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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45812
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-17-42012
v.)	
)	
NICHOLAS RYAN VANDERBURG,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Nicholas Ryan Vanderburg appeals from the district court's Judgment of Conviction and Order of Commitment. Mr. Vanderburg was sentenced to a unified sentence of five years, with two years fixed, for his possession of a controlled substance conviction. He asserts that the district court abused its discretion in sentencing him to an excessive sentence without giving proper weight and consideration to the mitigating factors that exist in his case.

Statement of the Facts & Course of Proceedings

On November 2, 2017, an Information was filed charging Mr. Vanderburg with possession of a controlled substance, burglary, and attempted petty theft. (R., pp.21-22.) The

charges were the result of report to police that Mr. Vanderburg had attempted to remove items from a Shopko. (PSI, p.3.)¹ Following his arrest five pills were found on his person.² (PSI, p.3.)

Mr. Vanderburg entered a guilty plea to possession of a controlled substance. (R., p.34.) Pursuant to the plea agreement, the remaining charges were dismissed. (R., p.48.) At sentencing, the prosecution recommended imposition of a unified sentence of seven years, with two years fixed. (Tr., p.16, Ls.21-25.) Defense counsel requested a unified sentence of four years, with six months fixed. (Tr., p.21, Ls.5-7.) The district court imposed a unified sentence of five years, with two years fixed. (R., pp.48-49.) Mr. Vanderburg filed a Notice of Appeal timely from the district court's Judgment of Conviction and Order of Commitment. (R., pp.51-52.)

ISSUE

Did the district court abuse its discretion when it imposed, upon Mr. Vanderburg, a unified sentence of five years, with two years fixed, following his plea of guilty to possession of a controlled substance?

ARGUMENT

The District Court Abused Its Discretion When It Imposed, Upon Mr. Vanderburg, A Unified Sentence Of Five Years, With Two Years Fixed, Following His Plea Of Guilty To Possession Of A Controlled Substance

Mr. Vanderburg asserts that, given any view of the facts, his unified sentence of five years, with two years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review

¹ For ease of reference, the electronic file containing the Presentence Investigation Report and attachments will be cited as "PSI" and referenced pages will correspond with the electronic page numbers contained in this file.

² Although he illegally obtained the pills, Mr. Vanderburg asserts that he was possessing the pills for medical purposes and not due to substance abuse issues. (PSI, p.15.)

of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

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) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Vanderburg does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Vanderburg must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). 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.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978), *overruled on other grounds by State v. Coassolo*, 136 Idaho 138 (2001)).

Appellate courts use a three-part test for determining whether a district court abused its discretion: (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason. *State v. Stevens*, 146 Idaho 139, 143 (2008) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94 (1991)).

Mr. Vanderburg asserts that the district court failed to give proper weight and consideration to the mitigating factors that exist in his case and, as a result, did not reach its decision by an exercise of reason. Specifically, he asserts that the district court failed to give

proper consideration to his family support. In *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that family and friend support were factors that should be considered in the Court's decision as to what is an appropriate sentence. *Id.* Mr. Vanderburg has the support of his family. (PSI, p.9.) He notes that his father is both emotionally and financially supportive and his mother is "loving, caring, and supportive." (PSI, p.9.) He has great relationships with his step-father and brother. (PSI, p.9.) Mr. Vanderburg's fiancé, Ms. Thiel, is also a significant source of support and motivation. (PSI, p.10.)

Additionally, Mr. Vanderburg has expressed his remorse for committing the instant offense. In *State v. Alberts*, 121 Idaho 204 (Ct. App. 1991), the Idaho Court of Appeals reduced the sentence imposed, "In light of Alberts' expression of remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character." *Id.* 121 Idaho at 209. Mr. Vanderburg has expressed his remorse for committing the instant offense and expressed a desire to change writing:

Im done being a stupid kid. Im older and know what I want. that is to be a contributing member of my community, start a career after going to back to college and spending the rest of my life with the love of my life, to start a family and to put the stupidity behind me. [sic]

(PSI, p.15.) He reiterated his acceptance of responsibility and a desire to change at the sentencing hearing:

I'm here before you, of course, to be sentenced on possession of controlled substance. I'm not going to beat around any bushes. I did possess the narcotics I was caught with. I was trying to fulfill my instant gratification.

And when there was a right way to go about managing my pain, I did not go about it the right way. And I'm paying for it in more ways than one. For the longest time, I've been known as the rebellious kid, and it's even trickled into my adult life. I've been called a menace to the community. I've been told I'd spend most of my life behind bars. I've even been told I'm a lost cause.

In the last couple of months, I've done some deep soul searching. And I've come to the realization that none of these things are me. I don't want to be known as a menace or a criminal. I want to be known as a contributing member to the community.

I want to go back to school, so I can make a difference. I want to spend my days helping troubled teens doing PSR work so they don't end up where I'm at.

I'm moving on with a new sober life. I want to be a family man. My fiance has shown me a life that I can only dream of. She has inspired me to reach for the stars. I'm done with life behind bars. I'm ready to move forward with any sentence this Court seems fit, complete it, and go on parole.

(Tr., p.21, L.15 – p.22, L.21.)

Based upon the above mitigating factors, Mr. Vanderburg asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his family support and remorse it would have crafted a less severe sentence.

CONCLUSION

Mr. Vanderburg respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing.

DATED this 3rd day of August, 2018.

/s/ Elizabeth Ann Allred
ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of August, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, electronically as follows:

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
Delivered via e-mail to: ecf@ag.idaho.gov

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

EAA/eas