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State v. Osborn Respondent's Brief Dckt. 44964

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44964
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2016-4203
)	
MICHAEL ROBERT OSBORN,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Osborn failed to establish that the district court abused its discretion, either by imposing an aggregate, unified sentence of 24 years, with 17 years fixed, upon his guilty pleas to burglary and grand theft, or by denying his Rule 35 motion for a reduction of sentence?

Osborn Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Osborn pled guilty to burglary and grand theft and the district court imposed an aggregate, unified sentence of 24 years, with 17 years fixed, and ordered that the sentence run concurrently with Osborn's sentence in Ada Count Case No. CR01-2016-24383. (R., pp.170-73.) Osborn filed a notice of appeal timely from the judgment of conviction. (R., pp.174-76.)

He also filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.189-94; Order Regarding Motion for Reconsideration of Sentence Pursuant to Idaho Criminal Rule 35 (Augmentation).)

Osborn asserts that the district court abused its discretion by imposing an excessive sentence in light of his substance abuse, desire for treatment, mental health issues, and support of family and friends. (Appellant's brief, pp.3-4.) Osborn has failed to establish an abuse of discretion.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed 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 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens,

146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, “[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The maximum prison sentence for burglary is 10 years and for grand theft is 14 years. I.C. §§ 18-1403, -2408(2)(a) The district court imposed consecutive, unified sentences of 10 years fixed for burglary and 14 years, with seven years fixed, for grand theft, which fall within the statutory guidelines. (R., pp.170-73.) Osborn’s sentence is also reasonable in light of his ongoing decisions to endanger others and his failure to rehabilitate.

Osborn’s criminal record demonstrates his disregard for the law, the terms of community supervision, and the well-being of others. Osborn’s first felony conviction was for discharging a firearm in a house, occupied building, or vehicle in 2003 and he was sentenced to a period of retained jurisdiction, which he did not successfully complete. (PSI, pp.7-9.) After being paroled in December of 2005, Osborn was convicted of robbery in 2006 and sentenced to 25 years in prison. (PSI, pp.7-9.) Osborn was placed on parole in February 2014, and an agent’s warrant for parole violation was issued in September of 2014. (PSI, p.9.) Osborn was released from incarceration in June 2015, and a warrant was again issued the very next month. (PSI, p.9.) After a period of incarceration, Osborn was placed on parole in February 2016, and he committed the instant offense two months later. (PSI, p.9.) Osborn also committed multiple disciplinary offenses while in incarcerated, including: disrespect to a commanding officer, intent to injure, group disruption, sexual activity, outside of authorized boundaries, horse play, battery, unauthorized transfer of property, and disobedience to orders. (PSI, pp.62-75.) Osborn’s desire for treatment and support from family and friends do not outweigh the seriousness of the

offenses, his demonstrated inability or unwillingness to conform his behavior to the requirements of the law, and the need for community protection.

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Osborn's sentence. (3/15/17 Tr., p.41, L.17 – p.43, L.24.) The district court concluded, saying, "You put everybody at risk. Your willingness to do that frightens me." (3/15/17 Tr., p.43, Ls.15-16.) The state submits that Osborn has failed to establish that his sentence is excessive for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Osborn next asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence because he was remorseful and provided an additional letter of support. (Appellant's brief, p.5.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this 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, Osborn 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. Osborn has failed to satisfy his burden.

Information with respect to Osborn's remorse and support from his mother was before the district court at the time of sentencing and, as such, it is not new information that entitled Osborn to a reduction of sentence. (3/15/17 Tr., p.33, Ls.10-20.; PSI, pp.40-44.) Furthermore, these factors do not outweigh the seriousness of the offense, the danger Osborn presents to the community, and his failure to rehabilitate or be deterred.

The district court considered all of the relevant information and appropriately concluded that Osborn's sentence was appropriate "given Defendant's criminal history and utter inability to remain crime free or drug free for any meaningful amount of time after being released on parole." (Order Denying Rule 35 Motion, p.9 (Augmentation).) Osborn has not shown that he was entitled to a reduction of sentence simply because he is remorseful and has the support of his mother. Given any reasonable view of the facts, Osborn has failed to establish that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence.

Conclusion

The state respectfully requests this Court to affirm Osborn's conviction and sentences and the district court's order denying Osborn's Rule 35 motion for a reduction of sentence.

DATED this 16th day of November, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th day of November, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JASON C. PINTLER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

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1 today. Thank you.
 2 THE COURT: Thank you.
 3 Mr. Osborn, you get the last word. Is
 4 there anything you want to tell me before I decide
 5 what sentence to impose?
 6 THE DEFENDANT: No, Your Honor.
 7 THE COURT: Nothing at all?
 8 THE DEFENDANT: (Shakes head).
 9 THE COURT: Is there any legal cause why
 10 judgment can't be entered?
 11 MR. DINGER: No.
 12 MR. NONA: No, Judge.
 13 THE COURT: Based upon your pleas of guilty,
 14 Mr. Osborn, to burglary and grand theft, I'm going
 15 to find you guilty of those two offenses and I
 16 will impose judgments of conviction on each count.
 17 The question becomes what sentence to
 18 impose. There have been compelling arguments made
 19 by both the State and defense counsel. And as I
 20 listened to them, it occurred to me that -- and we
 21 have talked about the Toohill factors, which I'm
 22 sure you've heard before, Mr. Osborn, the things
 23 that we have to take into consideration -- as I
 24 was listening to this in the juxtaposition of
 25 these offenses and the ones that Judge Norton just

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1 committed by you and having had an extremely
 2 significant sentence imposed on you in the past,
 3 deserves significant attention now.
 4 I tend to agree that Judge Norton's
 5 case and this case are different and temporally
 6 Judge Norton's case comes later and likely
 7 shouldn't be used in and of itself to enhance the
 8 sentence in this case. But it doesn't mitigate it
 9 in any way either because even though it came
 10 later, it does fairly clearly demonstrate the
 11 lengths that you are willing to go to in
 12 desperation with a gun, with a standoff, with
 13 threats, with considering, as I read the
 14 presentence investigation, probably an attempted
 15 suicide by cop. You put everybody at risk. Your
 16 willingness to do that frightens me. And while I
 17 don't think that that should enhance this
 18 sentence, I don't think it mitigates it either.
 19 I think that Judge Norton likely
 20 carefully considered all of the circumstances both
 21 in this offense and then in the ones in front of
 22 her in coming to her judgment and I think it was a
 23 reasonable judgment. I'm going to do something
 24 very similar to it.
 25 I'm going to impose a judgment of

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1 sentenced, it occurred to me, as it sometimes
 2 does, that sometimes we sentence the crime and
 3 sometimes we sentence the person. More frequently
 4 we sentence a combination of the two. That is
 5 true for you. There is both the crime, which was
 6 extraordinarily dangerous in and of itself,
 7 frankly. While I appreciate your attorney's
 8 attempts to sort of sanitize the details of this
 9 and while it may be true that you did not display
 10 a weapon in the context of this, frankly, it's a
 11 robbery. I mean, you've got a plea agreement that
 12 calls it a grand theft, but it looks like a
 13 robbery for all intents and purpose except for
 14 sentencing.
 15 It is difficult for me to believe that
 16 the person from whom you demanded money of did not
 17 feel extremely threatened by that. The fact that
 18 you were under the influence of heroin and
 19 methamphetamine may explain your behavior, may
 20 explain how people may have perceived you, but it
 21 does not excuse your behavior and tends to support
 22 their perspective that you were a scary guy when
 23 you were demanding money from them and they had
 24 every reason to feel threatened by that.
 25 That is an offense, which having been

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1 conviction. On Count One I'm going to impose an
 2 aggregate term of ten years consisting of ten
 3 years fixed followed by zero years indeterminate.
 4 On Count Two I'm going to impose an
 5 aggregate of term of 14 years consisting of seven
 6 years fixed followed by seven years indeterminate
 7 to run consecutive to Count One, but concurrent
 8 with the offense on which you are currently
 9 serving in Judge Norton's case as was agreed to in
 10 the plea agreement and I think Judge Norton has
 11 already done that in her judgment.
 12 You'll be given credit for all time
 13 served in pretrial incarceration.
 14 And then I'll sign a judgment in favor
 15 of the State in the amount of \$1,560 for
 16 restitution.
 17 I'm also going to sign an order, a
 18 protection order -- or a no-contact order, rather,
 19 prohibiting you from having any contact with Julia
 20 Davis. This order will be in effect for 20 years.
 21 It will expire March 15th of 2037.
 22 Do you have any questions about the
 23 judgment, Mr. Osborn?
 24 THE DEFENDANT: No.
 25 THE COURT: I'm sorry?