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State v. Storer Respondent's Brief Dckt. 44910

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 44910
	)	
vs.	)	Ada County No. CR-FE-2016-5900
	)	
SHANE MICHAEL STORER,	)	RESPONDENT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

Has Storer failed to show that the district court abused its sentencing discretion when it imposed and executed concurrent sentences of 10 years with one year determinate for aggravated DUI and five years indeterminate for eluding?

ARGUMENT

Storer Has Failed Show That The District Court Abused Its Sentencing Discretion

A. Introduction

Police first attempted to stop Shane Michael Storer's car near Capitol and Front, in downtown Boise. (R., pp. 156, 159.[1]) Storer eluded the officer by driving at speeds

[1] Page number references are to the electronic copy of the PSI, which does not always match the bates-stamp page numbers.

of 80 to 90 M.P.H. and running three red lights, heading toward the I-84 Connector. (PSI, p. 156.) Storer continued on I-84, where he reached speeds in excess of 100 M.P.H. (PSI, p. 121.) Storer, at speeds still around 100 M.P.H., took the west-bound Eagle Road off-ramp, ran another red light at Eagle Road, nearly striking a car, then re-entered the freeway on the west-bound Eagle Road on-ramp. (PSI, pp. 121-22, 125.) Officers again re-engaged in the pursuit, but again Storer eluded them for a while by traveling at 110 to 115 M.P.H. or more. (PSI, pp. 122-23, 123, 126, 140.) Storer exited I-84 on the Meridian Road off-ramp, still at very high speeds, and rear-ended a car, driven by Stefanie Jafek, that was stopped at the light. (PSI, pp. 118, 126, 136, 140-41, 163-64, 304.) The collision broke Stephanie's clavicle and a rib, and she was taken to the hospital. (PSI, p. 3.) Storer drove away from the accident, until the damage done to his car eventually disabled it. (PSI, pp. 3, 28, 123, 126-27.) When emergency personnel responded to his location, Storer became verbally abusive, threatening to kill the police officers and paramedics. (PSI, p. 118.) Storer had consumed large amounts of alcohol and marijuana and likely also used a hallucinogenic or other drug. (PSI, pp. 3-4, 202, 305, 308.)

The state charged Storer with aggravated DUI, leaving the scene of an injury accident, eluding, possession of marijuana and possession of drug paraphernalia. (R., pp. 37-39, 49-51.) Pursuant to a plea agreement, Storer pled guilty to aggravated DUI and eluding, and the state dismissed the additional charges. (R., pp. 71-80.) The district court imposed and executed concurrent sentences of 10 years with one year fixed for aggravated DUI and five years indeterminate for eluding. (R., pp. 82, 86.) The

district court suspended Storer's driving privileges for eight years with four years absolute suspension. (R., pp. 82, 86.)

Storer filed a timely notice of appeal. (R., pp. 85, 90.) On appeal Storer claims the district court abused its sentencing discretion by executing the sentences. (Appellant's brief, pp.3-19.) Review of the record shows no abuse of discretion.

B. Standard Of Review

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it 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)). Whether to grant probation "is a matter left to the sound discretion of the court." I.C. § 19-2601(4).

C. Storer Has Shown No Abuse Of The District Court's Discretion

To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). To establish that the sentence was excessive, he must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of

protecting society, deterrence, rehabilitation, and retribution. Farwell, 144 Idaho at 736, 170 P.3d at 401. In determining whether the appellant met his burden, the court considers the entire sentence but, because the decision to release him on parole is exclusively the province of the executive branch, presumes that the determinate portion will be the period of actual incarceration. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

At sentencing the district court applied the correct legal standards. (Tr., p. 44, L. 24 - p. 45, L. 12.) It considered the relevant factors and the arguments and recommendations of the parties. (Tr., p. 45, Ls. 13-20.) It found the following mitigating factors: Storer's good background, lack of significant criminal history, acceptance of responsibility, initiative in getting into treatment, stable home, education, amenability to rehabilitation, low LSI score, and gainful employment. (Tr., p. 45, L. 21 – p. 46, L. 20.) In aggravation it found that the crime involved a "very serious violent collision" and "serious personal injuries to an innocent victim"; that Storer's behavior could have resulted in a death and "put many people in the public at risk"; and that Storer's "serious alcohol issues" had resulted in bad behavior and detriment to his life previously. (Tr., p. 46, L. 21 – p. 47, L. 3.) The district court rejected retained jurisdiction as appropriate in this case. (Tr., p. 47, Ls. 4-13.) In deciding whether probation or an executed sentence were appropriate the court reasoned that the aggravating factors outweighed the mitigating ones, and executing concurrent sentences of 10 years with one year fixed for aggravated DUI and five years indeterminate for eluding was necessary for "both specific and general deterrent purposes." (Tr., p. 47, L. 14 – p. 49, L. 4.) "Ultimately in my mind it comes down to fashioning a sentence that fits the crime and I don't think that

it would be proper to impose a sentence for the seriousness of this event that would allow one to get out on probation even with jail time." (Tr., p. 49, Ls. 5-9.) The district court's analysis shows an appropriate exercise of discretion, not an abuse thereof.

Storer argues the district court abused its discretion based on "two facts of primary significance that interweave through all the sentencing factors and considerations." (Appellant's brief, p. 4.) "First, both the PSR and highly respected experts recommended a sentence of probation …." (Appellant's brief, pp. 4-5.) The problem with this argument is that such recommendations are "in no way binding upon the court." State v. Landreth, 118 Idaho 613, 615, 798 P.2d 458, 460 (Ct. App. 1990). See also State v. Saunders, 124 Idaho 334, 338, 859 P.2d 370, 374 (Ct. App. 1993) ("a trial judge is free to follow or to reject a presentence investigator's recommendation"); State v. Ramirez, 121 Idaho 319, 324, 824 P.2d 894, 899 (Ct. App. 1991). "Second, Mr. Storer's criminal conduct is inextricably and directly linked to his struggles with the illness of alcohol addiction …." (Appellant's brief, p. 5.) However, a court does not abuse its discretion when it considers evidence of alcohol abuse but concludes it does not mandate a lesser sentence. State v. Bradac, 101 Idaho 240, 240-41, 611 P.2d 1025, 1025-26 (1980); State v. Cowger, 111 Idaho 825, 826-27, 727 P.2d 1253, 1254-55 (Ct. App. 1986); State v. Cagle, 126 Idaho 794, 799-800, 891 P.2d 1054, 1059-60 (Ct. App. 1995). The district court considered and weighed all of the mitigating factors discussed by Storer on appeal. (Compare Appellant's brief, pp. 5-7 with Tr., p. 45, L. 21 – p. 46, L. 20.) That Storer wishes they had been given different weight does not show an abuse of discretion.

Storer faults the district court for considering the potential harm of his actions as an aggravating circumstance. (Appellant's brief, pp. 7-8 ("To the extent the court actually relied on speculative, potential harm that did not occur in sentencing Mr. Storer, such reliance was inappropriate.").) The cases he cites are from other jurisdictions, and are of limited value. (Appellant's brief, p. 8.) In Idaho, it is appropriate to consider in sentencing the "potential harm" caused by a defendant's crimes. State v. Marsh, 141 Idaho 862, 869, 119 P.3d 637, 644 (Ct. App. 2004) (district court considered "the potential harm" of the defendant's actions); State v. Monroe, 128 Idaho 676, 681, 917 P.2d 1316, 1321 (Ct. App. 1996) ("the district court recognized that the potential for serious harm, given Monroe's history, was great, although this was a case in which the victim escaped serious harm"); State v. Knutson, 121 Idaho 101, 108, 822 P.2d 998, 1005 (Ct. App. 1991) ("The judge pointed out that, while it is true that no individuals were injured during the attempted escape, the potential for harm was significant."). Indeed, that the "defendant's criminal conduct neither caused nor threatened harm" is among the specific statutory factors a court must weigh in favor of probation over incarceration. I.C. § 19-2501(2)(a). It was far from speculative for the judge to conclude that Storer's reckless and extreme actions put lives at risk, and this made his crimes more serious than if the danger had not been so great.

Storer also argues that the district court's analysis in rejecting a retained jurisdiction, which he characterizes as "reject[ing] a lesser sentence as unnecessary due to a defendant's exemplary and substantial progress," "defies reason." (Appellant's brief, p. 10.) However, "[t]he primary purpose of the retained jurisdiction program is to enable the trial court to gain additional information regarding the defendant's

rehabilitative potential and suitability for probation." State v. Lutes, 141 Idaho 911, 915, 120 P.3d 299, 303 (Ct. App. 2005). See also State v. Urrabazo, 150 Idaho 158, 161, 244 P.3d 1244, 1247 (2010) abrogated on other grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 265 P.3d 502 (2011) (""The purpose of this period of retained jurisdiction is to provide an evaluation 'of the offender's potential for rehabilitation and suitability for probation.'") (quoting State v. Diggie, 140 Idaho 238, 240, 91 P.3d 1142, 1144 (Ct. App. 2004)). The district court's determination that it did not need additional information regarding Storer's rehabilitative potential and suitability for probation was an eminently reasonable reason to reject retaining jurisdiction.

Storer also derides the district court for "the editorial nature of its descriptions" of his crimes. (Appellant's brief, pp. 16-17.) He identifies only one comment as having an "editorial tone," however; the characterization of "Mr. Storer's failure to yield at a red light as 'blast[ing] through the red light.'" (Appellant's brief, p. 17 (brackets original, quoting Tr., p. 5, Ls. 3-4).) Storer, however, has not presented a viable claim of error because he has provided neither law nor argument how the district court's choice of words describing Storer's conduct of going through a red light at about 100 M.P.H. was in any way improper. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (a party waives an issue on appeal if either authority or argument is lacking). If this issue is presented, Storer's description of his conduct ("failure to yield") is far less accurate than the district court's.

The district court applied the correct legal standards, reached findings of fact unchallenged on appeal, and weighed aggravating and mitigating factors in coming up with a sentence well within its discretion given the nature of the crimes in this case.

Storer argues the weighing should have reached a different conclusion, but has failed to show that the sentence is unreasonable. He has therefore failed to show an abuse of discretion.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 10th day of July, 2017.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 10th day of July, 2017, served two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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KKJ/dd