriate.

DATED this 7th day of September, 2017.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

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

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BARBARA A BUCHANAN
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_____/s/_____
EVAN A. SMITH
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BPM/eas