8-23-2017

State v. Herrera Appellant's Brief Dckt. 44913

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44913**
Plaintiff-Respondent,	)	
	)	**TWIN FALLS COUNTY**
	)	**NO. CR42-15-8968**
v.	)	
	)	
CODY D. HERRERA,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE RANDY J. STOKER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, 18-year old Cody Herrera pled guilty to one count of statutory rape. He received a unified sentence of fifteen years, with five years fixed, and the court retained jurisdiction. On appeal, Mr. Herrera contends that this sentence represents an abuse of the district court's discretion for two reasons. First, it is excessive given any view of the facts. Second, the court did not reach its decision based on an exercise of reason where it rejected the conclusions of the psychosexual evaluator in favor of the emotional statements of M.M.'s mother, and where it unduly focused on the number of sexual partners Mr. Herrera had.

Statement of the Facts & Course of Proceedings

In November of 2014, seventeen-year-old Mr. Herrera began spending time with M.M.[1] (Presentence Investigation Reporter (*hereinafter*, PSI),[2] p.4.) M.M. and Mr. Herrera had continued to see each other despite M.M.'s parents' objections and attempted to stop the relationship. (PSI, pp.73-78.) On March 11, 2015, Mr. Herrera had just turned eighteen and M.M. was fourteen. (PSI, p.4.) The two were hanging out in her bedroom. (PSI, p.4.) They were planning to watch a movie and Mr. Herrera began touching M.M.'s breasts. (PSI, p.4.) Mr. Herrera continued to touch M.M. and then he took off his shirt and clothes and removed her sweatpants and underwear. (PSI, p.4.) Mr. Herrera then put his penis in M.M.'s vagina. (PSI,

[1] M.M. told Mr. Herrera at the time that she was sixteen years old. (PSI, p.4.)

[2] The term "PSI" refers to the Presentencing Investigation Report and any attachments, including: the Addendums to the PSI, the Psychosexual Evaluation, and letters of support from Mr. Herrera's family members and friends. The page numbers in Appellant's Brief correspond with the pagination of the electronic file.

p.4.) M.M. began crying and told Mr. Herrera to stop, but Mr. Herrera reassured her and continued until he ejaculated.[3] (PSI, p.4.)

Based on these facts, Mr. Herrera was initially charged by Information with lewd conduct with a minor under sixteen years. (R., pp.77-79.) Pursuant to a plea agreement, Mr. Herrera pled guilty to the amended charge of statutory rape. (4/22/16 Tr., p.3, Ls.15-19; R., p.88.) In exchange, the State agreed to recommend a sentence of eight years, with three years fixed, and "Probation, Rider or to Serve based upon Psychosexual." (4/22/16 Tr., p.6, L.8 – p.7, L.3; R., p.88.) Defense counsel was free to argue for less. (4/22/16 Tr., p.7, Ls.4-9.) Mr. Herrera pled guilty to statutory rape. (4/22/16 Tr., p.11, Ls.17-20.)

At the sentencing hearing, the State asked for a unified sentence of eight years, with three years fixed, and a period of retained jurisdiction. (01/27/17 Tr., p.9, Ls.14-18.) Mr. Herrera's defense counsel asked the court to put Mr. Herrera on probation. (01/27/17 Tr., p.13, L.13 – p.14, L.7.) The district court, retreating from the findings of the psychosexual evaluation to give greater credence to the testimony of M.M.'s mother's during her victim impact statement, sentenced Mr. Herrera to nearly double the State's recommendation: fifteen years, with five years fixed, but the court retained jurisdiction over Mr. Herrera. (01/27/17 Tr., p.7, Ls.15-22; p.20, L.2 - p.24, L. 14; R., pp.128-133.)

At sentencing, the district court threatened to sentence Mr. Herrera to fixed life, telling him, "going to the Idaho State Penitentiary as a sex offender is not a good thing because you

[3] Mr. Herrera consistently maintained that the encounter was consensual, and M.M. never told him "no", but that M.M. said otherwise because she was afraid of her mother and what people would think. (PSI, p.91.) His polygraph results were consistent with his version of the events, namely that he did not force his penis into M.M.'s vagina against her wishes and M.M. told him "no" when he asked her if she wanted him to stop having sex with her because of her discomfort. (PSI, p.93.)

become Bubba's buddy, and I think you know that," implying Mr. Herrera would be raped in prison by the older, larger, stronger inmates. (01/27/17 Tr., p.21, Ls.11-21.) The court then commented:

> I will tell you, sir, that if you are ever placed on probation to this Court, a condition of that probation will be you will not have sexual relations with anyone other than who you are married to, if you're married, period.[4]

(01/27/17 Tr., p.23, Ls.8-11.)

On March 9, 2017, Mr. Herrera filed a Notice of Appeal. (R., pp.137-140.) Mr. Herrera appeals from the Judgment of Conviction. (R., pp.137-138.)

[4] These comments made national headlines: http://www.cosmopolitan.com/sex-love/a8693509/cody-herrera-rape-conviction-unmarried-sex-order/; http://www.nbcnews.com/news/us-news/idaho-judge-suspends-child-rapists-sentence-orders-no-sex-marriage-n717831; https://www.washingtonpost.com/news/post-nation/wp/2017/02/06/this-judge-told-a-19-year-old-rapist-that-his-probation-would-include-no-sex-outside-of-marriage/?utm_term=.5aac4ace2532. Because Mr. Herrera is not yet on probation and, thus, is not yet subject to a condition relating to whom he may have sex with, Mr. Herrera is not challenging the district court's unusual admonishment on appeal.

ISSUE

Did the district court abuse its discretion when it imposed a unified sentence of fifteen years, with five years fixed, upon Mr. Herrera following his plea of guilty to statutory rape?

ARGUMENT

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Fifteen Years, With Five Years Fixed, Upon Mr. Herrera Following His Plea Of Guilty To Statutory Rape

A. Introduction

Mr. Herrera asserts that, when sentencing Mr. Herrera, the district did not base its sentence on reliable information in the sentencing materials, but on M.M.'s mother's statements which were unsupported by information in the record. The district court further failed to reach its decision based on an exercise of reason where the district court appeared to be sentencing Mr. Herrera based on the number of sexual partners he had, rather than based on the facts of the case before it. Such speculation is unsupported in the record and, when combined with the district court's discourse on morality, demonstrates the court failed to act with an exercise of reason.

B. Standard Of Review

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, 772 (Ct. App. 1982). A district court abuses its discretion when it fails to recognize the issue as one of discretion, acts beyond the outer limits of that discretion, or does not reach a decision based on an exercise of reason. *State v. Hedger*, 115 Idaho 598, 601 (1989).

C. The District Court Failed To Reach Its Sentencing Decision Based On An Exercise Of Reason

The district court sentenced Mr. Herrera to nearly double the State's recommendation—fifteen years, with five years fixed, while retaining jurisdiction over Mr. Herrera. (01/27/17 Tr., p.7, Ls.15-22; p.20, L.2 - p.24, L. 14; R., pp.128-133.) Based on the court's comments when sentencing Mr. Herrera, it appears that the district court increased Mr. Herrera's sentence above the State's recommendation because it relied on the opinion of M.M.'s mother that Mr. Herrera was a predator, rather than the psychosexual evaluator's conclusion that Mr. Herrera was opportunistic, and because Mr. Herrera had numerous sexual partners in his lifetime. In doing so, the district court abused its discretion.

1. The District Court Erred In Relying On M.M.'s Mother's Opinion That Mr. Herrera Was A Predator, Rather Than The Expert's Conclusion That He Was An Opportunistic Offender

The psychosexual evaluator noted, "The examinee reports he did not find out the true age of the victim until after the sexual contact occurred. This was verified through available documents, interview and testing." (PSI, p.104.) The evaluator conducted six tests on Mr. Herrera, including a polygraph (which he passed), interviewed Mr. Herrera and his mother, and prepared a detailed 28-page evaluation in which he concluded that Mr. Herrera was opportunistic and not a predator. (PSI, pp.80-107.) The evaluator found Mr. Herrera "seemed most prone towards sexually offending adolescent females who the examinee is familiar with and is in a relationship with." (PSI, p.80.)

However, after listening to M.M.'s mother's emotional statement at sentencing, the district court concluded that the psychosexual evaluation was mistaken in not designating Mr. Herrera as a "sexual predator":

> This defendant, by his own admission, has had 34, count them, 34 sexual encounters with separate individuals. I have never, never seen that level of sexual activity between a 19-year-old, in this court system, and I've been doing this for 15, 16 years now. That tells me that what Ms. Maxfield is trying to tell me is that there is a level that this -- an attitude that this defendant has that, well, I'm going to use young children for sexual gratification. That does not seem to be consistent with what the psychosexual report says because I don't think they didn't -- as I read it, H&H did not designate Mr. Herrera as a, quote, sexual predator, even though there is certainly an argument that can be made for that. So I'm having a little trouble understanding why this evaluation came out the way it came out.

(01/27/17 Tr., p.20, L.14 – p.21, L.5.)

M.M.'s mother's told the court that she believed Mr. Herrera was a predator because he pursued a relationship with her daughter, and because Mr. Herrera's seventeen-year-old ex-girlfriend got a protection order against him. (01/27/17 Tr., p.7, L.5 – p.8, L.4.) However, M.M. also sought to continue the relationship with Mr. Herrera, even letting him in her bedroom window the night of the incident. (PSI, p.4.) Further, included in the PSI was a copy of the protection order for Mr. Herrera's seventeen-year-old ex-girlfriend, and the petition providing reasons why the protection order was being sought. (PSI, pp.58-67.) It had been completed by Mr. Herrera's ex-girlfriend's mother, and stated essentially that the mother had looked through Mr. Herrera's phone and found a video of Mr. Herrera and her daughter having sexual relations and Mr. Herrera had a weird look on his face. (PSI, pp.58-67.) In disregarding the psychosexual evaluation to rely instead, on M.M.'s mother's emotional statement that Mr. Herrera was "a predator, preying on young girls," the district court erred.

2. The District Court Erred In Concluding That The Substantial Number Of Sexual Partners Mr. Herrera Had Meant That He Used Young Children For Sexual Gratification

The district court further failed to reach its decision based on an exercise of reason where the district court appeared to be sentencing Mr. Herrera based on the number of sexual partners

he had, rather than based on the facts of the case before it. Further, there was no indication in any record before the court that Mr. Herrera's 34 past sexual partners were "young children."

At sentencing, the district court was clearly appalled by the number of sexual partners Mr. Herrera had, saying:

> This defendant, by his own admission, has had 34, count them, 34 sexual encounters with separate individuals. I have never, never seen that level of sexual activity between a 19-year-old, in this court system, and I've been doing this for 15, 16 years now.

(01/27/17 Tr., p.20, Ls.16-21.)

Although the court leapt to conclude that Mr. Herrera had an attitude that, "well, I'm going to use young children for sexual gratification," the record is devoid of any facts supporting the court's conclusion that Mr. Herrera's 34 past sexual partners were "young children." (01/27/17 Tr., p.20, Ls.14-24.)

The district court then offered its opinion on the internet and morality:

> When I was 19 years of age, the sexual proclivities of young people wasn't anything like I see today. I think it is a direct consequence of the social media system that we have in this county. . .
>
> . . .
>
> If I had my way, I would eliminate the internet, and we'd all have better lives, but I can't do that either. It also says something about, I guess, the level of morality in this country. I can't change morality.

(01/27/17 Tr., p.18, L.25 – p.19, L.12.)

The district court's speculation that Mr. Herrera's past sexual partners were "young children" that he was using "for sexual gratification," is unsupported in the record and, when combined with the district court's discourse on morality, demonstrates the court failed to act with an exercise of reason.

D. The District Court Abused Its Discretion In Failing To Fully Consider The Mitigating Factors Present In Mr. Herrera's 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 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)). In order to show an abuse of discretion in the district court's sentencing decision, he must show that, in light of the governing criteria, the sentence is excessive considering any view of the facts. *State v. Jackson*, 130 Idaho 293, 294 (1997). A sufficient consideration of the factors in this case shows the district court's decision was excessive and not an exercise of reason under the four goals of sentencing.

Mr. Herrera is immature for his age. (PSI, p.85.) Mr. Herrera's mother believes he is at a fifteen- or sixteen-year-old maturity level. (PSI, p.85.) The psychosexual evaluation reflected that Mr. Herrera was "very emotionally immature" and has poor judgment overall. (PSI, p.95.) While his emotional immaturity and poor judgment does not excuse the fact that Mr. Herrera pursued a dating relationship with fourteen-year-old M.M., these factors do help explain why he was in a romantic relationship with a person several years his junior.[5] (PSI, p.104.) But, immature as he may have been, Mr. Herrera was an adult (by nearly a month) and must pay the price for his actions as an adult.

Mr. Herrera was just one month past his eighteenth birthday when he committed the instant offense. (PSI, pp.3, 6.) In addition to his young age, Mr. Herrera does not have any prior felony convictions. (PSI, p.6; 01/27/17 Tr., p.8, L.18.) Prior to these charges, Mr. Herrera had nothing more significant than traffic citations. (PSI, p.6.)

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).

The defendant in *Hoskins* pled guilty to two counts of drawing a check without funds. *Hoskins*, 131 Idaho at 673. In *Nice*, the defendant pled guilty to the charge of lewd and lascivious conduct with a minor. *Nice*, 103 Idaho at 90. In both *Hoskins* and *Nice*, the court considered, among other important factors, that the defendants had no prior felony convictions. *Hoskins*, 131 Idaho at 673; *Nice*, 103 Idaho at 90. The *Hoskins* Court ultimately found that based upon the nature of the offense and the absence of any prior serious criminal record, the district court abused its discretion in imposing the sentence. *Hoskins*, 131 Idaho at 673. Here, Mr. Herrera did not have a criminal history beyond his traffic citations.

Another fact that should have received the attention of the district court is that Mr. Herrera has strong support from family and friends. *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). Mr. Herrera's family was present at his sentencing hearing and several family members wrote letters to show their support of Mr. Herrera. (01/27/17 Tr., p.14,

[5] The psychosexual evaluator noted, "The examinee reports he did not find out the true age of the victim until after the sexual contact occurred. This was verified through available documents, interview and testing." (PSI, p.104.)

Ls.3-5; PSI, pp.7, 34-36.) The letters from his friends and family reveal that he is a hardworking, churchgoing kid. (PSI, pp.34-36.) Mr. Herrera received character reference letters from his parents and his godparents. (PSI, pp.7, 34-36.)

Further, Mr. Herrera expressed great remorse for his conduct and took responsibility for his acts. (01/27/17 Tr., p.14, L.16 – p.15, L.5; PSI, pp.5, 13.) 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).

At sentencing, Mr. Herrera addressed the court:

> Thank you, Your Honor, for allowing me to address the Court. I want to apologize for my actions. I know I've made some wrong choices, and I take full responsibility for them. I attended my program, and I feel like I have some tools that will ensure I make better and more responsible decisions in the future.
>
> I am greatly remorseful for the pain I imposed on both families, and I want to take a moment to apologize to [M.M.]'s parents. I'm so sorry for the choices I have made, and I am so sorry to you and the pain I have caused you and your family.
>
> And to my family, I'm so sorry. I'm sorry for the pain I've caused you as well as the disappointment to you I've felt. I want you to know I will try for the rest of my life to be the son you can be proud of.

(01/27/17 Tr., p.14, L.16 – p.15, L.5.)

Mr. Herrera verbalized accountability for his actions at his pre-sentencing interview. (PSI, pp.5, 13.) Further, Mr. Herrera was proactive in getting treatment before he was sentenced—he completed a six-week treatment program prior to sentencing. (1/27/17 Tr., p.12, Ls.10-18; Augmentation, p.1.) *See State v. Shideler*, 103 Idaho 593, 594 (1982) (reducing sentence of first time offender who accepted responsibility for his acts and had the support of his family in his rehabilitation efforts); *see also State v. Carrasco*, 114 Idaho 348, 354-55 (Ct. App. 1988), *reversed on other grounds*, 117 Idaho 295 (1990) (reducing sentence of first time offender

who accepted responsibility, expressed remorse, and had been of good character before the offense at issue); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991) (noting 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").

The court sentenced Mr. Herrera without sufficiently considering all of the mitigating factors present in this case. Because the district court failed to consider all of these factors, it abused its discretion in imposing a fifteen-year sentence, and retaining jurisdiction.

CONCLUSION

Mr. Herrera respectfully requests that this Court remand his case with an order that he be placed on probation, or that it 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 23rd day of August, 2017.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of August, 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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_____/s/_____
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SJC/eas