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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45229
Plaintiff-Respondent,)	
)	CANYON COUNTY NO. CR 2016-14122
v.)	
)	
JOE MICHAEL ATENCIO,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Following a trial, the jury convicted fifty-seven-year-old Joe Michael Atencio of operating a motor vehicle while under the influence of alcohol (second felony within fifteen years). Despite Mr. Atencio's age, and a family connection to the Idaho Department of Correction that would likely result in his incarceration outside of Idaho, the district court imposed a unified sentence of twenty years, with seven years fixed. Mr. Atencio filed an Idaho Criminal Rule 35 (Rule 35) motion for a reduction of sentence, which the district court denied. On appeal, Mr. Atencio asserts the district court abused its discretion when it imposed his sentence, and when it denied his Rule 35 motion.

Statement of the Facts & Course of Proceedings

The State charged Mr. Atencio with operating a motor vehicle while under the influence of alcohol (second felony within fifteen years), felony, I.C. §§ 18-8004 and 18-8005, with a persistent violator sentencing enhancement, I.C. § 19-2514. (R., pp.21-27.) The State also charged him with misdemeanor driving without privileges. (*See R.*, p.28.) Mr. Atencio entered not guilty pleas to the charges. (R., p.28.)

Following Mr. Atencio's trial (*see R.*, pp.58-66, 79-89), the jury found Mr. Atencio guilty of operating a motor vehicle while under the influence of alcohol and driving without privileges. (R., pp.115-16.) Mr. Atencio then admitted to having a prior conviction for felony operating a vehicle while under the influence of alcohol, and to having four prior felony convictions in total. (*See Tr. Dec. 16, 2016*, p.194, L.20 – p.197, L.3.) The district court construed the admissions as guilty pleas to having a second felony within fifteen years and the persistent violator sentencing enhancement, and accepted the pleas. (*See Tr. Dec. 16, 2016*, p.197, Ls.8-18.)

At the sentencing hearing, the State recommended the district court impose a unified sentence of twenty years, with ten years fixed. (Tr. May 15, 2017, p.6, Ls.17-18.) Mr. Atencio's counsel reminded the district court that Mr. Atencio was in his "late 50s," and asserted, "if the Court were to follow a sentence like one requested by the State, that could be a life sentence effectively for Mr. Atencio if he had to do 20 years." (Tr. May 15, 2017, p.8, Ls.2-11.) Counsel also asserted Mr. Atencio, "despite his criminal history, has a long history of employment" (Tr. May 15, 2017, p.7, Ls.14-15), and told the district court Mr. Atencio would likely be incarcerated out-of-state because his brother "is a high-ranking employee with the Department of Correction[]" (Tr. May 15, 2017, p.8, L.21 – p.9, L.4). Mr. Atencio recommended the district court impose a unified sentence of five years, with one year fixed. (Tr. May 15, 2017, p.8,

Ls.17-20.) The district court imposed a unified sentence of twenty years, with seven years fixed. (R., pp.146-47.)

Mr. Atencio filed, within fourteen days from the date of entry of the judgment, an Idaho Criminal Rule 35 motion for a reduction of sentence. (R., pp.148-50.) In the Rule 35 motion, Mr. Atencio asserted his mother was in her 80s and would be unlikely to be alive after he completed the seven-year fixed term of his sentence. (R., p.149.) Mr. Atencio further asserted he had financially assisted his mother, his daughter, and his daughter's family, and the long fixed term of his sentence would create unnecessary hardships for his family. (R., p.149.) Additionally, Mr. Atencio asserted his brother had recently been named Director of the Idaho Department of Correction, and Mr. Atencio would thus likely have to serve his sentence outside of the state because of the related safety and security concerns. (R., p.149.) Mr. Atencio would likely have limited visitation with his family as a result. (R., p.149.)

Mr. Atencio also filed, pro se, a Notice of Appeal timely from the district court's Judgment and Commitment. (R., p.153.)

The district court conducted a hearing on Mr. Atencio's Rule 35 motion. (R., pp.158-59.) Mr. Atencio's counsel confirmed for the district court that Mr. Atencio was in a facility in Nevada. (Tr. July 25, 2017, p.4, Ls.1-4.) Counsel requested "a fixed portion somewhere between two and three years." (Tr. July 25, 2017, p.5, Ls.6-8.) The district court told Mr. Atencio that it understood "you're being housed out of state and that logistically that does cause you some issues. But I am standing by the sentence that I have previously imposed in this case. I do believe that it is appropriate." (Tr. July 25, 2017, p.6, Ls.17-21.) The district court denied the Rule 35 motion. (R., p.163.)

ISSUES

- I. Did the district court abuse its discretion when it imposed a unified sentence of twenty years, with ten years fixed, upon Mr. Atencio following his conviction for operating a motor vehicle while under the influence of alcohol?
- II. Did the district court abuse its discretion when it denied Mr. Atencio's Idaho Criminal Rule 35 Motion for a Reduction of Sentence?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Twenty Years, With Ten Years Fixed, Upon Mr. Atencio Following His Conviction For Operating A Motor Vehicle While Under The Influence Of Alcohol

Mr. Atencio asserts the district court abused its discretion when it imposed his unified sentence of twenty years, with ten years fixed, because his sentence is excessive considering any view of the facts. The district court should have instead followed Mr. Atencio's recommendation by imposing a unified sentence of five years, with one year fixed.

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 "due regard to the nature of the offense, the character of the offender, and the protection of the public interest." *State v. Strand*, 137 Idaho 457, 460 (2002).

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) (internal quotation marks omitted). Mr. Atencio does not assert that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Atencio 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.* An appellate court, “[w]hen reviewing the length of a sentence . . . consider[s] the defendant’s entire sentence.” *State v. Oliver*, 144 Idaho 722, 726 (2007). The reviewing court will “presume that the fixed portion of the sentence will be the defendant’s probable term of confinement.” *Id.*

Mr. Atencio asserts his sentence is excessive considering any view of the facts, because the district court did not adequately consider mitigating factors. Specifically, the district court did not adequately consider his work ethic. At the sentencing hearing, Mr. Atencio’s counsel told the district court that “Mr. Atencio, despite his criminal history, has a long history of employment. He’s been able to work with essentially the same employer for several years.” (Tr. May 15, 2017, p.7, Ls.14-16.) Mr. Atencio had been employed with a water pump company for a period of over four years, before his arrest for the instant offense, as a shop foreman. (*See* PSI, p.12.) He had also “held long-term employment with the company under a previous owner.” (PSI, p.12.) Counsel explained to the district court, “[e]ven through periods of time where he’s gotten himself into trouble, that employer has always been there for him because he’s a reliable worker, he’s a reliable person, he always shows up on time.” (Tr. May 15, 2017, p.7, Ls.16-20.)

The district court also did not adequately consider Mr. Atencio’s family situation. Mr. Atencio reported his daughter and her four children were living with him prior to his arrest for the instant offense. (PSI, p.11.) Mr. Atencio’s counsel told the district court, “Mr. Atencio’s brother is a high-ranking employee with the Department of Correction[.]” (Tr. May 15, 2017, p.8, Ls.21-25.) Counsel asserted that Mr. Atencio’s “relationship with his brother is going to

result in somewhat of a harsher sentence because he's going to be sent out of state somewhere. And we have no idea where that is. We have no idea what sort of programming or what sort of options would be available to him." (Tr. May 15, 2017, p.9, Ls.1-7.) According to Mr. Atencio's counsel, "effectively, what that does to him is not only is he serving time, but he's going to have significant distance between himself and his family." (Tr. May 15, 2017, p.9, Ls.8-10.) Any contact Mr. Atencio "would have with his family members in terms of visits or catching up with his children and grandchildren is going to be severely affected because of his relationship with his brother." (Tr. May 15, 2017, p.9, Ls.10-14.)

Further, the district court did not adequately consider Mr. Atencio's age. Mr. Atencio was fifty-seven years old at the time of sentencing. (*See* PSI, p.1.) His counsel asserted during the sentencing hearing that Mr. Atencio's age was an important factor for the district court to consider. (Tr. May 15, 2017, p.8, Ls.2-6.) Counsel asserted, "[m]ost likely, a sentence, if the Court were to follow a sentence like one requested by the State, that could be a life sentence effectively for Mr. Atencio if he had to do 20 years." (Tr. May 15, 2017, p.8, Ls.8-11.)

Mr. Atencio submits the district court did not adequately consider the above mitigating factors. Thus, the district court abused its discretion when it imposed Mr. Atencio's unified sentence, because his sentence is excessive considering any view of the facts.

II.

The District Court Abused Its Discretion When It Denied Mr. Atencio's Idaho Criminal Rule 35 Motion For A Reduction Of Sentence

Mr. Atencio asserts that the district court abused its discretion when it denied his Idaho Criminal Rule 35 motion for a reduction of sentence. The district court should have granted the

motion and reduced the fixed term of Mr. Atencio's sentence to a period of two or three years. (See Tr. July 25, 2017, p.5, Ls.6-8.)

“A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe.” *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994) (citation omitted). “The denial of a motion for modification of a sentence will not be disturbed absent a showing that the court abused its discretion.” *Id.* “The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable.” *Id.* “If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction.” *Id.*

Mr. Atencio asserts his sentence is excessive in view of the new and additional information presented with the Rule 35 motion. Mr. Atencio provided new and additional information on his family situation. He asserted his “mother is in her 80's and is unlikely to be alive after completion of the seven (7) year determinate portion of his sentence.” (R., p.149.) Mr. Atencio had also “historically helped his daughter, along with her family, and his mother financially on a regular monthly basis.” (R., p.149.) Mr. Atencio asserted, “[t]he long determinate portion of his sentence will create unnecessary hardships for his family.” (R., p.149.)

Alongside the unnecessary financial hardships, Mr. Atencio's connection with his brother would mean he would be incarcerated outside the state, putting further strain on his family relationships. In the Rule 35 motion, Mr. Atencio stated that his brother “was recently named Director of the Idaho Department of Correction[.]” (R., p.149.) He asserted, “[a]s a result, the

Defendant is likely to serve his sentence at a correctional facility outside of the State of Idaho because of the safety and security concerns relating to his brother being the Director of the Idaho Department of Correction[.]. This will likely result in the Defendant having limited visitation with his family.” (R., p.149.)

During the Rule 35 hearing, Mr. Atencio’s counsel confirmed that Mr. Atencio was incarcerated outside the state. Counsel stated, “[a]s the Court knows and we can see from the record, he is in a facility in Northern Nevada.” (Tr. July 25, 2017, p.4, Ls.1-2.) Counsel asserted Mr. Atencio was “in a situation where he’s actually being punished a bit differently because of his family situation where he’s been shipped out of state, which obviously would, you know, limit his family’s ability to come out and visit him, do those sorts of things.” (Tr. July 25, 2017, p.4, Ls.6-10.) Mr. Atencio’s counsel further stated, “I think that’s important, because that goes towards Mr. Atencio’s ability to rehabilitate himself. I think that if he can have access to his family and friends and support group, I think that he’s more likely to keep a positive attitude and work on things while he’s incarcerated.” (Tr. July 25, 2017, p.4, Ls.11-16.)

Thus, Mr. Atencio submits that the district court abused its discretion when it denied his Idaho Criminal Rule 35 motion for a reduction of sentence, in view of the new and additional information presented.

CONCLUSION

For the above reasons, Mr. Atencio respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 20th day of March, 2018.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of March, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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DAVIS F VANDERVELDE
DISTRICT COURT JUDGE
E-MAILED BRIEF

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

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BPM/eas