

Uldaho Law

Digital Commons @ Uldaho Law

Not Reported

Idaho Supreme Court Records & Briefs

8-28-2018

State v. Perez Appellant's Brief Dckt. 45786

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Perez Appellant's Brief Dckt. 45786" (2018). *Not Reported*. 4801.
https://digitalcommons.law.uidaho.edu/not_reported/4801

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

KIMBERLY A. COSTER
Deputy State Appellate Public Defender
I.S.B. #4115
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 45786
)	
v.)	TWIN FALLS COUNTY
)	NO. CR42-17-5560
)	
GERALD HERNANDEZ PEREZ,)	
)	APPELLANT'S BRIEF
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Gerald Hernandez Perez pled guilty to felony DUI, and the district court sentenced him to ten years, with three years fixed, and ordered the sentence to run consecutively to his sentence in a previous DUI case, Cassia County No. CR-2014-3176. On appeal, Mr. Perez asserts that the district court abused its discretion when it ordered his sentence to run consecutively to, instead of concurrently with, his sentence in the Cassia County case.

Statement of the Facts and Course of Proceedings

Mr. Perez is a recovering alcoholic with several DUIs in his past. (PSI, pp.1-4.)¹ He had maintained his sobriety for nearly two years before his relapse, and in June of 2017 he was arrested and charged with his third felony DUI. (PSI, p.55.) At the time of his arrest he was on probation for an earlier DUI, Cassia County No. CR-2014-3176, having received a suspended seven years sentence, with two years fixed, in that case. (PSI, pp.15-16.)

Pursuant to an agreement with the State, Mr. Perez pled guilty to felony DUI and at sentencing the State recommended that he serve a unified sentence of ten years, with five years fixed. (R., pp.106, 116; 12/18/17 Tr., p. 4, Ls.9-14.) Mr. Perez asked for an underlying sentence of ten years, with two years fixed, and the opportunity to first complete a specific inpatient treatment program in the community. (12/18/17 Tr., p.8, Ls.3-13.) He asked that he then be placed on probation with the condition that he complete DUI court, noting that he had already received provisional approval from the program's director. (12/18/17 Tr., p.8, L.3 – p.11, L.17.) Alternatively, Mr. Perez asked the district court to retain jurisdiction and allow him to complete a new rider. (12/18/17 Tr., p.8, L.3 – p.11, L.17.)

The district court rejected Mr. Perez's requests and imposed a ten-year prison sentence, with three years fixed; the court additionally ordered the sentence to run consecutively to Mr. Perez's sentence in the Cassia County DUI case, No. CR-2014-3176.² (12/18/17 Tr., p.23, Ls.6-8; R., p.122.) Mr. Perez timely appealed. (R., pp.129, 150.) On appeal, he contends the

¹Citations to the Presentence Investigation Report and attached materials will use the designation "PSI" and will include the page numbers associated with the 57-page electronic file containing those documents.

² At the time of sentencing in this case, Mr. Perez had admitted violating his probation in the Cassia County case, but the dispositional hearing had not yet occurred, and thus the underlying sentence of seven years, with two fixed, had yet to be executed. (See 12/18/17 Tr., p.8, L.3 – p.11, L.17.)

district court abused its discretion when it ordered his sentence to run consecutive to, instead of concurrently with, his Cassia County sentence.³

ISSUE

Did the district court abuse its discretion, resulting in an unreasonably harsh sentence, when it ordered Mr. Perez's sentence in this case to run consecutively to, instead of concurrently with, Mr. Perez's previously-imposed sentence in a separate DUI case?

ARGUMENT

The District Court Abused Its Discretion When It Ordered Mr. Perez's Sentence In This Case To Run Consecutively To, Instead Of Concurrently With, His Sentence In His Previous DUI Case

A. Introduction

Mr. Perez does not contest the reasonableness of his unified sentence of ten years, with three years fixed, imposed for DUI in this case. Rather, he claims that the district court's decision to run his sentence consecutive to the one imposed in the Cassia County DUI case rendered his sentence excessively harsh. Mindful that the combined fixed portions of both sentences – five years – does not exceed the fixed term recommended by the State pursuant to the plea agreement, Mr. Perez contends that the consecutive nature of his sentence is unreasonable, representing an abuse of the district court's sentencing discretion.

³ The plea agreement contains an appellate waiver. (R., p.116.) However, its terms expressly permit Mr. Perez to appeal his sentence to the extent the district court exceeded the State's recommendation regarding the fixed portion of his sentence. (R., p.116.) The State's recommendation for a ten-year sentence, with five years fixed, did not include a recommendation that the sentence be served consecutively to any other sentence. (*See generally*, R., p.116.) Absent such specification, the State's recommendation must be construed as a recommendation for a *concurrent* sentence. *See State v. Bosier*, 149 Idaho 664, 666 (Ct. App. 2010) (“If a court does not specify whether a sentence is to be served concurrently with or consecutive to another sentence, the sentence will be concurrent ...”)

B. Standard Of Review

When a defendant challenges his sentence as excessively harsh, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Miller*, 151 Idaho 828, 834 (2011). The appellate court reviews the district court's sentencing decisions for an abuse of discretion, which occurs if the district court imposed a sentence that is unreasonable, and thus excessive, "under any reasonable view of the facts." *State v. Strand*, 137 Idaho 457, 460 (2002); *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). "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." *Miller*, 151 Idaho at 834. When reviewing the length of a sentence, the Court considers the entire sentence. *State v. Oliver*, 144 Idaho 722 (2007).

The trial court has inherent authority to impose consecutive sentences. *State v. Murillo*, 135 Idaho 811, 814 (Ct. App. 2001). Whether the sentence for one crime should be consecutive to the sentence for another is a decision within the sound discretion of the trial court. *Id.* The sentencing criteria set forth in *Toohill* apply to this decision as well. *Id.*

C. The District Court's Order That Mr. Perez's Sentence Run Consecutively To His Previous Sentence Renders Mr. Perez's Prison Term Excessive, And Therefore Unreasonable, Representing An Abuse Of Discretion

Mr. Perez was thirty-five years old at the time of sentencing. (PSI, p.3.) He spent his early childhood in a small trailer on a dairy farm in Burley, Idaho, with parents who worked long hours at hard jobs, six days a week. (PSI, p.16.) He grew up with an alcoholic father, and with uncles who also drank. (PSI, pp.18, 24.) He began drinking when he was fourteen. (PSI, p.24.) When he was seventeen, Mr. Perez dropped out of school to become a father; he married and

worked six days a week on the farm to support his first wife and their three daughters. (PSI, p.18.) He had a tumultuous marriage, however, and in response to the stress of adulthood he took to drinking with the men after work. (PSI, p.18.) His first marriage failed and his drinking problem worsened. (PSI, p.18.) Early on, Mr. Perez believed he could control his drinking without help, and he resisted counseling and treatment - even in the face of several DUI convictions. (PSI, p.19.) Although he completed two riders, in 2010 and 2012, sobriety remained elusive for Mr. Perez. (PSI, p.28.) However, in July of 2014, following his second felony DUI conviction, Mr. Perez enrolled in a drug treatment program and turned his life around. (PSI, p.19.) He became sober and married his companion of ten years, and he had another child with her – a son. (PSI, p.19.) He and his wife worked at good jobs and they bought a new home. (PSI, p.19.) However, in late 2016 he began drinking again, to deal with the everyday stresses of life; perhaps overconfident in his earlier success, he felt he could control his consumption this time. (PSI, p.19.) His recent relapse started with just two beers on weekends, but within a few months escalated to one six-pack a day, then two. (PSI, p.24.) He now knows he was wrong, and that his alcoholism is a disease requiring treatment and therapy, for the years ahead, perhaps for the rest of his life. (PSI, p.19.)

According to his GAIN assessment, Mr. Perez has a substance abuse disorder, but he is amenable to treatment in an intensive outpatient therapy, and he will benefit from community-based sober-support or recovery groups, once he is released. (PSI, p.27.) Prior to sentencing in this case, Mr. Perez was accepted into a residential treatment program at Rainbow's End Recovery Center for a 30-stay, a program that was covered by his insurance. (PSI, p.1.) Mr. Perez's alcohol addiction and his strong potential for overcoming that addiction given his

youth, along with his strong family support, are mitigating factors that should be taken into account. *See State v. Coffin*, 146 Idaho 166, 171 (Ct. App. 2008); *State v. Baiz*, 120 Idaho 292, 293 (Ct. App. 1991).

Mr. Perez's remorse and acceptance of responsibility should be considered as mitigation as well. *See State v. Coffin*, 146 Idaho at 171. Mr. Perez told his presentence investigator,

I only blame myself and I take personal responsibility for my current circumstances. At this moment, sitting here in jail I believe that I can never drink again for the rest of my life. I think that the only way to do that is with treatment and psychiatric therapy, maybe for years or the rest of my life. If I am to believe in the treatment I've done, I have a disease and I will carry it for life, there is no magic cure.

(PSI, p.19) (typographical errors in original are corrected.)

Mr. Perez also has family support and a strong work ethic. He is a good husband to his wife, and good father to children – two sons and four daughters. (PSI, p.2.) He is a dependable worker and he has a job waiting for him upon his release. (PSI, pp.2, 23.) This support will help Mr. Perez when he is back in the community and should be considered as mitigation in his case. *See State v. Baiz*, 120 Idaho 292, 293 (Ct. App. 1991).

In light of these facts, and notwithstanding the aggravating ones, the district court's decision to order Mr. Perez to serve his sentence consecutively to the sentence in his Cassia County case is unreasonable and represents an abuse of the district court's sentencing discretion.

CONCLUSION

Mr. Perez respectfully requests that this Court vacate his sentence and remand his case to the district court with instructions that it order his sentence to run concurrently with his sentence in Cassia County No. CR-2014-3176.

DATED this 28th day of August, 2018.

/s/ Kimberly A. Coster
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of August, 2018, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

KAC/eas