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State v. White Appellant's Brief Dckt. 45641

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45641**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-17-178**
v.	)	
	)	
FINIS EUGENE WHITE,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE STEVEN J. HIPPLER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

The State charged Finis White with battery with the intent to commit rape. After the victim admitted that she had lied about pertinent facts, the parties entered into a plea agreement in which Mr. White pled guilty to aggravated assault, and the State agreed to not pursue a persistent violator enhancement. The agreement contemplated that the State would ask the district court to order Mr. White to undergo a psychosexual evaluation, but Mr. White was free to object; however, if the court granted the State's request, Mr. White agreed to submit to the evaluation. Over Mr. White's objection, the district court ordered him to undergo a psychosexual evaluation, the evaluator concluded that Mr. White was a high risk to re-offend, and the district court sentenced Mr. White to the statutory maximum five-year fixed term.

In what appears to be an issue of first impression in Idaho, Mr. White asserts the district court erred when it ordered him to undergo a psychosexual evaluation, because aggravated assault is not one of the crimes for which a court can order a psychosexual evaluation. Mr. White further asserts the district court abused its discretion by imposing an excessive sentence in light of the mitigating factors that exist in his case.

Statement of the Facts and Course of Proceedings

C.H. testified to an Ada County grand jury that her ex-boyfriend, Finis White, contacted her in November of 2016, after they had not been in a relationship for the previous six years. (Tr. GJ, p.15, L.14 – p.17, L.19.) According to C.H., Mr. White told her that he was still in love with her and he offered to give her some of his Norco (hydrocodone) pills, after C.H. told him she was struggling with an opioid addiction. (Tr. GJ, p.18, L.6 – p.24, L.22.) Mr. White brought Norco pills to the Roadway Inn, a hotel near the Boise airport where C.H. worked as a

housekeeper, and the two went into an unoccupied room. (Tr. GJ., p.15, L.25 – p.16, L.6; p.22, L.18 – p.25, L.11.) C.H. testified that, after he gave her three pills, Mr. White threw her on the bed, laid on top of her, and attempted to remove her clothes and have sex with her – C.H. resisted and told him to stop and to get off of her. (Tr. GJ, p.25, L.7 – p.29, L.4.) C.H. managed to call her boss on her cell phone, and the attack stopped when C.H.'s co-workers yelled for her from the hallway. (Tr. GJ, p.29, L.5 – p.31, L.13.)

Encouraged to do so by her boss, C.H. eventually met with police officers and she testified to the grand jury that she was "100 percent honest with them the whole time." (Tr. GJ, p.32, L.25 – p.33, L.15.) When asked what happened to the Norco pills, C.H. testified "Like I told the officer, I don't know if Finis grabbed them back up, I don't know, because they were in my hand, and in the struggle of it all, I'm not sure if they had dropped and he picked them back up, I don't know." (Tr. GJ, p.35, Ls.11-16.) C.H. testified twice that she did not consume the Norco pills. (Tr. GJ, p.35, Ls.9-21.)

In January of 2017, the grand jury issued an Indictment charging Mr. White with battery with the intent to commit rape, and the State eventually filed an Information Part II alleging Mr. White is a persistent violator. (R., pp.19-20, 71-75.) Five months later, C.H. admitted that she had lied to the police and to the grand jury, and that she had actually consumed the three hydrocodone pills after the alleged attack, five minutes before calling the police. (PSI, pp.602-03.)[1]

The parties then entered into a plea agreement whereby Mr. White agreed to plead guilty to aggravated assault as charged in an amended Information, and the State agreed to dismiss the

[1] Citations to the Presentence Investigation Report and its attached documents will use the designation "PSI" and will include the page numbers associated with the 1,330-page electronic file containing those documents.

persistent violator enhancement allegation. (R., pp.161-80; Tr. 8/21/17, p.5, L.11 – p.23, L.2) As part of the agreement, the State would request the district court order Mr. White to undergo a psychosexual evaluation, and Mr. White was free to object; however, Mr. White agreed that he would participate in a psychosexual evaluation if the district court ordered him to do so. (Tr. 8/21/17, p.5, L.16 – p.6, L.10.)

After Mr. White entered his guilty plea, the State asked the district court to order a psychosexual evaluation, recognizing that an aggravated assault conviction would not require Mr. White to register as a sex offender, but arguing there was some sexual contact by virtue of Mr. White's saliva being found on C.H.'s breast, and noting that Mr. White had been charged with rape in 2003, but that charge was reduced to burglary. (Tr. 8/21/17, p.23, L.5 – p.24, L.6.) In arguing against the court ordering a psychosexual evaluation, Mr. White's counsel noted that the alleged victim in the 2003 case was extremely intoxicated and had credibility problems, C.H. lied to the police in the present case, and Mr. White does not have a history of sexual assaults. (Tr. 8/21/17, p.24, Ls.8-23.) Counsel argued that either the court or the Department of Correction could require Mr. White to participate in a psychosexual evaluation as a condition of parole or probation, "so I don't think it's necessary in this case." (Tr. 8/21/17, p.24, L.24 – p.25, L.3.) The district court ordered a psychosexual evaluation finding, "[t]he reality remains that we don't know whether the defendant is a sexual predator or not, but there's enough concern for me to believe we out to at least be looking at that … ." (Tr. 8/21/17, p.25, Ls.4-19.)

Based in no small part on the 2003 rape allegation, and other non-charged, non-proven allegations of sexual assault, the psychosexual evaluator concluded that Mr. White was a high risk to re-offend, despite never having been convicted of a sex offense. (PSI, pp.26-77.) At sentencing, the State asked the district court to impose the statutory maximum five-year fixed

term (Tr. 11/13/17, p.9, Ls.23-24), while counsel for Mr. White asked the court impose something less than the full five years, and asked the court to consider placing him on probation (Tr. 11/13/17, p.25, Ls.8-10). The district court sentenced Mr. White to serve a five-year fixed term. (R., pp.187-90; Tr. 11/13/17, p.33, L.24 – p.34, L.2.) Mr. White filed a timely Notice of Appeal. (R., pp.194-96.)

ISSUES

I. Did the district court err by ordering Mr. White to undergo a pre-sentence psychosexual evaluation?

II. Did the district court abuse its discretion by imposing an excessive sentence in light of the mitigating factors that exist in this case?

ARGUMENT

I.

The District Court Erred By Ordering Mr. White To Undergo A Pre-Sentence Psychosexual Evaluation

Mr. White asserts that, because I.C. § 18-8316 allows the district court to order a psychosexual evaluation only where a defendant has been convicted of a crime listed in I.C. § 18-8304, and because aggravated assault is not a crime listed therein, the district court erred when it ordered Mr. White to participate in a pre-sentence psychosexual evaluation. "The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent." I.C. § 73-113(1); *see also Verska v. St. Alphonsus Regional Medical Center*, 151 Idaho 889, 892-93 (2011).

In 1998, the Idaho legislature passed the Sexual Offender Registration Notification and Community Right-to-Know Act. I.C. § 18-8301. The Act applies to people who have been convicted of a long list of Idaho crimes or substantially equivalent crimes from other jurisdictions. I.C. § 18-8304. A person "convicted of any offense listed in section 18-8304, Idaho Code, may submit" to a psychosexual evaluation, if ordered by the district court. I.C. § 18-8316. Notably absent from the crimes listed in I.C. § 18-8304 is aggravated assault, pursuant to I.C. §§ 18-901 and 18-905. *See* I.C. § 18-8304(1)(a).

Mr. White pled guilty to aggravated assault – a crime exempted from the list of crimes contained in I.C. § 18-8304(1)(a), and he specifically objected to the district court ordering him to undergo a psychosexual evaluation. (Tr. 8/21/17, p.24, L.8 – p.25, L.3.) As such, the district

court did not have the legal authority under I.C. § 18-8316 to order Mr. White to undergo a psychosexual evaluation, and the court erred in doing so.

The Court of Appeals' decision in *State v. Widmyer*, 155 Idaho 442 (Ct. App. 2013), does not compel a different answer. The defendant in *Widmyer* objected to the district court ordering him to undergo a psychosexual evaluation as a condition of probation, knowing that the failure to do so would result in the district court executing a term of incarceration, rather than placing him on probation. *Id.* at 445. Widmyer argued that he could not be compelled to undergo a psychosexual evaluation because the crime he pled guilty to – a misdemeanor charge of injury to a child – is not an offense listed under I.C. § 18-8304. *Id.* at 445-46. The *Widmyer* Court held that, "Nothing in the language of I.C. § 18-8316 limits the court's discretion to issue terms of probation authorized by I.C. § 19-2601(2)." *Id.* at 446. The Court held that ordering a psychosexual evaluation as a condition of probation in that case was a valid exercise of the sentencing court's legal authority because it reasonably related to the defendant's rehabilitation. *Id.*[2]

In the present case, the district court did not order Mr. White to undergo a psychosexual evaluation as a condition of probation reasonably related to his rehabilitation; instead, the court ordered Mr. White to undergo a psychosexual evaluation because,

> we don't know whether the defendant is a sexual predator or not, but there's enough concern for me to believe we ought to at least be looking at that to ensure the protection of the community and what proper supervision should be afforded

[2] The *Widmyer* Court also rejected the defendant's claim that forcing him to participate in a psychosexual evaluation violated his Fifth Amendment privilege against self-incrimination. *Widmyer*, 155 Idaho at 446-47. The propriety of that ruling has been, at the very least, called into question by the Idaho Supreme Court's decision in *State v. Van Komen*, 160 Idaho 534, 540 (2016) (holding the district court violated the defendant's Fifth Amendment rights by relinquishing jurisdiction because the defendant refused to participate in a polygraph examination regarding his alleged sexual relationship with a 16-year old).

> to the defendant, whether in the community or in custody, so I see no harm in ordering a psychosexual.

(Tr. 8/21/17, p.25, Ls.9-15.) A district court's curiosity does not authorize the court to order a psychosexual evaluation. Idaho Code § 18-8316 is the sole authority for a court to issue a pre-sentence psychosexual evaluation. Because I.C. § 18-8316 only authorizes the court to order a defendant convicted of crimes listed in I.C. § 18-8304 to undergo a psychosexual evaluation, and because aggravated assault is not one of those listed crimes, the district court erred by ordering Mr. White to undergo a psychosexual evaluation.

Furthermore, the district court stated that it "reviewed and considered the extensive pre-sentence investigation materials" when determining the appropriate sentence. (Tr. 11/13/17, p.32, Ls.14-18.) As the psychosexual evaluation was included in those materials (*see* PSI, pp.26-77), Mr. White asserts the error is not harmless, and this Court should remand his case for a new sentencing hearing in front of a different judge. *See e.g.*, *State v. Van Komen*, 160 Idaho 534, 540 (2016) (vacating the district court's order relinquishing jurisdiction and remanding for a new hearing in front of a different judge, where the record showed the relinquishment decision was based upon an improper consideration of the defendant invoking his Fifth Amendment rights).

II.

In Light Of The Mitigating Factors That Exist In This Case, Did The District Court Impose An Excessive Sentence

Alternatively, Mr. White asserts that, in light of his remorse, his acceptance of responsibility, and the support he enjoys from his family and friends, the district court abused its discretion by imposing the statutory maximum term of five-years fixed. A sentence imposed within the statutory limits is reviewed under an abuse of discretion standard. *State v. Delling*, 152 Idaho 122, 132 (2011) (citations omitted). "When considering whether the trial court abused

its discretion, [the Appellate Court] considers: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistently with the legal standards applicable; and (3) whether the trial court reached its decision by an exercise of reason." *Id.* (citations omitted).

Although Mr. White denied that he intended to sexually assault C.H., he took responsibility for his actions. In his PSI questionnaire, Mr. White stated, "'I'm not trying to place blame on [C.H.] for what I did. I should not have hurt her in any way. I know what I did was wrong and for that I should be punished.'" (PSI, p.5.) During the sentencing hearing, Mr. White again apologized to C.H. and took responsibility for his actions stating, "I don't blame anyone but myself for my actions." (Tr. 11/13/17, p.28, Ls.14-22.)

Mr. White enjoys the strong support of friends and family. Nathaniel Jones, pastor at Love & Unity Church, wrote a letter in support noting how much Mr. White had grown as a father and as a man during the course of the past year since Mr. White joined the church. (PSI, p.80.) His friend Susan Lutu described Mr. White as a hard worker who had learned from his past mistakes. (PSI, p.81) Paul Freeman described Mr. White as a "warm, trustworthy and dependable friend," and Peter J. Trammell described him as "an asset to society." (PSI, pp.82-84.) His employer, Jeremy White, described Mr. White as a "reliable crew leader" and stated that he was respectful to both his co-workers and to management. (PSI, p.86.) Finally, Page Griffith White, Mr. White's wife, wrote a letter expressing her love and support for Mr. White stating, "[h]e works hard, helps others, loves God, and he loves his wife!" (PSI, p.85.)

Idaho Courts recognize that remorse, acceptance of responsibility, and the support of family and friends, are all mitigating factors that should counsel a district court to impose a less-severe sentence. *See State v. Shideler*, 103 Idaho 593 (1982); *State v. Alberts*, 121 Idaho 204

(Ct. App. 1991); *State v. Sanchez*, 117 Idaho 51 (Ct. App. 1990). Mr. White asserts that, in light of the mitigating factors that exist in his case, the district court abused its discretion by imposing an excessive sentence.

CONCLUSION

Mr. White respectfully requests that this Court vacate his sentence and remand his case for re-sentencing in front of a different judge, with instructions to order a new Presentence Investigation Report that contains no reference to the September 19, 2017 psychosexual evaluation. Alternatively, Mr. White respectfully requests that this Court reduce his sentence, as it deems appropriate.

DATED this 23rd day of August, 2018.

/s/ Jason C. Pintler
JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of August, 2018, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

JCP/eas