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State v. Herrera Respondent's Brief Dckt. 44913

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 44913
Plaintiff-Respondent,)	
)	Twin Falls County Case No.
v.)	CR-42-2015-8968
)	
CODY D. HERRERA,)	
)	
Defendant-Appellant.)	
)	
)	
)	

BRIEF OF RESPONDENT

**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

Cody D. Herrera appeals from his judgment of conviction and sentence of 15 years with five years fixed for statutory rape, arguing that the district court abused its sentencing discretion.

Statement Of The Facts And Course Of The Proceedings

In the late hours of March 2, 2015, Herrera snuck into the house of a 14-year-old girl by climbing through her window. (PSI, p.4.) Herrera had been pursuing the 14-year-old girl for months, and had engaged in sexual contact with her on at least two prior occasions. (PSI, pp.4, 91.) The young girl tried to keep the relationship hidden from her parents, chatting with Herrera online and hanging out at the mall or his house. (PSI, p.4.) When her mother discovered the relationship, she warned Herrera that her daughter was only 14 and told him that she was not allowed to have a boyfriend. (PSI, pp.4, 73.) But Herrera, even after becoming an adult, continued the relationship in secret. (Id.)

According to the official police reports, after sneaking into the 14-year-old girl's bedroom, Herrera proceeded to fondle her breasts. (PSI, p.4.) She told him to stop, but he did not. (Id.) Instead, he removed her pants and underwear and, despite her continued pleas and protestations, forced his penis into her vagina and continued to have sex with her until he ejaculated. (Id.) Afterwards, he climbed back out through the window, leaving the 14-year-old girl alone crying. (Id.)

The girl, afraid of what her parents would think if she told them, eventually confided in a friend, and a report was filed by her school resource officer. (Id.) The state charged Herrera with lewd and lascivious conduct with a minor child. (R., pp.77-78.) Before trial, the parties reached a plea settlement under which Herrera pleaded guilty to statutory rape. (R., pp.87-88,

104-05.) The district court entered judgment against Herrera for rape and sentenced him to 15 years with five years fixed, but retained jurisdiction. (R., pp.128-32.) Herrera filed a timely notice of appeal. (R., pp.137-39.)

ISSUE

Herrera states the issue on appeal as:

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?

(Appellant's brief, p.4.)

The state rephrases the issue as:

Has Herrera failed to show any abuse of the district court's discretion in sentencing him to a unified term of 15 years with five years fixed upon his conviction for statutory rape?

ARGUMENT

Herrera Has Failed To Show An Abuse Of The District Court's Sentencing Discretion

A. Introduction

Below, pursuant to his guilty plea, Herrera was convicted of statutory rape. (R., pp.128-32.) The district court sentenced Herrera to a unified term of 15 years with five years fixed, but retained jurisdiction. (Id.) On appeal, Herrera argues that the district court abused its sentencing discretion on two bases: (1) that the district court *erred* by, allegedly, giving greater weight to victim impact statements than to the psychosexual evaluation, or (2) that, in light of allegedly mitigating circumstances, the district court abused its sentencing discretion. (Appellant's brief, pp.5-12.) Application of the correct legal standards to this case shows no 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 Sentencing Herrera To A Unified Term Of 15 Years With Five Years Fixed For Statutory Rape

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 this burden, Herrera must show that his 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). While the Court reviews the whole sentence on appeal, it presumes 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, the 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).

The sentence imposed by the district court is supported by the seriousness of Herrera's crime. Though offered a deal to enter a plea for the non-registerable offense of statutory rape, under the facts of this case Herrera could have also been convicted of lewd and lascivious conduct. Over the course of several months, he groomed a 14-year-old girl until he convinced her to have sex with him, and then he left her in the lurch. (PSI, p.4; compare I.C. § 18-1508.) Apparently, this is his *modus operandi*. (See PSI, pp.63-64.) He had been informed by his victim's parents, after they learned of the relationship but before the rape, that she was only 14 and told to stay away. (PSI, p.4.) After the sexual encounter, he reached out to the victim's mother—not to apologize or seek to make some sort of amends—but to verify whether his victim was pregnant and to maybe avoid jail time. (Id.) In that recorded phone conversation, Herrera also admitted that he knew his victim was underage. (Id.)

On appeal, Herrera appears to challenge whether he knew his victim's age, noting that Herrera reported during his psychosexual evaluation that he did not know his victim's true age until a week or so after their first sexual contact, and that he passed a polygraph on that question. (Appellant's brief, p.6.) But the PSE appears to differentiate sexual contact from sexual intercourse: Herrera twice had sexual *contact* with his 14-year-old victim before they had sexual

intercourse. (PSI, p.91.) That Herrera may have thought his victim was 16 during their first sexual contact is no excuse for continuing the relationship over the objections of the victim's parents after learning that the victim was in fact 14 (see PSI, p.4), much less an excuse for engaging in sexual *intercourse* with a 14-year-old girl.

Herrera claims that the district court *erred* by, allegedly, placing greater reliance on a conclusion that Herrera was a predator contained in the victim impact statement from the 14-year-old girl's mother over the PSE's conclusions. (Appellant's brief, pp.6-7.) This argument fails on multiple grounds. First, Herrera has presented no legal authority that a sentencing court commits error by giving greater weight to some evidence over other evidence at sentencing. (See id.) This Court, therefore, should not even consider this waived claim of error. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). In fact, the argument appears directly contrary to state law: In specific regards to findings at sentencing, the credibility of witnesses, the weight to be given to various testimony and opinion, and the reasonable inferences to be drawn from the evidence are all issues within the sole province of the trier of fact. State v. Carson, 151 Idaho 713, 724, 264 P.3d 54, 65 (2011). In this case, the trier of fact at sentencing was the district court. Finally, contrary to Herrera's arguments, there is no evidence that the district court actually relied on the victim impact statement's conclusion that Herrera was a predator. Rather, the district court noted that the PSE did not designate Herrera as a sexual predator,¹ while recognizing that "there is certainly an argument that can be made for that." (Tr.,

¹ Herrera wants to draw a distinction between "sexual predators" and "opportunistic offenders" (see Appellant's brief, p.6), but these are not mutually exclusive. By designating Herrera as one the PSE does not rule out the other; the PSE simply did not designate him as a predator. But the PSE did note that Herrera's "offending behaviors" included "mild grooming and coercion to gain sexual advantage" (PSI, p.105), which is hardly favorable toward Herrera.

p.20, L.24 – p.21, L.3.) That argument would be based on Herrera’s conduct in this case and his admissions to the pre-sentence investigator. (Tr., p.20, Ls.5-24.)

Though it did consider and weigh the findings of the PSE, the district court also expressed some concerns with the PSE’s ultimate conclusion that Herrera was only a moderate risk to reoffend. (Tr., p.18, Ls.10-15; p.20, L.2 – p.21, L.5.) And for good reason. First, the PSE’s ultimate conclusions may be less reliable because, as the report acknowledges, they are based on incomplete information. (See PSI, pp.105-06 (conclusions “[b]ased on available documentation and the victim report”; “[c]onclusions were based on available information and should be updated if additional relevant data is presented”).) An example of this incomplete information is found in Herrera’s sexual history. For both the district court and the PSE writers, it appears that this unusually extensive sexual history, including multiple deviant sexual behaviors, was the most striking part of Herrera’s PSE. (See PSI, p.104; Tr., p.20, Ls.16-21.) Due to the nature of Herrera’s sex crime in this case, such history is highly relevant. However, at the time of the report, Herrera had not been found as non-deceptive on a comprehensive sexual history polygraph. (PSI, p.104.) As noted in the PSE, “[i]t is not uncommon for additional disclosures and admissions to occur during preparation for and taking of the polygraph.” (Id.)

Second, Herrera was not always completely forthcoming in what he did report throughout his psychosexual evaluation. For instance, in reference to this current case, he told the evaluator that he was 17 when he had sex with his 14-year-old victim. (PSI, p.91.) In fact, he was 18, as he admitted in his PSI. (PSI, p.5.) He also claimed that he had “been clean from drugs for one year and eight months,” and denied ever using cocaine. (PSI, p.85.) A few months earlier, however, he admitted during a medical examination that “[h]e does smoke marijuana ... daily, and has used inhaled cocaine within the past week.” (PSI, p.54.) During his PSE, Herrera

denied having experienced suicidal thoughts (PSI, p.83); but in 2015 he actually attempted to overdose and reported a history of suicidal thoughts (PSI, p.38, 49-51), which he also admitted to his MSI-II writers (PSI, p.96). In late 2015, Herrera went to a medical practice with complaints of ADHD and insomnia. (PSI, pp.52-53.) Neither conditions were self-reported on Herrera's PSE. (PSI, p.83.) During his PSE, Herrera claimed he had 34 lifetime sexual partners (PSI, p.90); a few months earlier, that number was 36 (PSI, p.54).

Herrera also asserts that the district court abused its sentencing discretion, apparently, by not ignoring Herrera's unusually extensive sexual history. (Appellant's brief, pp.7-9.) Herrera specifically claims:

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.

(Appellant's brief, p.8.) These assertions are untethered to the facts of this case. First, the district court never stated, as claimed by Herrera on appeal, that "Herrera's 34 past sexual partners were young children." Rather, referring to Herrera's admission to the presentence investigator that he "was just a boy caught in love and had so many emotions at the time. What young man doesn't have urges of sex?" the district court noted, consistent with the victim impact statement, that Herrera's statement evidenced "an attitude that this defendant has that, well, I'm going to use young children for sexual gratification." (See Tr., p.20, Ls.2-24.) Though ignored by Herrera on appeal, that is exactly what happened in this case where Herrera used a 14-year-old girl for his own sexual gratification.

Herrera also takes issue with the district court's "opinion on the internet and morality." (Appellant's brief, p.8.) Regarding social media, the district court's comments were directly relevant to this case where, after the victim's parents tried to put an end to Herrera's illicit

relationship with their 14-year-old daughter, he surreptitiously continued it online and through social media. (PSI, p.4.) Second, it would be difficult to find a more stunning indictment of society's moral decline than Herrera's apparent libertine attitudes toward sexual gratification, including at the expense of a 14-year-old girl.

In crafting its reasonable and appropriate sentence, the district court considered the required statutory factors and case law sentencing criteria. (Tr., p.16, L.24 – p.18, L.10.) It reviewed and considered both Herrera's PSI and PSE, and the PSE's ultimate conclusion that Herrera displayed a moderate risk of reoffending. (Tr., p.18, Ls.10-21.) It considered the recommendations of the parties and the department of correction. (Tr., p.22, Ls.15-25.) Contrary to Herrera's argument on appeal, the district court also gave appropriate weight to all potentially mitigating factors in this case, including Herrera's expressions of remorse *after* his conviction, and seeking treatment prior to sentencing. Herrera has failed to show any abuse of the district court's sentencing discretion. His underlying unified sentence of 15 years with five years fixed on his conviction for statutory rape should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm Herrera's conviction and sentence for statutory rape.

DATED this 7th day of September, 2017.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of September, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Russel J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd