

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 45316
 Plaintiff-Respondent,)
) Ada County Case No.
 v.) CR-FE-2015-520
)
 JAMES DARNELL BLACK,)
)
 Defendant-Appellant.)
 _____)

SUPPLEMENTAL BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE MELISSA MOODY
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

James Darnell Black appeals from his judgment of conviction and sentence for criminal possession of a financial transaction card. After the initial briefing had been completed in this case and the appeal submitted for decision on those briefs, Black filed a motion to file, *pro se*, an augmented brief, which was granted by this Court. This supplemental brief responds to Black's subsequently filed, *pro se*, augmented brief.

Statement Of The Facts And Course Of The Proceedings

The statement of the facts and course of the proceedings were set forth in the respondent's brief (Respondent's brief, pp.1-2), and are incorporated herein by reference.

ISSUES

Black states the issues on appeal as:

I. The district court did not properly perform the legal analysis that the law required by disregarding this Court's prior opinion that Mr. Black's mental condition was a significant factor for sentencing and the district court used unsound reasoning by basically ruling that a mentally retarded defendant's mental condition was not a significant factor for sentencing.

II. The district court did not use sound reasoning in imposing a criminal sentence that is disproportionate to Mr. Black's diminished culpability.

(Appellant's brief, p.2 (capitalization standardized).)

The state rephrases the issue as:

Has Black failed to show an abuse of the district court's sentencing discretion?

SUPPLEMENTAL ARGUMENT

Black Has Failed To Show An Abuse Of The District Court's Sentencing Discretion

A. Introduction

The district court, on remand, after reviewing the psychological evaluation conducted pursuant to Idaho Code § 19-2522, re-imposed Black's sentence of five years, fixed. (R., pp.177-79; Tr., p.24, L.19 – p.27, L.24.) In his augmented brief, Black asserts that the district court abused its sentencing discretion. Review of the record shows no abuse of the district court's sentencing discretion. Black's sentence should be affirmed.

B. Standard Of Review

"Sentencing decisions are reviewed for an abuse of discretion." State v. Moore, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)).

C. The District Court Did Not Abuse Its Discretion When, After Carefully Reviewing The Required Psychological Evaluation, It Concluded That Black's Mental Health Was Not A Significant Factor At Sentencing

Black asserts that the district court abused its sentencing discretion when, acting on alleged bias, it, allegedly, disregarded the Court of Appeals' determination that Black's mental health was a significant factor for sentencing. (Augmented brief, pp.3-8.) This misrepresents the Court of Appeals' opinion in State v. Black, 161 Idaho 867, 392 P.3d 45 (Ct. App. 2017). In Black, the Court explained that a district court is required to order a psychological evaluation under Idaho Code § 19-2522 when there is *reason to believe* that the defendant's mental health will be a significant factor at sentencing. Id., 161 Idaho at 871, 392 P.3d at 49. The Court never determined that Black's mental health *would* be a significant factor at sentencing, only that it

could be, and so the district court was required to order the psychological evaluation. *Id.* at 871-72, 392 P.3d at 48-49. The factors that led the Court to make that determination were Black’s self-reported mental health issues, such as bipolar disorder, depression, paranoia, anxiety, auditory hallucinations as a child, schizophrenia, and suicidal ideations, which were corroborated in letters from family and friends. *Id.* at 868-71, 392 P.3d at 46-49.

On remand, the district court ordered the required psychological evaluation under Idaho Code § 19-2522. After performing the required evaluation, the evaluator concluded that mental health was not a significant factor in Black’s ongoing criminality: Black actually possessed a low level of psychopathy, and his medications appeared to ameliorate his condition. (Eval., p.8.) The real driver for Black’s ongoing criminality was his drug addiction, which “appear[ed] to have taken over his life,” and “his risk to engage in other general criminal behaviors appear[ed] to be high.” (Id.) But, if Black were “able to get his drug addiction under control and remain drug free, his risk to the community [could] be significantly reduced.” (Id.)

The district court reviewed the mental health evaluation, twice. (Tr., p.25, Ls.20-24.) After carefully considering that report, the district court determined that Black’s mental health was, in fact, not a significant factor for sentencing. (Tr., p.25, L.11 – p.26, L.4.) That determination, far from showing an abuse of discretion, is actually supported by the required evaluation, as shown above. Black has therefore failed to show that the district court abused its sentencing discretion.

D. The District Court Did Not Abuse Its Discretion When, After Noting That Black’s Cognitive Deficiencies Were Mitigating, It Nevertheless Determined That The Original Sentence Imposed Was Necessary To Protect The Community

Black also argues that the district court abused its discretion by re-imposing his sentence of five years, fixed, in light of his cognitive deficiencies. (Augmented brief, pp.9-13.) This is

essentially the same argument presented by Black's appellate counsel in his opening brief, where Black asserted that the district court abused its sentencing discretion by not sufficiently considering his "intellectual disability and low IQ."¹ (Appellant's brief, pp.10-14.) Black's argument fails for many of the same reasons.

As the state previously noted in its respondent's brief, where a sentence is within statutory limits, an appellant is required to establish that the sentence is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden, Black must show that his sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable if appropriate to achieve the primary objective of protecting society, and any or all of the related sentencing goals of deterrence, rehabilitation, or retribution. State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978). While the Court reviews the whole sentence on appeal, it presumes that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). In deference to the trial judge, the Court will not substitute its view of a reasonable sentence where reasonable minds might differ. State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

After considering all of the required sentencing factors of deterrence, rehabilitation, retribution, and protection of society, the district court determined that, in order to protect society, the maximum sentence of five years, fixed, was appropriate in this case. (7/24/2017 Tr.,

¹ Contrary to Black's consistent arguments raised now in his opening, reply, and augmented briefs that his psychological evaluation showed that he has a "low IQ," his psychological evaluation showed no such thing. The psychological evaluation administered in this case was not competent to measure Black's IQ. The cognitive functioning test used during Black's evaluation was the Shipley-2, and the Shipley-2 does not measure IQ.

p.26, L.5 – p.27, L.10.) In this case, Black stole and fraudulently used the financial transaction card numbers of at least five separate victims. See Black, 161 Idaho at 868, 392 P.3d at 46. This was not Black’s first crime. In fact, as the district court correctly explained, it could not “recall seeing an individual who has a more extensive criminal history than [Black]. It spans three decades and most of the states.” (7/24/2017 Tr., p.26, L.20 – p.27, L.1.) Black acknowledged in his opening brief that his extensive criminal history includes convictions out of Ohio, Michigan, Kentucky, Florida, Alabama, Indiana, Maryland, Missouri, Colorado, Oregon, and now Idaho. (Appellant’s brief, p.16.) The sentence imposed by the district court is thus supported by the seriousness of Black’s crimes, including those dismissed pursuant to his plea agreement, and his extensive criminal history.

In his augmented brief, as he did in his opening brief, Black argues that the district court failed to sufficiently appreciate and give mitigating weight to his diminished cognitive capacity. (Augmented brief, pp.9-13.) However, as noted in the respondent’s brief, the district court in fact recognized Black’s intellectual limitations and appreciated that those were mitigating. (See 7/24/2017 Tr., p.26, Ls.9-14.) But the court also recognized (consistent with Dr. Sombke’s report) that Black’s “risk to engage in other general criminal behaviors appears to be high.” (Eval., p.8; see also 7/24/2017 Tr., p.27, Ls.4-10.) The sentence imposed by the district court was reasonable in order to protect society from Black’s continued criminality. Black has failed to show an abuse of the district court’s discretion.

In his augmented brief, Black also argues that his sentence is too severe because, he asserts, it is more than twice the length of the average sentence for a property offense, which he claims is 2.27 years. (Augmented brief, p.12.) This argument also fails. Comparative sentencing, as Black here proposes, is contrary to Idaho precedent. As this Court explained in

State v. Pederson, 124 Idaho 179, 183, 857 P.2d 658, 662 (Ct. App. 1993), comparative sentencing is inappropriate because:

It is well settled that not every offense in like category calls for identical punishment; there may properly be a variation in sentences between different offenders, depending on the circumstances of the crime and the character of the defendant in his or her individual case.

Again, Black has failed to show an abuse of the district court's discretion.

In light of Black's extensive history of criminality and the primary sentencing concern of protecting society, Toohill, 103 Idaho at 568, 650 P.2d at 710, the district court's sentence of five years, fixed, is clearly appropriate. Black has failed to show any abuse of the district court's sentencing discretion. Black's sentence of five years, fixed, on his conviction for criminal possession of a financial transaction card should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm Black's sentence of five years, fixed, on his conviction for criminal possession of a financial transaction card.

DATED this 13th day of August, 2018.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of August, 2018, served two true and correct paper copies of the foregoing SUPPLEMENTAL BRIEF OF RESPONDENT by placing the copies in the United States mail, postage prepaid, addressed to:

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RJS/dd