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State v. Hansen Respondent's Brief Dckt. 39664

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 39664
)	
vs.)	
)	
SCOTT ANTHONY HANSEN,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNER**

**HONORABLE STEVE VERBY
District Judge**

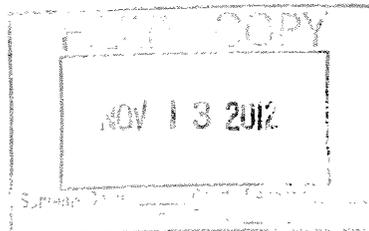
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STATEMENT OF THE CASE

Nature Of The Case

Scott Anthony Hansen appeals from the judgment of conviction and sentence entered upon his guilty plea to statutory rape.

Statement Of The Facts And Course Of The Proceedings

Hansen, a 19-year-old adult, engaged in sexual relations with two 13-year-old girls, which he claimed were consensual. (PSI, p.2.) Hansen described himself as “ma[king] the first move,” and admitted to having sexual intercourse with his first victim while describing his interaction with the second victim as her giving “him a ‘hand job’, while he ‘fingered her.’” (Id.) The state charged Hansen with statutory rape and lewd conduct with a minor under the age of sixteen. (R., pp.22-23.) Pursuant to a plea agreement, Hansen pleaded guilty to statutory rape and the state dismissed the second charge. (R., pp.39-51, 61.) The district court entered judgment against Hansen on September 22, 2011, and imposed a sentence of eight years with two years fixed upon his conviction, but retained jurisdiction for 365 days. (R., pp.62-64.)

Hansen arrived at NICI on October 17, 2011. (APSI, p.1) Less than two months later, NICI recommended that the district court relinquish jurisdiction. (Id.) On December 27, 2011, the district court entered an order relinquishing jurisdiction. (R., pp.69-70.) On February 7, 2012, Hansen filed a notice of appeal timely only from the district court’s order relinquishing jurisdiction. (R., pp.72-73.) Thereafter, Hansen filed a Rule 35 motion for reduction of sentence (R., pp.81-85), which the district court subsequently denied (R., pp.91-95).

ISSUES

Hansen states the issues on appeal as:

1. Did the district court violate Mr. Hansen's rights of due process when it did not allow him to allocute before he was sentenced?
2. Did the district court abuse its discretion when it imposed a unified sentence of eight years, with two years fixed, upon Mr. Hansen following his plea of guilty to statutory rape?
3. Did the district court abuse its discretion when it relinquished jurisdiction over Mr. Hansen?
4. Did the district court abuse its discretion when it denied Mr. Hansen's Idaho Criminal Rule 35 Motion for a Reduction of Sentence in light of the additional information offered in his supporting affidavit?

(Appellant's brief, p.5.)

The state rephrases the issues as:

1. Hansen's appeal is timely only from the district court's order relinquishing jurisdiction. Does this Court therefore lack jurisdiction to consider an issue of alleged error in the underlying proceedings on appeal?
2. Has Hansen failed to establish an abuse of the district court's sentencing discretion?

ARGUMENT

I.

This Court Lacks Jurisdiction To Consider An Issue Of Alleged Error In The Underlying Proceedings Where Hansen's Appeal Is Timely Only From The District Court's Relinquishment of Jurisdiction

A. Introduction

For the first time on appeal, Hansen asserts that the district court committed fundamental error and violated his due process rights by allegedly not allowing him to allocute at sentencing. (Appellant's brief, pp.6-11.) Hansen, however, not only failed to preserve this issue below by timely objection, he also failed to preserve this Court's jurisdiction to review his alleged error by filing a timely appeal. Because Hansen failed to timely appeal from the judgment of the district court, this Court lacks jurisdiction to consider his claim and it should be dismissed.

B. Standard Of Review

"Whether a court lacks jurisdiction is a question of law that may be raised at any time, and over which appellate courts exercise free review." State v. Jones, 140 Idaho 755, 757, 101 P.3d 699, 701 (2004).

C. This Court Lacks Jurisdiction To Consider An Issue Of Alleged Error In The Underlying Proceedings Because Hansen's Appeal Is Timely Only From The District Court's Relinquishment of Jurisdiction

The Idaho Appellate Rules govern the time and manner in which appeals to the Idaho Supreme Court are to be filed. A timely filed notice of appeal is a prerequisite to appellate jurisdiction. I.A.R. 21; State v. Ciccone, 150 Idaho 305, 306, 246 P.3d 958, 959 (2010) (citation omitted). The failure to file a notice of appeal within the time limits

prescribed by the appellate rules requires “automatic dismissal” of the appeal. I.A.R. 21; Ciccone, 150 Idaho at 306, 246 P.3d at 959.

With respect to appeals from the district court, Idaho Appellate Rule 14(a) requires an appeal of “any judgment, order or decree of the district court appealable as a matter of right” to be filed within 42 days of the date “from the date evidenced by the filing stamp of the clerk of the court.” I.A.R. 14(a). The rule goes on to explain that

[i]f, at the time of judgment, the district court retains jurisdiction pursuant to Idaho Code § 19-2601(4), the length of time to file an appeal *from the sentence contained in the criminal judgment* shall be enlarged by the length of time between entry of the judgment on conviction and entry of the order relinquishing jurisdiction or placing the defendant on probation; provided, however, that *all other appeals challenging the judgment* must be brought within 42 days of that judgment....

Id.

On appeal, Hansen argues both that his sentence is excessive and that he was deprived of due process when he, allegedly, was unable to give a statement of allocution. (Appellant’s brief, pp.6-20.) While this Court has jurisdiction to address Hansen’s challenge to “the sentence contained in the criminal judgment,” it does not have jurisdiction to entertain Hansen’s assertion that the district court violated his due process rights. The district court entered judgment against Hansen on September 22, 2011. (R., p.62.) Hansen filed his notice of appeal on February 7, 2012, some 139 days later. (R., p.72.) Because Hansen failed to file his notice of appeal within the time limits prescribed by the appellate rules, this Court lacks jurisdiction to consider Hansen’s due process claim and it must be dismissed.

Even had Hansen timely appealed from the judgment of the district court, his arguments would still fail. As Hansen acknowledges, he never raised his due process

claim to the district court. (Appellant's brief, p.7.) Generally, issues not raised to the district court may not be considered for the first time on appeal. State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). An unpreserved issue may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010).

Hansen claims that the district court committed fundamental error by, allegedly, not allowing him to make a statement of allocution during sentencing. (Appellant's brief, pp.6-11.) The state recognizes that the Court of Appeals previously held that the lack of allocution is fundamental error. See State v. Gervasi, 138 Idaho 813, 816, 69 P.3d 1074, 1077 (Ct. App. 2003). However, since the Court of Appeals decided Gervasi, the Idaho Supreme Court in State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010), clarified the test for establishing fundamental error in Idaho appellate courts. In light of the Supreme Court's controlling precedent in Perry, Gervasi is no longer good law. Rather, in order to establish fundamental error, Hansen must meet the standard articulated by the Court in Perry, wherein

the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

Id. at 226, 245 P.3d at 978.

Any effort to establish fundamental error is doomed to failure because there is no constitutional right to allocution at sentencing. The United States Supreme Court has held that allocution is "not a fundamental defect which inherently results in a complete

miscarriage of justice.” Hill v. United States, 368 U.S. 424, 428 (1962). Rather, the entitlement Hansen seeks is based on a Court rule. See I.C.R. 33(a)(1). Second, the error alleged by Hansen is anything but clear from the record. Hansen was both able to present mitigation through counsel (Tr., p.16, L.2 – p.26, L.6) and conversed extensively with the district court himself (see Tr., p.17, Ls.4-12; p.18, Ls.1-12; p.18, L.19 – p.21, L.7; p.28, L.12 – p.31, L.14). There is no indication from the record that Hansen had anything more to say than what he had already presented to the district court. Finally, Hansen has failed to establish prejudice. Hansen engaged in sexual relations with two 13-year-old girls. (PSI, p.2.) The district court, despite this crime, imposed a relatively lenient sentence of eight years with two years fixed and retained jurisdiction. (R., pp.62-64.) Hansen has failed to show how his sentence would have been any different had he only been able to address the court more.

Because Hansen failed to timely appeal from the judgment of the district court, this Court lacks jurisdiction to consider his assertion that he was deprived of due process in the district court. Even had he timely appealed, he still failed to establish fundamental error. This issue should be dismissed.

II.

Hansen Has Failed To Establish An Abuse Of The Sentencing Court’s Discretion

A. Introduction

Hansen asserts that the district court abused its discretion when it imposed a sentence of eight years with two years fixed upon Hansen’s conviction for statutory rape, when it relinquished jurisdiction, or when it denied his Rule 35 motion.

(Appellant's brief, pp.11-19.) Hansen has failed to establish an abuse of the district court's sentencing discretion.

B. Standard Of Review

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

C. The District Court Did Not Abuse Its Discretion By Imposing A Sentence Of Eight Years With Two Years Fixed Upon Hansen's Conviction For Statutory Rape

Hansen argues that the district court abused its sentencing discretion when it imposed a sentence of eight years with two years fixed upon his conviction for statutory rape. (Appellant's brief, pp.11-17.) 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 his burden, Hansen must show that the 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, with the presumption 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, this 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).

Giving due consideration to Hansen's present crimes, and in light of his criminal history, Hansen's sentence of eight years with two years fixed is anything but excessive. In the instant case, Hansen engaged in sexual relations with two 13-year-old girls. (PSI, p.2.) When confronted with his crimes, Hansen said that he viewed the girls as victims, not because *he* did anything wrong, but "because they have had to be questioned by the police, and have gotten into trouble at home." (Id.) Hansen also expressed his belief that 13-year-old girls "are old enough to make decisions to have sex or not" because "they are in school and have learned about sexual things." (Id.)

Hansen's criminal history displays the same lack of awareness. At 14, Hansen stole his foster parents' truck to go for joyrides. (PSI, pp.3-4.) A year later, he "was arrested for burglary, theft, trafficking stolen property and unlawful possession of a firearm." (PSI, p.3.) According to Hansen, "he was homeless and needed money for food and clothes," so "[h]e took a 9mm hand gun [sic], and robbed a house." (Id.)

Failure to acknowledge guilt may indicate a lack of rehabilitative potential. State v. Grist, 152 Idaho 786, 795, 275 P.3d 12, 21 (Ct. App. 2012). Hansen failed to understand the impact of his crimes. The district court, noting Hansen's lack of awareness, explained:

And another thing that concerns me is that, you know, the victims were 13, not 14. I take that back. But, as you said, they were almost 14. Now, that's almost like a comical thing, something you'd see on "Saturday Night Live" or something. "Yeah, I had sex with a 13 year old, but she was almost 14." You don't get how off that sounds—okay?—or you wouldn't have said it. But it is off. Okay? You say you believe girls of that age, 13, are old enough to make a good decision to have sex or not and they are in

school and have learned about sexual things because they had sex education or whatever. Again, you don't get how wrong that sounds. And you didn't say it that long ago.

(Tr., p.27, L.16 – p.28, L.3.) The district court was also aware that Hansen had been diagnosed as a significant risk to reoffend, requiring close supervision. (Tr., p.31, Ls.15-22.) However, the district court recognized in mitigation that Hansen was a good worker, had not been given many chances in life, and “had a lousy upbringing.” (Tr., p.33, Ls.17-22.) The district court, therefore, imposed a lenient sentence of eight years with two years fixed and retained jurisdiction for 365 days. (R., pp.62-64.)

The district court's sentence, while providing some protection for the community, also provided for rehabilitation, allowing Hansen the opportunity to receive treatment and programming during his period of retained jurisdiction. Hansen has failed to establish an abuse of the district court's sentencing discretion.

D. The District Court Did Not Abuse Its Discretion When It Relinquished Jurisdiction

Hansen argues that the district court abused its sentencing discretion by relinquishing jurisdiction. (Appellant's brief, pp.17-18.) Whether to grant probation “is a matter left to the sound discretion of the court.” I.C. § 19-2601(4). The decision to relinquish jurisdiction is also a matter of discretion. See State v. Hood, 102 Idaho 711, 712, 639 P.2d 9, 10 (1981); State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). A court's decision to relinquish jurisdiction will not be deemed an abuse of discretion if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate. State v. Chapel, 107 Idaho 193, 194, 687 P.2d 583, 584 (Ct. App. 1984).

The district court had sufficient information to determine that treatment in the community would be inappropriate in Hansen's case. On October 17, 2011, Hansen arrived at NICI. (APSI, p.1.) Less than two months later, NICI recommended that the district court relinquish jurisdiction. (Id.) Staff noted that during that brief time

Mr. Hansen has had numerous disciplinary issues while at NICI. The first month at NICI most of his disciplinary issues were handled within the Community Model. He was given numerous Learning Experiences and taken to The Game over eight times. His behavior did not improve. Staff began documenting his behavior and using the general disciplinary process. He still did not respond to interventions. Mr. Hansen made it clear with his continued behavior that he is not ready to give up his criminal life style [sic].

(APSI, p.3.) In his Sex Offender Risk Assessment conducted at NICI, Hansen was also diagnosed as a high risk to reoffend. (Appended to APSI.)

Considering Hansen's very poor performance during his brief period of retained jurisdiction, he was not a good candidate for a suspended sentence and probation. Hansen has failed to establish an abuse of the district court's discretion by relinquishing jurisdiction.

E. The District Court Did Not Abuse Its Discretion When It Denied Hansen's Rule 35 Motion

Hansen argues that the district court abused its sentencing discretion by denying his Rule 35 motion. (Appellant's brief, pp.18-19.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and the Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Hansen must "show that the sentence is excessive in light of new or additional information

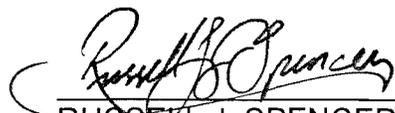
subsequently provided to the district court in support of the Rule 35 motion.” Id.
Hansen failed to carry this burden.

The “new information” provided by Hansen was an acknowledgment that he had not been completing his assignments at NICI, had displayed “a pretty bad attitude” during his period of retained jurisdiction, and had “anger problems towards the other inmates.” (R., pp.83-85.) Now, however, that he had been placed in prison, he suddenly recognized that he did care, that he wanted to change, and was ready to accept responsibility for his crimes. (Id.) None of this information shows that the sentence imposed by the district court was excessive. Hansen has failed to show an abuse of the district court’s discretion in denying his Rule 35 motion.

CONCLUSION

The state respectfully requests that this Court affirm Hansen’s conviction and sentence.

DATED this 13th day of November, 2012.



RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of November, 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm