

11-6-2017

State v. Vesely Appellant's Brief Dckt. 45027

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45027
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-16-29926
v.)	
)	
JOSHUA LEO VESELY,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

A jury found Joshua Leo Vesely guilty of three counts of possession of a controlled substance with the intent to deliver and one count of misdemeanor possession of a controlled substance. The district court imposed an aggregate sentence of ten years, with two and one-half years fixed. Mr. Vesely appeals, arguing the district court abused its discretion by imposing an excessive sentence.

Statement of Facts and Course of Proceedings

The State charged Mr. Vesely with four drug offenses: (1) possession of morphine with the intent to deliver, a felony, in violation of I.C. § 37-2732(a); (2) possession of hydrocodone with the intent to deliver, a felony, in violation of I.C. § 37-2732(a); (3) possession of amphetamine with the intent to deliver, a felony, in violation of I.C. § 37-2732(a); and (4) possession of “bath salts,” a misdemeanor, in violation of I.C. §§ 37-2732(c), -2705(f)(3). (R., pp.31–32.) Mr. Vesely pled not guilty and exercised his right to a jury trial. (R., pp.42, 79–86; *see generally* Tr., p.1, L.1–p.349, L.19.) The jury found Mr. Vesely guilty as charged. (R., pp.121–24; Tr., p.343, L.7–p.345, L.12.)

At sentencing, the State recommended an aggregate sentence of ten years, with five years fixed. (Tr., p.354, Ls.15–16.) Mr. Vesely requested the district court sentence him to an aggregate term of seven to ten years, with two to five years fixed, and either retain jurisdiction or suspend the sentence and place him on probation. (Tr., p.359, L.16–p.360, L.11.) The district court sentenced Mr. Vesely to ten years, with two and one-half years fixed, for each count of possession with the intent to deliver, to be served concurrently. (Tr., p.366, Ls.16–24.) It sentenced him to 120 days, with 120 days credit for time served, for the misdemeanor. (Tr., p.366, Ls.20–21; R., p.136.) The district court declined to retain jurisdiction or place Mr. Vesely on probation. (Tr., p.365, L.20–p.366, L.15.) Mr. Vesely timely appealed from the district court’s judgment of conviction. (R., pp.135–38, 140–42.)

ISSUE

Did the district court abuse its discretion when it imposed a unified aggregate sentence of ten years, with two and one-half years fixed, upon Mr. Vesely, following his conviction for three drug offenses?

ARGUMENT

The District Court Abused Its Discretion When It Imposed A Unified Aggregate Sentence Of Ten Years, With Two And One-Half Years Fixed, Upon Mr. Vesely, Following His Conviction For Three Drug Offenses

“It is well-established 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. Pierce*, 150 Idaho 1, 5 (2010) (quoting *State v. Jackson*, 130 Idaho 293, 294 (1997) (alteration in original)). Here, Mr. Vesely’s aggregate sentence does not exceed the statutory maximum. *See* I.C. § 37-2732(a)(1)(A) (maximum of life imprisonment). Accordingly, to show that the sentence imposed was unreasonable, Mr. Vesely “must show that the sentence, in light of the governing criteria, is excessive under any reasonable view of the facts.” *State v. Strand*, 137 Idaho 457, 460 (2002).

“‘Reasonableness’ of a sentence implies that a term of confinement should be tailored to the purpose for which the sentence is imposed.” *State v. Adamcik*, 152 Idaho 445, 483 (2012) (quoting *State v. Stevens*, 146 Idaho 139, 148 (2008)).

In examining the reasonableness of a sentence, the Court conducts an independent review of the entire record available to the trial court at sentencing, focusing on the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public; (3) possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

Stevens, 146 Idaho at 148. “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.” *State v. Delling*, 152 Idaho 122, 132 (2011).

“The 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. Jones*, 141 Idaho 673, 676 (Ct. App. 2005). “[P]robation is the ultimate

objective of a defendant who is on retained jurisdiction.” *Id.* at 677. The district court’s decision to retain jurisdiction is reviewed for an abuse of discretion. *Id.* “There can be no abuse of discretion in a trial court’s refusal to retain jurisdiction if the court already has sufficient information upon which to conclude that the defendant is not a suitable candidate for probation.” *Id.* Similarly, “[t]he choice of probation, among available sentencing alternatives, is committed to the sound discretion of the trial court” *State v. Landreth*, 118 Idaho 613, 615 (Ct. App. 1990).

Mr. Vesely asserts the district court abused its discretion by imposing an excessive sentence under any reasonable view of the facts. Specifically, he contends the district court should have sentenced him to a lesser term of imprisonment, retained jurisdiction, or placed him on probation in light of the mitigating factors, including his many years of sobriety, acceptance of responsibility, family support, gainful employment, and cancer diagnosis.

Prior to the instant offenses, Mr. Vesely had been sober for fourteen years. (Presentence Investigation Report (“PSI”), p.10.) He was initially incarcerated in federal prison, but was released in 2011. (PSI, p.6; Tr., p.355, Ls.10–13.) He was then on supervised probation for five years. (PSI, p.6.) During this time, Mr. Vesely lived in Minnesota and worked as a welder and carpenter. (PSI, pp.7, 8–9.) He successfully completed federal probation. (PSI, p.11.) In June of 2016, Mr. Vesely’s stepfather passed away. (PSI, p.6.) Mr. Vesely moved to Boise about eight months later to be closer to his family in Idaho. (PSI, p.6.) This move to Boise, however, did not go as planned. (PSI, p.10.) Mr. Vesely started “hanging with the wrong crowd” after he lost his union job. (PSI, pp.3, 10, 18.) He started using methamphetamine, bath salts, and pain pills. (PSI, p.3.) With regard to the instant offense, Mr. Vesely explained, “I was arrested with pain pills I had considered selling, but thankfully I got caught before I could do any more damage to myself

or sink deeper into other crimes or mistakes.” (PSI, p.3.) He took full responsibility for his actions. (PSI, p.10.) Mr. Vesely’s long period of sobriety coupled with his acceptance of responsibility support a lesser sentence. Although Mr. Vesely relapsed, he has shown that he can succeed on probation due to his past success on federal probation. With steady employment and a strong support system, Mr. Vesely can get back on track and become a contributing member of society once again.

Mr. Vesely has the tools to succeed on probation or during a period of retained jurisdiction. For example, he has a supportive family in Idaho. His stepsister and two nephews live in Meridian. (PSI, p.6.) He is very close to them. (PSI, p.6.) Mr. Vesely also has prosocial friends. (PSI, p.6.) In particular, he has two close friends who do not have substance abuse issues “and are successful adults.” (PSI, p.6.) He could live with them if placed on probation. (PSI, p.6.) Even with this support network, Mr. Vesely recognized that he had some friends in Idaho with substance abuse issues, so he was also considering moving back to Minnesota. (PSI, pp.7, 18.) He did not know anyone who used illegal drugs in Minnesota. (PSI, p.7.) In addition, Mr. Vesely was motivated to turn his life around. While in custody, he completed a residential drug abuse program and aftercare. (PSI, p.10.) He also hoped to finish college, participate in additional substance abuse treatment, and eventually become a chemical dependency counselor himself. (PSI, pp.8, 11.) Moreover, Mr. Vesely is employable. He is a skilled carpenter and welder. (PSI, p.9.) He was confident he could find employment upon release. (PSI, p.9.) These factors—family and friend support, commitment to sobriety, and gainful employment opportunities—all support a lesser sentence, including probation or a period of retained jurisdiction.

Finally, Mr. Vesely’s serious health issues support a more lenient sentence. In 2001 or 2002, Mr. Vesely was diagnosed with leukemia. (PSI, pp.9, 21.) His leukemia was in remission

prior to his arrest. (PSI, p.9.) Most recently, he was treated by an oncologist at St. Alphonsus. (PSI, p.21.) Now incarcerated, Mr. Vesely has been unable to get the necessary medication, Gleevec. (PSI, p.9.) In fact, at the time of the presentence report, he had not received his leukemia medication for five months. (PSI, pp.11, 18.) He characterized his situation as “desperate” and believed his health was failing without the medication. (PSI, pp.9, 11.) For example, he had chronic fatigue and an ear infection that would not heal. (PSI, p.11.) The Ada County jail eventually provided Mr. Vesely with a fourteen-day supply of Gleevec just prior to his sentencing hearing. (Tr., p.358, Ls.8–10.) Nonetheless, Mr. Vesely expressed immense concern with his medical treatment in prison. (Tr., p.361, L.25–p.362, L.19.) He informed the district court that he was not in remission anymore. (Tr., p.362, L.1.) Mr. Vesely understood that he committed crimes and deserved punishment, but maintained that he should not be denied the proper medication. (Tr., p.262, Ls.4–11, p.363, Ls.19–24.) He wanted to get healthy again. (Tr., p.363, Ls.19–20.) In light of his cancer diagnosis, along with the other mitigating factors discussed above, Mr. Vesely asserts the district court abused its discretion by imposing an excessive sentence.

CONCLUSION

Mr. Vesely respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he respectfully requests that this Court vacate the district court’s judgment of conviction and remand this case to the district court for a new sentencing hearing.

DATED this 6th day of November, 2017.

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of November, 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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PATRICK H OWEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

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_____/s/_____
EVAN A. SMITH
Administrative Assistant

JCS/eas