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State v. Anderson Appellant's Brief Dckt. 44896

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44896
Plaintiff-Respondent,	)	
	)	BINGHAM COUNTY NO. CR 2016-6737
v.	)	
	)	
TERRY C. ANDERSON,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, fifty-two-year-old Terry C. Anderson pleaded guilty to felony DUI. The district court imposed a unified sentence of ten years, with six years fixed. Mr. Anderson filed an Idaho Criminal Rule 35 (Rule 35) motion for a reduction of sentence, which the district court denied. On appeal, Mr. Anderson asserts the district court abused its discretion when it imposed his sentence, when it executed his sentence rather than place him on probation, and when it denied his Rule 35 motion.

Statement of the Facts & Course of Proceedings

Blackfoot Police Department officers responded to a two-vehicle crash. (Presentence Report (*hereinafter*, PSI), p.3.)[1] A white truck had rear-ended a tow truck. (*See* PSI, p.38.) At the scene, officers contacted Mr. Anderson, the driver of the white truck. (PSI. p.3.) Mr. Anderson had the odor of alcohol coming from his person, slurred his words as he spoke, and had glassy and bloodshot eyes. (PSI, p.3.) He was verbally uncooperative and aggressive during the administered field sobriety tests, and was unable to successfully execute the examinations. (PSI, p.3.) Mr. Anderson was then placed under arrest for suspicion of DUI. (PSI, p.3.) In the white truck, officers saw a can of beer that had spilled out, as well as an eighteen-count box of beer with eight cans missing. (*See* PSI, p.3.)

After being transported to the Bingham County Jail, Mr. Anderson refused breath testing but admitted he was drunk. (PSI, p.3.) His blood was drawn at the Bingham Memorial Hospital pursuant to a blood draw warrant. (PSI, p.3.)

The State charged Mr. Anderson, in a three-part Prosecuting Attorney's Information, with one count of operating a motor vehicle while under the influence of alcohol, drugs and/or any other intoxicating substance, felony, I.C. §§ 18-8004(1)(a) and 18-8005(9), one count of unlawful transportation of alcoholic beverages, misdemeanor, I.C. § 23-505, and a persistent violator sentencing enhancement under I.C. § 19-2514. (R., pp.107-112.) Mr. Anderson entered a not guilty plea to the charges. (R., pp.126-28.)

Pursuant to a plea agreement, Mr. Anderson agreed to plead guilty to the felony DUI count, and the State agreed to dismiss the unlawful transportation of alcoholic beverages count and the persistent violator sentencing enhancement. (R., pp.143-51; Tr., Nov. 14, 2016, p.5,

L.22 – p.7, L.25.) The State would recommend that the sentence in this case would run concurrently with the sentence in Bonneville County No. CR 2014-1944 (*hereinafter*, the Bonneville County case).[2] (R., p.146; Tr., Nov. 14, 2016, p.8, Ls.1-5.) The district court accepted Mr. Anderson's guilty plea. (R., pp.154-56; Tr., Nov. 14, 2016, p.12, L.19 – p.13, L.1.)

At the sentencing hearing, Mr. Anderson recommended the district court consider placing him on probation. (Tr., Jan. 17, 2017, p.14, Ls.16-19.) Alternatively, Mr. Anderson recommended the district court consider imposing a sentence with a shorter fixed term and a longer indeterminate term, so he could get access to the treatment about which the parole commission had talked to him. (Tr., Jan. 17, 2017, p.15, Ls.2-14.) Mr. Anderson further recommended the district court run the sentence concurrently with the sentence in the Bonneville County case. (Tr., Jan. 17, 2017, p.15, Ls.14-15.) The State recommended the district court impose a unified sentence of ten years, with seven years fixed. (Tr., Jan. 17, 2017, p.20, Ls.23-25.) The district court imposed a unified sentence of ten years, with six years fixed. (R., pp.161-64.) The sentence would run consecutively to the sentence in the Bonneville County case. (R., p.162.)

Mr. Anderson filed, pro se, a Motion for Correction or Reduction of Sentence, ICR 35. (R., pp.170-73.) Mr. Anderson requested the district court reduce his sentence to "a combined sentence of eight (8) years with three (3) fixed and five (5) [indeterminate] with required substance abuse treatment and community service," to run concurrently with the sentence in the

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[1] All citations to the PSI refer to the 88-page PDF version of the Presentence Report and attachments.

[2] In Bonneville County No. CR 2014-1944, Mr. Anderson was convicted for felony DUI. (PSI, pp.12-13.) He was sentenced to a unified sentence of six years, with one year fixed. (PSI, p.12.) At the time of the present incident, Mr. Anderson had been released from custody and was on parole supervision. (*See* PSI, pp.3, 12-13.)

Bonneville County case. (*See* R., p.173.) He also filed a Motion for Hearing to present information and oral argument in support of the Rule 35 motion. (R., pp.174-75.) Without conducting a hearing, the district court issued an Order Denying Rule 35 Motion. (Order Denying Rule 35 Motion, June 1, 2017.)[3]

Mr. Anderson filed a Notice of Appeal timely from the district court's Judgment of Conviction/Order of Commitment. (R., pp.185-87.)

ISSUES

1. Did the district court abuse its discretion when it imposed a unified sentence of ten years, with six years fixed, upon Mr. Anderson following his plea of guilty to felony DUI?
2. Did the district court abuse its discretion when it failed to place Mr. Anderson on probation?
3. Did the district court abuse its discretion when it denied Mr. Anderson's Idaho Criminal Rule 35 motion for a reduction of sentence?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Ten Years, With Six Years Fixed, Upon Mr. Anderson Following His Plea Of Guilty To Felony DUI

Mr. Anderson asserts the district court abused its discretion when it imposed his unified sentence of ten years, with six years fixed, to be served consecutively to the sentence in the Bonneville County case, because his sentence is excessive considering any view of the facts. The district court should have followed Mr. Anderson's recommendation and imposed a

[3] The Order Denying Rule 35 Motion is the subject of a Motion to Augment, filed contemporaneously with this brief.

sentence with a shorter fixed term and a longer indeterminate term, to be served concurrently with the sentence in the Bonneville County case.

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. Anderson does not assert that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Anderson must show that in light of the governing criteria, the sentence was 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. Anderson asserts his sentence is 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. Anderson's problems with substance abuse. Mr. Anderson's GAIN-I Recommendation and Referral Summary (G-RRS) contained a diagnosis of "Alcohol Use Disorder, Moderate – In a Controlled Environment." (PSI, p.74.) Mr. Anderson reported

first using alcohol at the age of nineteen. (PSI, p.16.) The presentence report stated that, "although the defendant appeared to minimize his use and related problems, Mr. Anderson admitted his substance abuse has contributed to both prior and recent criminal charges." (PSI, p.16.) Indeed, including the instant offense, Mr. Anderson has eleven DUI convictions, and two of his five total felony convictions are for DUIs. (*See* PSI, pp.4-13; Tr., Jan. 17, 2017, p.15, L.21 – p.16, L.2.) Before the instant offense, Mr. Anderson had been sober for fifteen months after he got out of prison. (*See* PSI, p.16; Tr., Jan. 17, 2017, p.24, Ls.16-17.) He told the district court he relapsed after he was kicked out of his residence and was homeless for about two weeks. (*See* Tr., Jan. 17, 2017, p.24, L.17 – p.25, L.6.)

Mr. Anderson now wants treatment to deal with his substance abuse problems. The GRRS stated Mr. Anderson's "responses indicate high motivation for treatment," and that he "reported that he has quit using substances and is about 100% ready to remain abstinent." (PSI, p.79.) At the sentencing hearing, defense counsel informed the district court Mr. Anderson had "indicated on numerous occasions that he's come to the realization that he has to just be done with this." (Tr., Jan. 17, 2017, p.16, Ls.12-14.) Counsel also stated, "I think that's he's correct in that he just has to be done, but I think that in order to realize that goal and to make that a reality he does need to get treatment that can assist him in dealing with the addiction, specifically with alcohol." (Tr., Jan. 17, 2017, p.16, Ls.14-18.)

Additionally, the district court did not give adequate consideration to Mr. Anderson's remorse and acceptance of responsibility. In the Presentence Investigation Questionnaire and during the sentencing hearing, Mr. Anderson reported he bumped into the tow truck because it was sitting at a stop sign with no taillights. (*See* PSI, p.4; Tr., Jan. 17, 2017, p.23, Ls.6-13.) However, Mr. Anderson also stated during the presentence investigation that "he was thankful

for his arrest, despite the events which contributed to that incident. . . . According to Mr. Anderson, he learned a valuable lesson; 'I should have looked for help instead of turning to alcohol.'" (PSI, p.4.) At the sentencing hearing, Mr. Anderson told the district court, "I understand I did wrong. I understand and I take the responsibility for it." (Tr., Jan. 17, 2017, p.22, Ls.4-5.) Later in the hearing, he stated, "Your Honor, I understand what those two beers did to me. I understand what a danger it did. I wish that upon no one else." (Tr., Jan. 17, 2017, p.25, Ls.7-9.)

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

II.

The District Court Abused Its Discretion When It Ordered Mr. Anderson's Sentence Into Execution Rather Than Place Him On Probation

Mr. Anderson asserts the district court abused its discretion when it ordered his sentence into execution. The district court should have followed Mr. Anderson's recommendation by placing him on probation.

"A trial court's decision regarding whether imprisonment or probation is appropriate is within its discretion." *State v. Reber*, 138 Idaho 275, 278 (2002). Before imposing a sentence, a district court must consider the criteria of I.C. § 19-2521 regarding whether a defendant should be placed on probation. *Id.* "A decision to deny probation will not be deemed an abuse of discretion if it is consistent with the criteria articulated in I.C. § 19-2521." *Id.*

Section 19-2521 provides that a sentencing court

> shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances

of the crime and the history, character and condition of the defendant, it is of the opinion that imprisonment is appropriate for protection of the public because:

(a) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) A lesser sentence will depreciate the seriousness of the defendant's crime; or

(d) Imprisonment will provide appropriate punishment and deterrent to the defendant; or

(e) Imprisonment will provide an appropriate deterrent for other persons in the community; or

(f) The defendant is a multiple offender or professional criminal.

I.C. § 19-2521(1). Additionally, while not controlling the discretion of the court, the following grounds

shall be accorded weight in favor of avoiding a sentence of imprisonment:

(a) The defendant's criminal conduct neither caused nor threatened harm;

(b) The defendant did not contemplate that his criminal conduct would cause or threaten harm;

(c) The defendant acted under a strong provocation;

(d) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(e) The victim of the defendant's criminal conduct induced or facilitated the commission of the crime;

(f) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that was sustained; provided, however, nothing in this section shall prevent the appropriate use of imprisonment and restitution in combination;

(g) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;

> (h) The defendant's criminal conduct was the result of circumstances unlikely to recur; [and]
>
> (i) The character and attitudes of the defendant indicate that the commission of another crime is unlikely.

I.C. § 19-2521(2). However, a district court need not "recite the statutory criteria of I.C. § 19-2521, or its application of the facts to those criteria in rendering its decision on probation." *Reber*, 138 Idaho at 278.

Mr. Anderson asserts that the district court did not act consistently with the applicable legal standards when it ordered his sentence into execution rather than place him on probation, because it did not adequately consider factors falling within the criteria of I.C. § 19-2521. Mr. Anderson would be better able to address his substance abuse issues through treatment in the community while on probation. The G-RRS recommended Mr. Anderson "engage in Level 2.1 Outpatient Treatment to address his dependence on alcohol, relapse potential and issues pertaining to his ongoing substance us." (PSI, p.84.)

At the sentencing hearing, Mr. Anderson's counsel informed the district court Mr. Anderson would be able to get inpatient treatment as a tribal member. (*See* Tr., Jan. 17, 2017, p.14, L.19 – p.15, L.1.) Counsel asserted, "treatment is most effective within the community. Mr. Anderson would very [much] like to have the opportunity to participate in community-based treatment." (Tr., Jan. 17, 2017, p.14, Ls.14-17.) Defense counsel told the district court, "[e]ven with the number of those DUIs that are present, Your Honor, I think that he is an individual who can succeed with the proper tools." (Tr., Jan. 17, 2017, p.17, Ls.4-6.) Mr. Anderson's counsel stated, "when people receive treatment in an incarcerated setting, what they are not receiving is how to incorporate that treatment on a day to day basis. How to use it when they are at home or around family or with a bad neighbor or whatever the trigger may be

that causes them to relapse." (Tr., Jan. 17, 2017, p.17, Ls.13-18.) Counsel further stated, "[w]hat they are lacking in receiving treatment in an incarcerated setting is treatment that them how to use those on the ground while running, so to speak. To teach them how to use it on a day to day basis and provide them with resources." (Tr., Jan. 17, 2017, p.17, Ls.20-24.)

Mr. Anderson informed the district court, "I just would like you to give me the opportunity to change myself, you know." (Tr., Jan. 17, 2017, p.25, Ls.9-10.) He explained he felt "[i]n prison you are forced to change," and "[i]t's something that you resent going to the classes when you are forced to." (Tr., Jan. 17, 2017, p.25, Ls.10-15.) Conversely, "when you're out here in the community and it's like I get to go to my AA meetings, go to this, do that. You feel better about it." (Tr., Jan 17, 2017, p.25, Ls.16-18.) Mr. Anderson also stated, "I feel that I've learned more or appreciate it more being able to do it on my own, being able to make myself go. . . . Make it to my appointments and get around. Help myself instead of being forced, you know." (Tr., Jan. 17, 2017, p.25, Ls.18-22.) For Mr. Anderson, treatment in the community while on probation would "[h]elp my morale, help me look at myself as a better person because I'm able to get up and do it myself instead of being forced to do it." (*See* Tr., Jan. 17, 2017, p.25, Ls.23-25.)

That Mr. Anderson would be better able to address his substance abuse issues through treatment in the community while on probation indicates he is not in need of correctional treatment that can be provided most effectively by his commitment to an institution. *See* I.C. § 19-2521(1)(b). Coupled with his desire for treatment as explored in Section I above, it also suggests his character and attitudes indicate that the commission of another crime is unlikely. *See* I.C. § 19-2521(2)(i). Thus, Mr. Anderson asserts the district court did not act consistently with the applicable legal standards when it ordered his sentence into execution

rather than place him on probation, because it did not adequately consider factors falling within the criteria of I.C. § 19-2521.

III.

The District Court Abused Its Discretion When It Denied Mr. Anderson's Rule 35 Motion For A Reduction Of Sentence

Mr. Anderson asserts that the district court abused its discretion when it denied his Idaho Criminal Rule 35 motion 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. Anderson asserts his sentence is excessive in view of the new and additional information presented with the Rule 35 motion. While some of the assertions Mr. Anderson made in the Rule 35 motion are not cognizable under Rule 35 (*see* R., pp.171-72 (ineffective assistance of counsel, prosecutorial bias, and comparative sentencing claims)), Mr. Anderson also presented new and additional information on his performance while on parole and opportunities for employment if released. Mr. Anderson stated his parole officer "offered and intended to address the court at my sentencing, informing the court that I had performed well

until this incident . . . ." (*See* R., p.171.) Mr. Anderson also asserted, "I would like this Court to know that employment is available to me, contingent only upon my release, wherein I would be employed by my tribal [council] and would, again, be of benefit to my people and society as a whole." (R., p.172.) Thus, Mr. Anderson's sentence is excessive in view of the new and additional information presented with the Rule 35 motion. The district court abused its discretion when it denied Mr. Anderson's Rule 35 motion for a reduction of sentence.

CONCLUSION

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

DATED this 21st day of July, 2017.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of July, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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_____/s/_____
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BPM/eas