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State v. Bosse Appellant's Brief Dckt. 44773

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44773
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR-FE-2016-5327
v.)	
)	
MICHAEL EARL BOSSE,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Michael Bosse pled guilty to one count of lewd conduct. He received a unified sentence of thirty years, with twelve years fixed. Mr. Bosse contends that his sentence is excessive in light of the mitigating factors that exist in his case.

Statement of the Facts & Course of Proceedings

Thirteen years ago, during a period in his life where he was drinking heavily, Michael Bosse had sexual contact with an 11 year old female, S.L., who was living in his house at the time because her mother was in a dating relationship with Mr. Bosse. (Presentencing

Investigation Report (*hereinafter*, PSI),¹ pp.10-11.) Mr. Bosse was charged by indictment with four counts of lewd conduct in 2016, after digital images depicting child pornography were found in a storage shed in Montana which had allegedly been rented to Mr. Bosse. (R., pp.10-12; PSI, pp.2-7.)

Pursuant to a plea agreement, Mr. Bosse pled guilty to one count of lewd conduct and the remaining counts were dismissed. (R., pp.52-55; Tr., p.6, L.20 – p.7, L.23, p.18, Ls.11-13.) Pursuant to the terms of the plea agreement, the State agreed to argue for no more than twelve years determinate and eighteen years indeterminate, but the defense was free to argue for whatever sentence it felt was appropriate at sentencing. (R., pp.51-59; Tr., p.7, Ls.1-12.)

At sentencing, the prosecutor recommended a unified sentence of thirty years, with a fixed term of twelve years. (Tr., p.34, Ls.20-21, p.37, Ls.6-8.) Mr. Bosse’s counsel asked the district court to sentence Mr. Bosse to fifteen years, with four years fixed, and retain jurisdiction. (Tr., p.42, L.23 – p.43, L.3.) The district court imposed a sentence of thirty years, with twelve years fixed. (R., pp.67-70; Tr., p.49, Ls.12-16.) A Judgment of Conviction was entered on January 6, 2017. (R., pp.67-70.) Mr. Bosse filed a timely Notice of Appeal on January 17, 2017.² (R., pp.71-73, 75-79.)

¹ The designation “PSI” shall refer to the electronic file containing the Presentence Investigation Report and all attachments including the substance abuse evaluation, psychosexual evaluation, and letters of support for Mr. Bosse written by family and friends.

² Mr. Bosse also filed a motion for leniency under I.C.R. 35. (Augmentation, pp.1-3.) On appeal, Mr. Bosse does not challenge the denial of his Rule 35 motion, as there was no new information presented in conjunction with his Rule 35 motion. (Augmentation, pp.1-3.) The Idaho Supreme Court has held that “[w]hen presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion. *State v. Huffman*, 144 Idaho 201, 203 (2007). “An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information. *Id.*

ISSUE

Did the district court abuse its discretion when it imposed a unified sentence of thirty years, with twelve years fixed, upon Mr. Bosse following his plea of guilty to one count of lewd conduct?

ARGUMENT

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Thirty Years, With Twelve Years Fixed, Upon Mr. Bosse Following His Plea Of Guilty To One Count Of Lewd Conduct

Mr. Bosse asserts that, given any view of the facts, his unified sentence of thirty years, with twelve years fixed, is 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. Bosse does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Bosse must show that in light of the governing criteria, the sentence is 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. Bosse’s sentence was excessive. At age 57, Mr. Bosse has no prior convictions for conduct of a sexual nature. (PSI, pp.11-12.) In fact, Mr. Bosse had only been convicted of two misdemeanor traffic violations in the 1990’s.

(Tr., p.38, Ls.10-12; PSI, pp.11-12.) 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).

Another important matter that should have received the attention of the district court is that Mr. Bosse has the support of his family. *See State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who had the support of his family and employer in his rehabilitation efforts); *see also State v. Carrasco*, 114 Idaho 348, 354-55 (Ct. App. 1988) (reducing sentence of first-time offender who had a family depending upon him for support and who accepted responsibility for the offense at issue), *overruled on other grounds*, 117 Idaho 295 (1990). Mr. Bosse maintains a good relationship with his family. (PSI, pp.14-15.) His sister even wrote a letter to the court to show her support for Mr. Bosse. (Tr., p.29, Ls.18-20; PSI, pp.441-442.) Unfortunately, Mr. Bosse has had to cope with the death of several close family members. His first wife died of cancer in 2004. (PSI, p.15.) His mother, with whom he was very close, died in 2007. (PSI, p.14.)

Mr. Bosse was an engineer in the Navy for seven years. (PSI, p.17.) In *State v. Nice*, 103 Idaho 89, 90 (1982), the court found the defendant’s honorable discharge from the military to be a factor in mitigation of sentence. Mr. Bosse served his country and was honorably discharged when he was 26 years old. (PSI, p.17.)

Mr. Bosse admits that he has a problem with alcohol. (PSI, pp.18-19.) His abuse of alcohol contributed to his current legal problems. (PSI, p.21.) 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 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). Mr. Bosse acknowledged to the court that he is an alcoholic. (Tr., p.44, Ls.22-23.) However, Mr. Bosse recognizes that he needs an alcohol treatment program. (PSI, pp.19, 33.)

Idaho recognizes that good employment history should be considered a mitigating factor. See *State v. Nice*, 103 Idaho 89, 91 (1982); see also *State v. Shideler*, 103 Idaho 593, 595 (1982). Mr. Bosse has an extensive employment history, working in several fields. (PSI, p.18.) He has worked for the Department of Veteran's Affairs, for the Idaho Department of Correction, and he was employed by Saint Alphonsus Regional Medical Center for approximately five years. (PSI, pp.17-18.)

Further, Mr. Bosse expressed remorse and accepted responsibility for his acts. (Tr., p.44, L.24 – p.46, L.9; PSI, p.21.) 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). Mr. Bosse accepted full responsibility for his acts and admitted that the conduct was his fault. (PSI, pp.21, 50.)

The issue of reducing a sentence because a defendant expresses remorse has been addressed in several cases. 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 problem, his willingness to accept treatment and other positive attributes of his character.” *Id.* at 209.

The Idaho Supreme Court has also reduced a defendant’s term of imprisonment because the defendant expressed regret for what he had done. *State v. Shideler*, 103 Idaho 593, 595 (1982). In *Shideler*, the Idaho Supreme Court ruled that the prospect of Shideler’s recovery from his poor mental and physical health, which included mood swings, violent outbursts, and drug abuse, coupled with his remorse for his actions, was so compelling that it outweighed the gravity of the crimes of armed robbery, assault with a deadly weapon, and possession of a firearm during the commission of a crime. *Id.* at 594-95. Therefore, the Court reduced Shideler’s sentence from an indeterminate term not to exceed twenty years to an indeterminate term not to exceed twelve years. *Id.* at 593.

Based upon the above mitigating factors, Mr. Bosse asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his military service, employment history, remorse and acceptance of responsibility, it would have imposed a less severe sentence.

CONCLUSION

Mr. Bosse respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing.

DATED this 2nd day of October, 2017.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of October, 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:

MICHAEL EARL BOSSE
INMATE #121692
ICIO
381 W HOSPITAL DRIVE
OROFINO ID 83544

MICHAEL REARDON
DISTRICT COURT JUDGE
E-MAILED BRIEF

MICHAEL DEANGELO
ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

SJC/eas