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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 45088 & 45089
Plaintiff-Respondent,)	
)	BANNOCK COUNTY NOS.
v.)	CR 2016-7925 & CR 2016-16549
)	
TORY ALLEN HOWARD,)	APPELLANT’S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Tory Allen Howard was sentenced to an aggregate unified term of 50 years, with 15 years fixed, following his conviction for delivery of a controlled substance and trafficking in a controlled substance, with persistent violator enhancements, based on a confidential informant’s testimony that he twice purchased heroin from Mr. Howard. Mr. Howard contends the district court abused its discretion at sentencing considering the mitigating factors that exist in this case, most notably the fact that Mr. Howard is no kingpin—he is simply an addict who supported his addiction by selling drugs to others. This Court should vacate Mr. Howard’s sentence and remand this case to the district court for resentencing.

Statement of Facts & Course of Proceedings

In CR 2016-7925 (“the delivery case”), Mr. Howard was charged by Information with one count of delivery of a controlled substance. (R., pp.75-76.) In CR 2016-16549 (“the trafficking case”), Mr. Howard was charged by Information with one count of trafficking in heroin. (R., pp.298-99.) He was charged in both cases with being a persistent violator within the meaning of Idaho Code § 19-2514. (R., pp.77-78, 300-01.) The district court consolidated the two cases for trial on the State’s motion. (R., pp.152-53, 161-64, 315-16, 319.)

The two cases were tried to a jury over the course of three days. (R., pp.167, 211-13, 217-18.) The jury found Mr. Howard guilty of delivery and trafficking based largely on the testimony of the confidential informant, a former addict who made a deal with the State to “work[] off a burglary charge.” (R., pp.208-09, 2/2/17 Tr., p.410, Ls.1-9.) The jury also found Mr. Howard had been convicted of two or more felonies, and was thus subject to the persistent violator enhancement. (R., pp.210, 382.) At sentencing, the prosecutor recommended a unified sentence of ten years, with five years fixed on each count, to be served concurrently. (4/10/17 Tr., p.26, Ls.17-20.) Counsel for Mr. Howard did not object to this recommendation. (4/10/17 Tr., p.27, Ls.1-8.) The district court sentenced Mr. Howard to a unified term of 22 years, with 7 years fixed in the delivery case, and 28 years, with 8 years fixed in the trafficking case, to be served consecutively. (4/10/17 Tr., p.36, Ls.4-22.) The judgments of conviction were filed on April 13, 2017, and Mr. Howard filed timely notices of appeal on May 2, 2017.¹ (R., pp.245-48, 414-17, 249-53, 418-22)

¹ Mr. Howard subsequently filed a motion pursuant to Idaho Criminal Rule 35 for a reduction of sentence. (R., pp.262-64, 431-33.) The district court denied the motion following a hearing. (R., pp.267-69, 435-37.) Mr. Howard does not challenge on appeal the district court’s denial of his Rule 35 motion in light of *State v. Huffman*, 144 Idaho 201, 203 (2007).

ISSUE

Did the district court abuse its discretion when it imposed upon Mr. Howard an aggregate unified sentence of 50 years, with 15 years fixed, 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 Imposed Upon Mr. Howard An Aggregate Unified Sentence Of 50 Years, With 15 Years Fixed

Mr. Howard asserts that, given any view of the facts, his aggregate unified sentence of 50 years, with 15 years fixed, for one count of trafficking and one count of delivery is excessive, even with persistent violator enhancements. Where, as here, the sentence imposed by the district court 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 (2011)). “When a trial court exercises its discretion in sentencing, ‘the most fundamental requirement is reasonableness.’” *Id.* (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 aggregate sentence the district court imposed upon Mr. Howard was not reasonable considering the nature of his offenses and his character, and was not necessary to protect the public interest. The crime of trafficking in a controlled substance is certainly serious, as demonstrated by the fact that it carries a mandatory minimum sentence of three years. Delivery

of a controlled substance is also serious. But the circumstances surrounding Mr. Howard's commission of these crimes are not particularly egregious. Mr. Howard responded to text messages from someone who had agreed to work as a confidential informant for the State to "work[] off a burglary charge." (Tr., p.410, Ls.1-9.) Mr. Howard agreed to sell the confidential informant heroin on two occasions, once for \$40 (leading to the delivery charge) and once for \$500 (leading to the trafficking charge). (Presentence Investigation Report ("PSI"), pp.25-26.) Mr. Howard did not seek out the confidential informant, and neither transaction involved any force or violence. (PSI, pp.25-26.) Most importantly, Mr. Howard was not a kingpin by any means, but was simply selling drugs to support his own drug habit. (PSI, pp.35, 40.) He was a victim of the same crime he was perpetuating on others.

The aggregate sentence the district court imposed on Mr. Howard was also not reasonable considering Mr. Howard's character. Mr. Howard has a long criminal history, but those charges "stem from his substance dependence." (PSI, p.36.) Mr. Howard is addicted to drugs. Like many addicts, he suffers from mental health issues in addition—specifically, ADHD, anxiety and depression. (PSI, p.2.) During the presentence investigation, Mr. Howard identified his most important goal in life as staying sober so he could be a father to his children and a productive member of society. (PSI, p.38.) Mr. Howard's mother submitted a letter to the district court attesting to her son's character. She described him as "a great guy" who "just can't keep away from using drugs." (PSI, p.43.) Mr. Howard also received a very positive character reference from the sales manager at a car dealership who directly supervised Mr. Howard. (PSI, p.53.) There is simply no indication in the presentence investigation materials that consideration of Mr. Howard's character supported a term of incarceration of 50 years, with 15 years fixed.

Finally, this sentence was also not supported by protection of the public interest. Mr. Howard indicated during the presentence investigation that he was ready for substance abuse treatment, and believed he could succeed based on his age and maturity. (PSI, p.40.) There is every indication that Mr. Howard's crimes stemmed from his drug addiction and, if he could overcome the drug addiction, he would pose no threat to the community. Considering all of the mitigating factors that exist in this case, and notwithstanding the aggravating factors, the district court abused its discretion when it imposed upon Mr. Howard an aggregate unified sentence of 50 years, with 15 years fixed.

CONCLUSION

Mr. Howard respectfully requests that this Court 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 February, 2018.

_____/s/_____
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th 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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_____/s/_____
EVAN A. SMITH
Administrative Assistant

AWR/eas