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State v. Erolin Respondent's Brief Dckt. 45203

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45203
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR01-2017-2570
)	
NICOLAUS LO EROLIN,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Erolin failed to establish that the district court abused its discretion, either by declining to place him on probation or retain jurisdiction upon imposing a unified sentence of 10 years, with two years fixed, for lewd conduct with a minor under 16, or by denying his Rule 35 motion for a reduction of sentence?

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

Erolin pled guilty to lewd conduct with a minor under 16 and the district court imposed a unified sentence of 10 years, with two years fixed. (R., pp.65-67.) Erolin filed a notice of appeal timely from the judgment of conviction. (R., pp.68-70.) He also filed a timely Rule 35 motion

for a reduction of sentence, which the district court denied. (R., pp.73-74; Order Denying Motion for Reconsideration Under ICR 35 (Augmentation).)

Erolin asserts that the district court abused its discretion when it ordered his sentence into execution rather than placing him on probation or retaining jurisdiction, in light of the fact that he has no substance abuse issues, accepted responsibility, has family support, and is amenable to treatment. (Appellant's brief, pp.4-6.) Erolin has failed to establish an abuse of discretion.

A trial court's decision regarding whether imprisonment or probation is appropriate is within its discretion. State v. Reber, 138 Idaho 275, 278, 61 P.3d 632, 635 (Ct. App. 2002) (citations omitted); I.C. § 19-2601(4). The goal of probation is to foster the probationer's rehabilitation while protecting public safety. State v. Cheatham, 159 Idaho 856, ___, 367 P.3d 251, 253 (Ct. App. 2016) (citations omitted). A decision to deny probation will not be deemed an abuse of discretion if it is consistent with the criteria articulated in I.C. § 19-2521. Id. (citing State v. Toohill, 103 Idaho 565, 567, 650 P.2d 707, 709 (Ct. App. 1982)). Pursuant to I.C. § 19-2521(1):

The court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that imprisonment is appropriate for protection of the public because:

(a) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) A lesser sentence will depreciate the seriousness of the defendant's crime; or

(d) Imprisonment will provide appropriate punishment and deterrent to the defendant; or

(e) Imprisonment will provide an appropriate deterrent for other persons in the community; or

(f) The defendant is a multiple offender or professional criminal.

I.C. § 19-2521(1).

The decision whether to retain jurisdiction 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. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). The primary purpose of a district court retaining jurisdiction is to enable the court to obtain additional information regarding whether the defendant has sufficient rehabilitative potential and is suitable for probation. State v. Jones, 141 Idaho 673, 677, 115 P.3d 764, 768 (Ct. App. 2005). Probation is the ultimate goal of retained jurisdiction. Id. There can be no abuse of discretion if the district court has sufficient evidence before it to conclude that the defendant is not a suitable candidate for probation. Id.

Contrary to Erolin's assertions on appeal, the record supports the district court's determination that Erolin was not a suitable candidate for probation, particularly in light of his continued criminal offending and manipulative actions towards people and situations. Twenty-nine-year-old Erolin had sexual intercourse with a 13-year-old girl he met online through a "teenage dating site." (PSI, pp.3-4.) Erolin was already on felony probation for "computer crime-access to defraud" when he committed the instant offense, and he had also been previously convicted of two other felonies: burglary and fraudulent check. (PSI, pp.6-7.) Although Erolin assured the psychosexual evaluator that his conduct in this case was "a one-time offense," he maintained a profile on "MYLOL"—a teenage dating website, his "friends" on the site were between the ages of 12-17, and a "large portion" of conversations with the girls in this age range were "sexual" in nature. (PSI, pp.35, 37.) Also, an officer with the Boise County Sheriff's

Department contacted the detective in this case and reported that his step-daughter and Erolin exchanged text messages that were sexual in nature when she was 15 years old and he was 26 years old. (PSI, p.38.) While Erolin has acknowledged his behavior was wrong, apologized to the victim's family, none of these factors outweigh the seriousness of the offense and Erolin's prior history.

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth in detail its reasons for imposing Erolin's sentence and declining to place Erolin on probation or retain jurisdiction. (6/12/17 Tr., p.16, L.7 – p.21, L.7.) The state submits that Erolin has failed to establish an abuse of discretion, 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.)

Erolin next asserts the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence in light of a letter he submitted in support of his Rule 35 motion. (Appellant's brief, pp.6-7.) 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, Erolin 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. Erolin has failed to satisfy his burden.

The only information Erolin provided in support of his Rule 35 motion was a letter in which he stated he had "made many personal growth changes" since committing the crime, had the support of his family, and was ready for treatment. (Letter from Nicholas Erolin to Judge Bail (Augmentation).) This was not "new" information, as it was all before the court at the time

of sentencing. (See PSI, pp.75-76, 78-84, 95.) In denying Erolin's Rule 35 motion the district court concluded, "The Court stated its reasons for the sentence it imposed on the record at the time of sentencing. All of those reasons remain valid. No information has been submitted which warrants changing that sentence." (Order Denying Motion for Reconsideration Under ICR 35, p.5 (Augmentation).) Because Erolin presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentence was excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion.

Conclusion

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

DATED this 8th day of February, 2018.

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

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of February, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

KIMBERLY A. COSTER
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

STATE OF IDAHO VS. NICOLAUS LO EROLIN DOCKET NO: 45203

1 being a model inmate.
2 And I just want to say that this isn't our first
3 meeting, but it will be our last. I will -- I need to be
4 spending time with my family and fulfilling my dreams and
5 aspirations, and I've written them all down for you. And
6 I don't want to live my life like this anymore and just
7 anything you ask of me I will not only do but I will
8 complete.
9 I have no intention of failing you or my
10 counsel, Mr. Steveley, my family, I don't intend on
11 failing JP and her family as well as the community.
12 This is something I've actually taken very
13 serious. I've always stuck to my word.
14 I know it's easy to say that I will not be
15 recidivist towards this, but this is seriously a direct
16 promise to you that you will not see my name on your desk
17 again.
18 And truthfully I'm very horrible at lying and
19 I'm really bad at sarcasm, so I stick to my word and
20 that's a guarantee to you.
21 I'm sorry it this took me so long to basically
22 figure things out in my life, and I'm sorry I made this
23 decision to be here with this case. I know it's
24 disturbing. It's frowned upon. And I don't condone my
25 actions, and I don't condone myself by any means.

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1 and then I've always maintained steady work, reliable
2 transportation as well as safe housing.
3 My status with my supervisors has always been
4 outstanding. I would like the opportunity to give back
5 by doing community service. I believe my time can be
6 allocated in a more meaningful and impactful way by just
7 assisting the community, just helping clean up the
8 community as well, whether it be litter or anything of
9 that matter.
10 And then I would like to seek out programs at
11 qualified facilities such as Ascent or H and H Treatment
12 in Meridian. I've looked into a lot of these things and
13 just the severity of this issue as well as the importance
14 of everything for me.
15 And I'm sorry that I feel like rambling on, but
16 I have utmost respect for you, Your Honor, as well as
17 your judgment. And I appreciate you for allowing me to
18 speak. I've just had so much on my mind and so much I've
19 had to say to express myself, either through my writings
20 or my experiences and how everything is just happened for
21 me.
22 And this isn't something easy to talk about.
23 And I know I have my faults. But, as I stated, I am
24 someone that can be -- I am worth the time to fix, and
25 just please allow me to clean up my mess. That's really

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1 It's a crazy situation how things happen, and
2 this was not -- I did not plan for this to happen. This
3 was not the mind set or anything.
4 Just -- I ask just like how my family, they have
5 not given up on me. And I ask for you to have faith and
6 trust in me. I'm not asking for a leap of faith but to
7 take confident steady steps with me, because I'll do
8 anything you ask me to really get back to my family.
9 I know I need to be just doing the right thing.
10 I wrote a quote that the mind is terrible thing to waste
11 but a wonderful thing to invest in. I know I'm very
12 intellectual. And I have many opportunities for, whether
13 it be education or just moving forward, that I can
14 utilize and, especially with my family, my father has
15 been very supportive.
16 I can't thank him enough for what he has done
17 for me, especially through these times and just making
18 the right decisions in what I should be doing.
19 And I -- I know I'm a good person deep down,
20 like my heart is really in the right place when I put my
21 mind to it. And I am so sorry for this.
22 And I just would like the opportunity to say
23 thanks for Mr. Steveley for saying that I believe I am
24 still a competent candidate for probation. I have had no
25 violations in the approximately seven years on probation,

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1 what I ask.
2 Thank you.
3 THE COURT: Is there legal cause why judgment
4 and sentence should not be pronounced?
5 MR. STEVELEY: None known, Judge.
6 THE COURT: Okay.
7 Well, this is your third felony. You, as a
8 30-year-old man, pretended to be 19 so that you could
9 meet the qualifications for a website that caters for
10 adolescent dating.
11 You ended up with a 13 year old that you said
12 told you a sad story about how she was depressed and had
13 a number of difficult issues in her life. And, according
14 to you, that she said she had cancer.
15 And so then you had sex -- oral sex with her,
16 and then later you had intercourse with her. She's 13
17 years old, you're 30. This is not what I consider to be
18 a successful probation on your earlier case.
19 This is a serious offense. And, frankly, as I
20 know and as I'm sure counsel for the State and the
21 defense also know, the LSI is utterly useless for
22 assessing sex offender risk. It is a tool designed to
23 give information to probation officer's about how they
24 might structure the resources of probation for
25 principally drug offenders; this is not a drug case, and

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1 therefore, it is not useful.

2 What I see is a person who set it up so that he
3 could be sure and meet lots of minor females who were
4 substantially young and substantially vulnerable.

5 And I see that in the context of a person who
6 committed this particular offense that he's on probation
7 for by coming up with a scam where he created false
8 accounts with fake names and passwords for himself and
9 his friends and created five fake accounts using other
10 people's coupons. And it went on for a considerable
11 period of time.

12 So I see this from somebody who has shown
13 himself to be, in essence, a person comfortable with
14 manipulating others and creating false circumstances in
15 order to accomplish what he desired.

16 I think Dr. Johnston's observation that the
17 defendant shows antisocial and narcissistic traits is
18 certainly confirmed by his criminal record, since he
19 appears to be a person who does what he needs to do and
20 says what he needs to say to get what he wants.

21 Dr. Johnston concluded that the defendant
22 presented a moderate risk of reoffense and that he was
23 most likely to act in an opportunistic or moderate level
24 predatory way engaging individuals who were readily
25 available, easily manipulated, sexually curious willing

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1 participants who are overcome by force.

2 Unfortunately, there are young adolescents just
3 like the victim in this case who are very vulnerable
4 people who because of their age and because of some of
5 their life experiences are not really protecting
6 themselves from manipulative adults who are exploiting
7 their vulnerabilities for their own needs.

8 And it -- for a person who's vulnerable, for a
9 person who has had problems and issues and who's only 13,
10 when they get older, they may feel even worse about how
11 they were used by somebody that they hoped cared for
12 them.

13 Because that is what was done in this case. And
14 that certainly is consistent with the approach the
15 defendant was following by pretending he was 19 and
16 getting onto an adolescent dating site.

17 In light of the correspondence between -- the
18 texts between the defendant and the victim, I had
19 assessed that there was more likely vulnerability and
20 poor judgment, and I did not assess that it had moved to
21 a level of violence.

22 I frankly thought that the behavior was
23 inconsistent with that analysis.

24 On the other hand, I see no similar defects in
25 the defendant's own background. He has a good family, a

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1 loving family. He's obviously very intelligent. He's
2 extremely well spoken. He's a very good writer, as he's
3 shown himself both times he's appeared before this Court
4 for a sentencing.

5 He has many gifts and talents. And what he uses
6 those gifts and talents for, apparently, is to take
7 advantage of 13-year-old girls for sex and cheat his
8 employer.

9 And so I was quite willing to give him an
10 opportunity when -- to -- for probation when it was a
11 property offense with no violence or harm threatened to
12 another person, even though I always have a certain level
13 of caution when I see somebody who creates a well
14 thought-out scam because a person who creates a well
15 thought-out scam, like the kind of scam that was present
16 in the original case is somebody who has put in a fair
17 amount of thought and energy into committing a crime.

18 And the more thought and energy and attention
19 and work a person puts towards committing an offense, the
20 more likely they are to commit another offense in the
21 future because they have directed so much of their time,
22 attention and intelligence towards committing the
23 offense.

24 So while I was willing in that instance to
25 consider a lesser sentence and lesser response because it

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1 was a property offense with no harm to anybody else.

2 In contrast, a person who is cruising for young
3 adolescent folks to have sex with when he's 30 years old
4 is somebody who presents considerably higher level of
5 risk when he uses his intelligence, his well-spokenness,
6 his fluidity with speech and with persuasion to do
7 something that he clearly has to know is completely
8 illegal and wrong, that person presents a much higher
9 risk.

10 And I think particularly in light of his
11 behavior and his attitude towards it, I think a penalty
12 is primarily the focus in this case, because I think that
13 the defendant clearly does show considerable concern for
14 himself and his own future.

15 And while he expresses regret for the harm he
16 may have caused to the vulnerable 13 year old, he didn't
17 take anything that would lessen that harm when he was in
18 real life really committing the offenses and really
19 acting in a criminal way while on felony probation; I
20 think that a penalty may well serve to deter him, which
21 is a legitimate goal.

22 And, frankly, because of his past history of a
23 level of deception connected with his felony offense, I'm
24 not really persuaded that a focus other than a penalty
25 focus with penalty designed to be both a penalty for

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1 doing what the defendant knew to be wrong and also a
2 penalty imposed to possibly deter the defendant from
3 committing a future offense.
4 Because I think he does care about things that
5 might hurt him. And for that reason, I'm imposing a
6 sentence of two years fixed followed by eight years
7 indeterminate for a ten-year sentence.
8 You do have 42 days in which to appeal. You are
9 remanded to the custody of the Ada County Sheriff.
10 And I will enter the no contact order with the
11 victim and a no contact order with other minor females.
12 MS. GUZMAN: The order of restitution is in the
13 system. Do you also want the hard copy?
14 THE COURT: I've got the hard copy and I've
15 signed it.
16 MS. GUZMAN: Thank you.
17 THE COURT: Counsel for the State, I hate to
18 draw this to your attention, but this is the nice
19 easy-to-read no contact order that was not adopted --
20 MS. GUZMAN: Okay.
21 THE COURT: -- by the Idaho Supreme Court. So
22 you need to give me the multiple page difficult-to-follow
23 one that is the correct form.
24 MS. GUZMAN: Okay.
25 THE COURT: And then so the defendant should be

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1 kept upstairs until we get the right form. And I will
2 sign it.
3 MS. GUZMAN: Okay. On the Pv, what is the
4 Court's ruling?
5 THE COURT: On the probation violation -- thank
6 you -- the probation is revoked, sentence is imposed
7 concurrent with the other sentence.
8 MS. GUZMAN: Thank you.
9 THE COURT: So sign the order for restitution.
10 We'll sign the no contact order. The sentences are
11 concurrent not consecutive.
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13 (End of proceedings.)
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