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### State v. Ware Appellant's Brief Dckt. 45038

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 45038
	)	
v.	)	MADISON COUNTY NO. CR 2016-1124
	)	
THOR FITZGERALD WARE, JR.,	)	
	)	APPELLANT’S BRIEF
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Thor Fitzgerald Ware, Jr., was sentenced to a unified term of twelve years, with three years fixed, after he pled guilty to statutory rape. Mr. Ware filed a motion pursuant to Idaho Criminal Rule 35(b) for a reduction of sentence, which the district court granted, reducing his sentence to ten years, with two and one-half years fixed. Mr. Ware contends the district court abused its discretion when it did not further reduce his sentence considering the mitigating factors that exist in this case—most notably, the fact that Mr. Ware did not know the victim’s actual age, and reasonably believed she was eighteen.

## Statement of Facts and Course of Proceedings

On March 31, 2016, Mr. Ware, a high school graduate who had recently turned twenty, had non-forcible sexual intercourse with a sixteen-year-old girl. (Presentence Investigation Report (“PSI”), p.8; Psychosexual Eval., p.158.) Mr. Ware was charged by Information with one count of statutory rape in violation of Idaho Code § 18-6101(2) (defining rape as penetration “[w]here the victim is sixteen (16) or seventeen (17) years of age and the perpetrator is three (3) years or more older than the victim.”) (R., pp.44-45.) Mr. Ware entered into an agreement with the State pursuant to which he agreed to plead guilty, with the explanation that he reasonably believed the victim to be eighteen years old, and the State agreed to recommend the district court suspend Mr. Ware’s sentence and place Mr. Ware on probation. (R., p.100; 1/5/17 Tr., p.5, Ls.3-7.) The district court accepted Mr. Ware’s guilty plea. (1/5/17 Tr., p.37, Ls.19-22.)

At the time of sentencing, Mr. Ware had served 334 days in the county jail. (2/27/17 Tr., p.58, Ls.6-8.) Counsel for Mr. Ware recommended either a withheld judgment, or that Mr. Ware be sentenced to 334 days in county jail, with credit for time served, and be placed on probation for a period of three years. (2/27/17 Tr., p.62, Ls.18-21, p.64, Ls.10-20.) The prosecutor recommended a unified sentence of twelve years, with four years fixed. (2/27/17 Tr., p.69, Ls.3-9.) The prosecutor acknowledged the “need to follow [the] plea agreement” and recommended the sentence be suspended, with Mr. Ware placed on probation for a period of ten years. (2/27/17 Tr., p.69, Ls.3-9.) The district court sentenced Mr. Ware to a unified term of twelve years, with three years fixed, and retained jurisdiction. (2/27/17 Tr., p.95, Ls.6-10; R., pp.143-44.) The order retaining jurisdiction was entered on February 27, 2017, and Mr. Ware filed a timely notice of appeal on April 7, 2017. (R., pp.143-44, 207-11.)

While the appeal was pending, Mr. Ware filed a motion pursuant to Idaho Criminal Rule 35(b) (“Rule 35”) for reconsideration of sentence. (R., pp.182-84.) Following a lengthy hearing, the district court granted Mr. Ware’s Rule 35 motion and reduced his sentence to a unified term of ten years, with two and one-half years fixed.<sup>1</sup> (4/24/17 Tr., p.91, Ls.1-4, p.92, Ls.6-12; R., pp.227-28.) Also while the appeal was pending, the district court entered an order relinquishing jurisdiction over Mr. Ware. (Motion to Augment, Ex. A.)<sup>2</sup>

### ISSUE

Did the district court abuse its discretion when it failed to further reduce Mr. Ware’s sentence considering the mitigating factors that exist in this case?

### ARGUMENT

#### Considering The Mitigating Factors That Exist In This Case, The District Court Abused Its Discretion When It Failed To Further Reduce Mr. Ware’s Sentence

Mr. Ware asserts that, given any view of the facts, his unified sentence of ten years, with two and one-half years fixed, is excessive. Because the reduced sentence is within statutory limits, “the appellant bears the burden of demonstrating that it is a clear abuse of discretion.” *State v. Miller*, 151 Idaho 828, 834 (2011) (quoting *State v. Windom*, 150 Idaho 873, 875

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<sup>1</sup> The district court’s decision is reflected in its oral ruling and in the court minutes. (4/24/17 Tr., p.91, Ls.1-4, p.92, Ls.6-12; R., pp.227-28.) The district court did not enter an order granting Mr. Ware’s Rule 35 motion. As of the filing date of this brief, the Idaho Supreme Court records and the records of the Idaho Department of Correction do not reflect the reduced sentence. Appellate counsel for Mr. Ware has contacted the district court to update the official records to reflect the reduced sentence of ten years, with two and one-half years fixed.

<sup>2</sup> The Order Relinquishing Jurisdiction is not contained in the Clerk’s Record. Simultaneously with the filing of this brief, Mr. Ware is filing a Motion to Augment the Record to include a copy of this order. Mr. Ware notes that this order reflects that Mr. Ware’s sentence is twelve years, with three years fixed. As discussed in note 1, appellate counsel for Mr. Ware has contacted the district court and understands that a new order will be entered to reflect Mr. Ware’s actual sentence of ten years, with two and one-half years fixed.

(2011)); *see also State v. Hanson*, 150 Idaho 729, 734 (Ct. App. 2011) (setting forth standard for sentence review following grant of Rule 35 motion). “When a trial court exercises its discretion in sentencing, ‘the most fundamental requirement is reasonableness.’” *Miller*, 151 Idaho at 834 (quoting *State v. Hooper*, 119 Idaho 606, 608 (1991)). “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.* (citation omitted). “When reviewing the reasonableness of a sentence this Court will make an independent examination of the record, ‘having regard to the nature of the offense, the character of the offender and the protection of the public interest.’” *Id.* (quoting *State v. Shideler*, 103 Idaho 593, 594 (1982)).

The sentence the district court imposed upon Mr. Ware was not reasonable considering the nature of Mr. Ware’s offense, his character, and the protection of the public interest. Mr. Ware committed rape within the meaning of Idaho Code § 18-6101(2) when he had sexual intercourse with a sixteen-year-old girl. But this offense did not warrant a term of incarceration of any length, and certainly not of ten years, with two and one-half years fixed. It was undisputed that the sixteen-year-old girl lied to Mr. Ware about her age, and that Mr. Ware reasonably believed she was eighteen years old. (4/24/17 Tr., p.15, Ls.3-13; Psychosexual Eval., p.15.) It was also undisputed that the sexual acts were not forced. (*See* 2/27/17 Tr., p.22, Ls.4-10.) The Legislature has defined this conduct as a crime, but, on the facts of this case, it is not a crime that should result in imprisonment.

The sentence the district court imposed was also not reasonable considering Mr. Ware’s character. Mr. Ware was successful in the classroom and on the football field in high school. (PSI, p.14.) He was raised in a stable and loving family, by his father, a math teacher, and his mother, who stayed home with Mr. Ware and his four brothers. (PSI, p.14.) Mr. Ware

voluntarily submitted to a battery of testing in advance of sentencing which revealed he has no mental health or substance abuse issues. (2/27/17 Tr., p.49, Ls.1-6.) As his counsel explained to the district court, Mr. Ware is “a normal young man.” (2/27/17 Tr., p.49, Ls.1-6.) He has no violent tendencies and is the opposite of a hardened criminal. (2/27/17 Tr., p.49, Ls.9-11.) It is a loss to Mr. Ware and to the community as a whole that he is currently incarcerated.

Mr. Ware submitted multiple letters to the district court in advance of sentencing attesting to his good character. (R., pp.112-23, 128-34, 139-42.) These letters reflect that Mr. Ware is well-supported and well-loved, and has a great future ahead of him. (*See id.*) Mr. Ware’s grandparents told the district court Mr. Ware could live with them in Alaska, where he would have a very good support system and be able to pursue his education. (R., p.113.) Mr. Ware’s father told the district court about Mr. Ware’s academic and athletics skills, and described his son as “caring, compassionate, and [kind-hearted].” (R., p.114.) Mr. Ware’s brothers told the district court about their love for Mr. Ware, and their hope for leniency. (R., pp.118-19, 121, 122.) Mr. Ware’s mother described the bright future she hopes her son had in store, and her concerns that this one act might have derailed that future. (R., p.120.) She described Mr. Ware as a person with a “kind soul” who “has the smarts and heart to do good and be a leader.” (R., p.120.)

Mr. Ware told the district court at sentencing he wished this had never happened and “would do anything to take this back.” (2/27/17 Tr., p.75, Ls.4-5.) He told the presentence investigator he wants to move to Alaska, live with his grandparents, and attend the University of Alaska to pursue a degree in the medical field. (PSI, p.8.) He explained to the district court, “I want to get an education and move on with my life. I miss my family more than anything.”

(2/27/17 Tr., p.76, Ls.3-6.) There is nothing in Mr. Ware's character that supports the sentence the district court imposed for the offense of statutory rape.

Finally, the sentence the district court imposed was not reasonable considering the protection of the public interest. Though Mr. Ware was assessed as presenting a moderate risk to reoffend, that risk would be lessened with treatment, and the psychosexual evaluator determined Mr. Ware can be treated with community-based cognitive behavioral therapy. (Psychosexual Eval., pp.3, 65-70.) The evaluator concluded "Mr. Ware is capable of refraining from sexual contact with any inappropriate person" and "is capable of continuing to be safe and appropriate in the community when he chooses to do so." (Psychosexual Eval., p.70.) The evaluator recommended "sex offender probation status and community based sex offender treatment." (Psychosexual Eval., p.70.) In light of this recommendation, and all of the presentence materials available to the district court, it is clear Mr. Ware would not have presented a risk to the public if given treatment and placed on supervised probation.

In light of all of the mitigating factors that exist in this case, and notwithstanding the aggravating factors, the district court abused its discretion when it failed to further reduce Mr. Ware's sentence.

#### CONCLUSION

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

DATED this 28<sup>th</sup> day of February, 2018.

\_\_\_\_\_/s/\_\_\_\_\_  
ANDREA W. REYNOLDS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28<sup>th</sup> day of February, 2018, 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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ISCI  
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GREGORY W MOELLER  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

AWR/eas