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State v. Serna Appellant's Brief Dckt. 45121

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45121
Plaintiff-Respondent,)	
)	BINGHAM COUNTY NO. CR 2016-7751
v.)	
)	
VICTORIANO AVILA SERNA,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

After Victoriano Avila Serna pled guilty to felony driving under the influence, the district court sentenced him to a unified term of ten years, with five years fixed. Mr. Avila¹ appeals from his judgment of conviction and asserts that his sentence is excessive in light of the mitigating factors in his case. He asks this Court to order that he be placed on probation or a period of retained jurisdiction, or that it reduce his sentence as it sees fit.

¹ Mr. Avila prefers to go by his first surname, Avila.

Statement of Facts and Course of Proceedings

The State charged Mr. Avila with felony DUI with a persistent violator enhancement, misdemeanor leaving the scene of an accident, and misdemeanor unlawfully transporting alcohol after he got into an accident with another car. (R., pp.84–88.) In exchange for his guilty plea to felony DUI and agreement to pay restitution, the State dismissed the misdemeanor charges, agreed not to amend the DUI charge to aggravated DUI, and agreed to recommend a sentence consistent with the presentence investigator but no greater than a retained jurisdiction. (R., pp.97–109; Tr., p.10, Ls.3–20.)

At sentencing, the State cited Mr. Avila’s prior DUI offenses and treatment, the impact of his crime on the victims, and failure to take responsibility for his actions, then recommended a unified sentence of ten years, with five years fixed. (Tr., p.36, L.16–p.39, L.10.) The State also recommended, consistent with the PSI investigator, that the court retain jurisdiction. (Tr., p.39, Ls.6–8; PSI, p.13.) Defense counsel explained that Mr. Avila clearly needed to stay away from alcohol, but he was a hard worker with elderly parents and adult children to support. (Tr., p.33, L.25–p.34, L.10, p.35, L.16–p.36, L.1.) This was also Mr. Avila’s first felony, and he was willing to do anything that the court would require. (Tr., p.33, Ls.11–24.) Mr. Avila asked that the court place him on probation and order that he complete alcohol treatment. (Tr., p.33, Ls.20–24.) Finally, Mr. Avila told the court:

I would like to ask the people that I crashed into to forgive me. . . . I feel bad for what I did, and I would like to ask them to forgive me.

This is not going to happen with any other person.

....

And if it is possible, I would like to be given the opportunity to pay for the damages—for all of the damages and pain that I caused. Nobody deserves it. And I feel very bad about everything that’s happened.

Also, also, my mom and dad are very old, and I feel bad that I can’t be taking care of them. There’s nobody else that can take care of them like I can.

(Tr., p.40, Ls.3–24.) Mr. Avila also turned to the victims and apologized to them directly.

(Tr., p.41, Ls.12–23.)

The court discussed Mr. Avila’s background and crime, then sentenced Mr. Avila to a unified term of ten years, with four years fixed. (Tr., p.43, L.5–p.4, L.15; R., pp.132–34.)

Mr. Avila timely appealed. (R., pp.144–47.)

ISSUE

Did the district court abuse its discretion when it sentenced Mr. Avila to a unified term of ten years, with five years fixed, for driving under the influence?

ARGUMENT

The District Court Abused Its Discretion When It Sentenced Mr. Avila To A Unified Term Of Ten Years, With Five Years Fixed, For Driving Under The Influence

When a defendant challenges his sentence as excessively harsh, this Court will conduct an independent review of the record, taking into account “the nature of the offense, the character of the offender, and the protection of the public interest.” *State v. Miller*, 151 Idaho 828, 834 (2011). The Court reviews the district court’s sentencing decision for an abuse of discretion, which occurs if the district court imposed a sentence that is unreasonable, and thus excessive, “under any reasonable view of the facts.” *State v. Strand*, 137 Idaho 457, 460 (2002); *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). “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.” *Miller*, 151 Idaho at 834.

Considering Mr. Avila’s background, moderate likelihood to reoffend, family support, and potential for rehabilitation, probation was the appropriate sentence in this case. At the very least, as recognized by the prosecutor and PSI investigator, Mr. Avila should have been able to

prove himself worthy of probation while taking advantage of a treatment program during a period of retained jurisdiction. His sentence is therefore excessive.

Originally from Mexico, Mr. Avila came to the U.S. in the 70s and is a lawful permanent resident. (PSI, pp.7–8.) He has lived in Riverside, a small town near Blackfoot, since 2003. (PSI, p.8.) He has no formal education, but is a hard worker, and has worked mostly on farms. (PSI, pp.7, 9.) In his free time, he works on his house and goes fishing. (PSI, p.8.)

When this crime took place, Mr. Avila had just left a friend's house. (PSI, p.3.) The friend's daughter recently passed away and the two had been drinking. (*Id.*) He hit another car, and according to officers, drove his truck through a fence and was found in someone's lawn. (*Id.*) He tested at a .362 blood alcohol concentration. (PSI, p.12.) He was on pretrial release related to a misdemeanor DUI charge at the time, (PSI, p.6), and has symptoms consistent with a moderate alcohol use disorder (PSI, p.46). Mr. Avila's daughter Virginia did not think he had been drinking on pretrial release until the death of his friend's daughter, and that he drank to attempt to cope with the loss. (PSI, p.9.) She also noted that he did well when he participated in drug court. (*Id.*) Importantly, Mr. Avila does not use any other drugs, and has no mental health concerns. (PSI, pp.10, 53.) He was found to have a moderate risk to reoffend. (PSI, p.11.)

Although Mr. Avila did not take responsibility for this offense during the presentence investigation interview (PSI, p.3), he took full responsibility during the sentencing hearing by acknowledging he was at fault and expressing how sorry he was for the pain and damage he had caused (Tr., p.40, L.3–p.41, L.25).

Finally, Mr. Avila has the support of his family, and also provides support, financial and otherwise, to them. (PSI, p.7.) He is close to his parents and siblings, half of whom live in Mexico and half of whom live in the United States. (PSI, pp.7–8.) He helps financially support

his parents, who are elderly and struggling with health problems. (PSI, p.7.) Mr. Avila is divorced and raised his three children, who are now adults, on his own. (*Id.*) According to his daughter Virginia, Mr. Avila was an “excellent dad” who managed to put all three of his kids through college. (PSI, p.9.) All three of them still live in Riverside and have children of their own. (PSI, pp.7, 9.)

In light of Mr. Avila’s background, moderate likelihood to reoffend, family support, and potential for rehabilitation, the district court should have placed Mr. Avila on probation or retained jurisdiction. The district court abused its discretion by sentencing Mr. Avila to ten years, with five years fixed.

CONCLUSION

Mr. Avila respectfully requests that this Court order that he be placed on probation or a period of retained jurisdiction, or that it reduce his sentence as it deems appropriate.

DATED this 8th day of November, 2017.

_____/s/_____
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th 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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INMATE #122903
ICIO
381 W HOSPITAL DRIVE
OROFINO ID 83544

DARREN B SIMPSON
DISTRICT COURT JUDGE
E-MAILED BRIEF

JEROMY W STAFFORD
ATTORNEY AT LAW
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CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

MPW/eas