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10/5/2018 4:11 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**Supreme Court Case NO. 45759**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY**
v.	)	**NO. CR01-17-01623**
	)	
COLTYNE DANIELS CONLEY,	)	
	)	
Defendant-Appellant.	)	
	)	

REPLY 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 JASON SCOTT
District Judge

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I.

The District Court Did Not Address The Appellant's Objection And Contention That The Prosecutor's Argument Implied That The District Court Should Deviate From The Probation Recommendation The Prosecutor Was Bound To Make Pursuant To The Plea Agreement

The Respondent concedes that Mr. Conley specifically preserved the issue as to whether the prosecutor's sentencing argument impliedly disavowed the recommendation he was required to make pursuant to the plea agreement. (Respondent's Brief, p. 6, n.2.) Further, the Respondent acknowledges that the district court did not address the grounds specifically set forth in Mr. Conley's objection. (Respondent's Brief, p. 6, n.2.) The Respondent's contention that the district court did not address the specific grounds of Mr. Conley's objection does not account for the district court's unambiguous comments. The district court addressed the prosecutor's argument with respect to the prosecutor's jail recommendation. (Tr., p. 79, Ls. 1-20.) However, the district court did not make any comment with respect to the prosecutor's obligation to recommend probation. (Tr., p. 79, Ls. 1-20.) Mr. Conley's attorney had already specified that there was no agreement that capped the state's overall jail recommendation. (Tr., p. 65, Ls. 6-15.) The district court acknowledged that statement. (Tr., p. 79, Ls. 6-7.)

Mr. Conley's attorney stated her objection to the prosecutor's sentencing argument to preserve the issue for appeal at the outset of her sentencing argument. (Tr., p. 46, Ls. 15-20.) That objection was reinforced when Mr. Conley's attorney stated that the prosecutor was bound by the plea agreement to recommend probation, but the prosecutor's argument implied that the district court should do otherwise. (Tr., p. 62, Ls. 1-21.) In the context of that same argument, Mr. Conley's

attorney noted the apparent disparity between the prosecutor's agreement to cap the recommendation for straight jail time at thirty (30) days, in contrast to the prosecutor's overall request for 365 days. (Tr., p. 62, Ls. 5-12.)

The Respondent also suggests that the prosecutor's argument did not run afoul of the plea agreement because it was an attempt to persuade the district court that the state's recommendation was more appropriate than Mr. Conley's substantially different recommendation. (Respondent's Brief, p. 6.) However, the prosecutor addressed the district court first and he did not make the statements at issue in response to Mr. Conley's sentencing argument. (Tr., p. 36, Ls. 12-13.) The Respondent also argues that the plea agreement did not require that the prosecutor refrain from making such arguments at the sentencing hearing. (Respondent's Brief, p. 7.) Rarely, if ever, do plea agreements address the arguments to be made by either the state or the defendant. However, a prosecutor is prohibited from circumventing a plea agreement through words or actions that convey a reservation about the plea agreement. *State v. Jones*, 139 Idaho 299, 302, 77 P.3d 988, 991 (Ct. App. 2003) (citations omitted). Further, a prosecutor cannot disavow the plea agreement by implying that the plea agreement is no longer supported by the prosecutor. *Id*. (citations omitted). There is no mandate that a prosecutor "use any particular form of expression," but a prosecutor's conduct must be reasonably consistent with the recommendation for an agreed upon sentence. *Id*. (citation omitted).

Here, the prosecutor completely failed to mention probation, provide any reason why the prosecutor had agreed to recommend probation, or articulate to the district court in any way why Mr. Conley was an appropriate candidate for probation. It would have been entirely appropriate

for the prosecutor to articulate his perceived concerns, but balance those concerns with statements to the district court as to why Mr. Conley was an appropriate candidate for probation. The absence of such statements coupled with the prosecutor's inflammatory statements during his argument utterly disavowed the plea agreement. The prosecutor even addressed Mr. Conley's actions after the incident, and also after the plea agreement was made. (Tr., p. 42, Ls. 8-12.) The prosecutor claimed that Mr. Conley's actions showed that his apology was "just false." (Tr., p. 42, Ls. 11-12.) This statement further implied that the prosecutor no longer supported the plea agreement that was made. As Mr. Conley's attorney stated, the only interpretation of the prosecutor's argument was that this constituted the "most egregious offense," not a case that the state offered to resolve as an Aggravated Assault as early as the preliminary hearing stage. (Tr., p. 54, L. 5 – p. 55, L. 6.)

The Respondent asserts that the prosecutor did not allude to a more severe sentence or present any argument that was fundamentally inconsistent with the recommendation for probation and jail time. (Respondent's Brief, p. 10.) However, the prosecutor's argument was replete with inflammatory language that belies this assertion. For example, the prosecutor's use of the words "terrifying" and "dangerous" and his statement that "[i]f that is true, nobody would be safe from him, so I hope he is simply lying to make himself look good," demonstrate a substantial departure from the prosecutor's obligation to recommend probation. (Tr., p. 44, Ls. 3 -13.) Additionally, the prosecutor went into a lengthy description of the psychosexual evaluation. (Tr., p. 42, L. 13 – p. 44, L. 23.) At the outset of these statements, the prosecutor correctly stated that the determination that Mr. Conley was a low-risk to reoffend was based upon his participation in treatment. (Tr., p. 42, Ls. 13-15; PSI p. 26.) However, the prosecutor then implied that he doubted Mr. Conley's

amenability to treatment. (Tr., p. 42, Ls. 16-18.) This statement completely contradicted the determination by the psychosexual evaluator that Mr. Conley was amenable to treatment and, that due to his low-risk classification, he should participate in individual treatment rather than group treatment. (PSI, p. 26.) The only reasonable interpretation of the prosecutor's statements is that Mr. Conley posed an utmost threat to society, not that he was an appropriate candidate for probation.

Further, the sentence imposed by the district court was clearly influenced by the prosecutor's improper argument. The district court articulated that case had originated as a rape charge and the court had considered conduct that Mr. Conley did not plead guilty to. (Tr., p. 71, L. 13 – p. 74, L. 8.) The district court specified that this underlying conduct was "influential." (Tr., p. 71, Ls. 13-14.) The district court correctly stated that the pertinent case law entitled the district court to consider uncharged conduct with appropriate caution. (Tr., p. 72, L. 21 – p. 73, L. 6.) The district court articulated a number of mitigating factors in favor of Mr. Conley. (Tr., p. 75, L. 19 – p. 76, L. 10.) Importantly, that Mr. Conley did not have ongoing criminal tendencies and the mitigating factors suggested that he could refrain from engaging in like behavior in the future, could generally conform to the law, and do productive things in the community. (Tr., p. 75, L. 24 – p. 76, L. 10.)

However, the district court stated that the most important sentencing factor the court considered with respect to this case was punishment. (Tr., p. 76, Ls. 11 – 14.) The district court also subsequently referenced the statutory factors listed in I.C. § 19-2521 following the court's comments regarding the impact and harm of this crime to the victim. (Tr., p. 77, Ls. 18-21.) The

district court concluded that a lesser sentence would depreciate the seriousness of the offense. (Tr., p. 77, Ls. 22-25.) While punishment is certainly a sentence factor, the primary factor for a court's consideration at sentencing is the protection of society. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982) (citation omitted). All the other sentencing factors are subservient to the protection of society. *Id*. (citation omitted).

It was clear that Mr. Conley did not pose a risk to society and was an appropriate candidate for probation. However, the district court discussed the emotional impact of the crime on the victim and the "very distressing, concerning information" the court had regarding the impact of the crime on the victim. (Tr., p. 76, Ls. 19-21.) The district court stated the risk of emotional harm to the victim made the crime "so terribly wrong and what makes it so worthy of punishment." (Tr., p. 77, Ls. 6-9.) The victim submitted victim impact statements, but did not provide testimony at the time of the sentencing hearing. (Tr., p. 35, Ls. 19 – 22.) The prosecutor extensively argued the effect of the crime on the victim in the context of his overall argument, which disavowed the plea agreement. (Tr., p. 45, L. 1 – p. 46, L. 9.) It cannot be concluded, beyond a reasonable doubt, the court would have imposed the same sentence if the prosecutor had not disavowed the plea agreement through his argument and statements to the district court at the time of sentencing.

II.

The Attendant Facts And Circumstances In This Case Demonstrate That The Sentence Imposed By The District Court Was Excessive

Reasonableness is a fundamental requirement when a court exercises its discretion when sentencing a person. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982) (citing *State v.*

Dillon, 100 Idaho 723, 604 P.2d 737 (1979)). The circumstances of each case must be examined to determine whether a punishment imposed is excessive. *Id*. (citations omitted). Mr. Conley "must show that in light of the governing criteria, the sentence was excessive, considering any view of the facts." *State v. Jackson*, 130 Idaho 293, 294, 939 P.2d 1372, 1373 (1997) (citation omitted). The governing criteria are protection of society, deterrence of the individual and the public, possibility of rehabilitation, and punishment for wrongdoing. *Id*. (citation omitted). A first-time offender should be accorded more lenient treatment than someone who is a habitual criminal. *Nice*, 103 Idaho at 91, 645 P.2d at 325 (citation omitted).

Similarly, to *Nice*, the instant conviction was Mr. Conley's first felony offense. Prior to this incident, he had never been charged with a crime and certainly had never been charged with any crime for a violent offense or sexual misconduct. In fact, counsel for Mr. Conley noted that the state is not generally in the business of resolving sex offense case for the benefit of the defendant. (Tr., p. 54, Ls. 2 – 4.) However, the state had offered to resolve this case as an aggravated assault at the preliminary hearing stage. (Tr., p. 54, Ls. 16-20.) The significant factual problems with the state's case as originally charged were argued by Mr. Conley at the sentencing hearing. (Tr., p. 56, L. 15 – p. 58, L. 4.) The district court detailed all of the mitigating factors in favor of Mr. Conley. (Tr., p. 75, L. 19 – p. 76, L. 10.) Mr. Conley also demonstrated a sincere remorse. (Tr., p. 68, Ls. 11-21.)

In further support of the district court's sentence, the Respondent further contends that the information contained in the psychosexual evaluation revealed concerning factors. (Respondent's Brief, p. 13.) However, the psychosexual evaluator considered the entirety of the information

regarding Mr. Conley through the psychosexual evaluation process and concluded that he was a low-risk to reoffend. (PSI, pp. 25-26.) Importantly, the PSI statistics regarding recidivism rates show that the assessed potential for recidivism was actually higher if an individual in the Low Risk Category went on a rider or was sent directly to term. (PSI, pp. 13-14.) The PSI sentencing database information indicated that no other person who met similar criteria as Mr. Conley has received a prison sentence since sentencing statistics begun being compiled in 2006. (PSI, p. 13.)

Yet, the district court imposed a sentence of five (5) years, with the first year fixed. The number of years of the sentence was the maximum permitted pursuant to I.C. § 18-906. The district court imposed that sentence and sent Mr. Conley to prison. In light of all these factors, the sentence imposed was not reasonable. In fact, pursuant to the statistics available to the district court at the time of sentencing, such a sentence had a higher potential rate of recidivism. The sentence imposed by the district court departed from the objectives of sentencing that relate to the protection of society, the deterrence of the individual and the public, and the possibility of rehabilitation.

CONCLUSION

Mr. Conley has established that the prosecutor's argument at the sentencing hearing disavowed the sentence he was bound to recommend pursuant to the plea bargain. Consequently, Mr. Conley received an excessive sentence. Accordingly, Mr. Conley respectfully requests that this Court vacate his sentence and remand his case for a new sentencing hearing before a different district judge with instructions that the state recommend a sentence that strictly adheres to the plea agreement. Alternatively, he respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 5th day of October, 2018.

EDWINA E. ELCOX
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to the attorney listed below by means of iCourt File and Serve:

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