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State v. Rush Appellant's Brief Dckt. 45128

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45128
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR-FE-2016-7492
v.)	
)	
TREVOR JAMES RUSH,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Trevor James Rush pled guilty to felony injury to a child. He received a unified sentence of ten years, with two years fixed, but the district court retained jurisdiction. Following his rider, the district court relinquished jurisdiction. On appeal, Mr. Rush contends that this sentence represents an abuse of the district court's discretion, as it is excessive given any view of the facts. He further contends that the district court abused its discretion in relinquishing its jurisdiction.

Statement of the Facts & Course of Proceedings

Officers responded to a report of inappropriate sexual contact between a seventeen-year-old girl, M.H., and twenty-four-year-old Trevor Rush. (Presentence Investigation Report (*hereinafter*, PSI), pp.2-3.) M.H. and two of her friends were interviewed. (PSI, pp.2-3.) On the night of May 21, 2016, the three girls went to Mr. Rush's house to babysit. (PSI, p.2.) While they were there, they consumed alcoholic beverages. (PSI, p.3.) M.H. had too much to drink and laid down on a couch. (PSI, p.3.) She reported that Mr. Rush touched her, in a sexual manner, both manually and orally. (PSI, p.3.)

Based on these facts, Mr. Rush was charged by indictment with two counts of sexual battery of a sixteen or seventeen year old and one count of misdemeanor dispensing alcohol to minors. (R., pp.28-30.) Pursuant to a plea agreement, Mr. Rush pled guilty to an amended information in which he was charged, *inter alia*, with one count of felony injury to a child. (10/3/16 Tr., p.5, L.10 – p.7, L.4; R., pp.69-70, 74-80.) In exchange, the State agreed to dismiss the remaining charges and not to file charges related to another minor. (10/3/16 Tr., p.6, Ls.13-18; R., p.76.) The State also agreed to recommend a sentence of ten years, with two years fixed. (10/3/16 Tr., p.5, Ls.18-19; R., p.76.) The State would recommend a retained jurisdiction if the psychosexual evaluation classified Mr. Rush as a low risk and amenable to treatment. (10/3/16 Tr., p.5, Ls.20-22; R., p.76.)

At the sentencing hearing, the State asked the district court to sentence Mr. Rush to a unified sentence of ten years, with two years fixed, and that the court retain jurisdiction. (11/21/16 Tr., p.7, Ls.18-21.) Mr. Rush's counsel asked the district court to place Mr. Rush on probation. (11/21/16 Tr., p.15, L.2 – p.16, L.24.)

Mr. Rush was sentenced to ten years, with two years fixed, but the district court retained jurisdiction over him for a period of up to 365 days. (11/21/16 Tr., p.22, L.23 – p.23, L.1; R., pp.89-92.)

On May 15, 2017, after a hearing, the district court relinquished jurisdiction and ordered Mr. Rush to serve the underlying sentence previously imposed. (5/15/17 Tr., p.33, Ls.19-21; R., pp.96-97.) On May 22, 2017, Mr. Rush filed a timely Notice of Appeal.¹ (R., pp.98-100.)

ISSUES

- I. Did the district court abuse its discretion when it imposed a unified sentence of ten years, with two years fixed, upon Mr. Rush following his plea of guilty to felony injury to a child?
- II. Did the district court abuse its discretion when it relinquished jurisdiction over Mr. Rush?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Ten Years, With Two Years Fixed, Upon Mr. Rush Following His Plea Of Guilty To Felony Injury To A Child

Mr. Rush asserts that, given any view of the facts, his unified sentence of ten years, with two years fixed, is excessive. 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

¹ Mr. Rush filed a motion for reconsideration of sentence and supporting brief. (R., pp.103-106.) However, Mr. Rush did not submit new or additional information in support of the motion. The district court denied the motion without a hearing. (Augmentation, pp.1-2.) Mr. Rush does not assert that the district court erred in denying his Rule 35 motion as no new information was presented in support of the motion for leniency, as required under *State v. Huffman*, 144 Idaho 201, 203 (2007).

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)). Mr. Rush does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Rush must show that in light of the governing criteria, the sentences were excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

In light of the mitigating factors present in this case, Mr. Rush’s sentence is excessive considering any view of the facts.

Mr. Rush is only twenty-six-years-old, but he has long struggled with alcohol abuse. (PSI, pp.1, 5-12.) Mr. Rush’s abuse of alcohol has resulted in numerous violations of the law and is the reason for this offense. (PSI, pp.4-12, 17.)

The Idaho Supreme Court has held that substance abuse should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982). In *Nice*, the Idaho Supreme Court reduced a sentence based on Nice’s lack of prior record and the fact that “the trial court did not give proper consideration of the defendant’s alcoholic problem, the part it played in causing defendant to commit the crime and the suggested alternatives for treating the problem.” *Id.* at 91. Additionally, the Idaho Supreme Court has ruled that ingestion of drugs and alcohol resulting in impaired capacity to appreciate the

criminality of conduct, could be a mitigating circumstance. *State v. Osborn*, 102 Idaho 405, 414 (1981). Mr. Rush wants to stop drinking. (PSI, p.17.)

Mr. Rush does have a supportive family to assist him in his rehabilitation. His wife of five years is supportive of him, and he has two children that he loves very much. (PSI, pp.15, 18.) Mr. Rush misses his children a lot and wants to be the best father he can be. (PSI, pp.15, 18.)

Further, Mr. Rush expressed remorse and accepted responsibility for his actions. (PSI, pp.5, 18; 10/3/16 Tr., p.16, L.22 – p.17, L.13.) At his sentencing hearing, Mr. Rush accepted full responsibility for his actions. (8/29/16 Tr., p.18, Ls.11-12.) He told the court:

Something like this shouldn't have happened in my life. And it is a rude awakening. And I see what happened, and I accept full responsibility for what lies ahead of m[e].

(11/21/16 Tr., p.18, L.25 – p.19, L.4.) Idaho recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *Shideler*, 103 Idaho at 595; *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

The Idaho Supreme Court has also reduced a defendant's term of imprisonment because the defendant expressed regret for what he had done. *Shideler*, 103 Idaho at 595. In *Shideler*, the Idaho Supreme Court ruled that the prospect of Shideler's recovery from his poor mental and physical health, which included mood swings, violent outbursts, and drug abuse, coupled with his remorse for his actions, was so compelling that it outweighed the gravity of the crimes of armed robbery, assault with a deadly weapon, and possession of a firearm during the commission of a crime. *Id.* at 594-95. Therefore, the Court reduced Shideler's sentence from an indeterminate term not to exceed twenty years to an indeterminate term not to exceed twelve years. *Id.* at 593.

Based upon the above mitigating factors, Mr. Rush asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his remorse, family support, and substance abuse/addiction it would have imposed a less severe sentence.

II.

The District Court Abused Its Discretion When It Relinquished Jurisdiction Over Mr. Rush

Before the district court relinquishes jurisdiction over a defendant, it must evaluate whether probation would be appropriate under I.C. § 19-2521. *State v. Statton*, 136 Idaho 135, 137 (2001). “The decision to place a defendant on probation or whether, instead, to relinquish jurisdiction over the defendant is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion.” *State v. Schultz*, 149 Idaho 285, 288-289 (Ct. App. 2010). Upon review of a sentence following a period of retained jurisdiction, this Court reviews the entire record, encompassing events both before and after the original judgment. *Id.* at 289.

Mr. Rush contends the district court abused its discretion in relinquishing jurisdiction in light of his limited successes during his period of retained jurisdiction, his recognition of a problem, and his desire to make the changes necessary so that this type of incident does not happen again.

Mr. Rush was actively participating in his programming. (PSI, p.244.) He was an active participant in his Cognitive-Behavioral Interventions for Sexual Offending program, and he consistently volunteered to present and engaged in discussion points. (PSI, p.244.) He demonstrated a positive, open, and receptive attitude towards learning—he accepted feedback

well and was always well-prepared for group with his assignments completed. (PSI, pp.244-245.) He acknowledged his alcohol use as the primary reason for his offense and did not minimize the behavior. (PSI, p.245.) Although, while on his rider, Mr. Rush did receive disciplinary sanctions, he was actively participating in his programming. (PSI, pp.243-245.)

Mr. Rush recognized the mistakes he made on the rider, saying:

I didn't take my program serious. I know what I could have done differently. I was barely on the verge. There was a lot more I could have learned and tapped into. There was a higher comprehension level I could have been implementing.

(PSI, p.244.) Mr. Rush also stated that he saw how others were doing their program well, and he wanted to prove that he could succeed. (PSI, p.244.) Ultimately, Mr. Rush did learn on his rider, but he just failed to implement these tools. (PSI, p.244.)

The district court failed to recognize that Mr. Rush's accomplishments while on the retained jurisdiction would equate to a successful probation when it relinquished its jurisdiction over Mr. Rush. (5/15/17 Tr., p.33, Ls.19-21.)

In light of all of the mitigating evidence that was presented to the district court that demonstrates Mr. Rush's significant rehabilitative potential, the district court abused its discretion when relinquished its jurisdiction over Mr. Rush.

CONCLUSION

Mr. Rush respectfully requests that this Court place him on probation or 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 27th day of December, 2017.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of December, 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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DISTRICT COURT JUDGE
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ADA COUNTY PUBLIC DEFENDER
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E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

SJC/eas