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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45937
Plaintiff-Respondent,)	
)	Bonneville County Case No.
v.)	CR-2017-8242
)	
CHRISTOPHER MICHAEL CLINGERMAN,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Clingerman failed to establish that the district court abused its discretion by imposing a unified sentence of 20 years, with two years fixed, upon his guilty plea to sexual abuse of a child under the age of 16 years?

Clingerman Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Clingerman pled guilty to sexual abuse of a child under the age of 16 years and the district court imposed a unified sentence of 20 years, with two years fixed. (R., pp.99-101.)

Clingerman filed a timely notice of appeal. (R., pp.115-18.)

Clingerman asserts his sentence is excessive in light of difficult childhood, mental health issues, substance abuse issues, and willingness to participate in treatment. (Appellant’s brief, pp.3-5.) The record supports the sentence imposed.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed 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 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. 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. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, “[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The maximum prison sentence for sexual abuse of a child under the age of 16 years is 25 years. I.C. § 18-1506. The district court imposed a unified sentence of 20 years, with two years fixed, which falls well within the statutory guidelines. (R., pp.99-101.) Furthermore, Clingerman's sentence is appropriate in light of his extensive criminal history, his failure to rehabilitate or be deterred, and the risk he poses to the community.

Clingerman, while young, has a criminal history that started at the age of 10 and includes juvenile adjudications for lewd conduct with a child under 16, battery, and two counts of aggravated assault with the use of a deadly weapon. (PSI, pp.3, 5-7.¹) Clingerman also has juvenile charges that were eventually dismissed. (PSI, pp.5-6.) As an adult, Clingerman was convicted of misdemeanor disturbing the peace. (PSI, p.6.) Idaho Department of Juvenile Corrections (IDJC) records show that Clingerman "has a history of battery, was in detention for assaulting his eight year old sister, holding a knife to his one-year-old brother's throat, and a long history of inappropriate touching, hitting, kicking, and throwing things at peers in school." (PSI, p.7.) IDJC also reported that Clingerman was committed to Juvenile Corrections in 2007, and again in 2009 after doing poorly on probation. (PSI, p.7.) During his time at IDJC, Clingerman participated in sex offender treatment and substance abuse treatment. (PSI, p.7.) Upon release from St. Anthony's, Clingerman was placed on probation, but violated his probation and completed his sentence in jail. (PSI, p.7.) While incarcerated, Clingerman was disciplined for fighting, passing items to other inmates, and tattooing. (PSI, p.7.) Treatment and incarceration has failed to rehabilitate Clingerman or deter him from committing crimes.

In his psychosexual evaluation, Clingerman admitted to having sexual intercourse with his sister at a young age; molesting a friend's younger sister; engaging in bestiality and

¹ PSI page numbers correspond with the page numbers of the electronic file "PSI.pdf."

voyeurism; engaging in sexual acts with peer-aged boys; attempting to place his hands down the pants of a neighbor girl; and engaging in sexual intercourse with fellow inmates. (PSI, p.12.) In this case, Clingerman admitted to kissing the victim, touching and kissing her breasts, touching her buttock, placing his hands inside of her pants and touching her vagina, and exposing his penis to her. (PSI, p.12.) The psychosexual evaluator reported that Clingerman meets DSM criteria for substance dependence, unspecified intellectual disability, unspecified depressive disorder, and personality disorder with borderline and antisocial traits, and also determined Clingerman presented a well above average risk to sexually recidivate. (PSI, p.94.) The psychosexual evaluator also recommended that Clingerman participate in sex offender treatment, substance abuse treatment, and mental health treatment, even though his motivation for sex offender treatment was poor. (PSI, pp.94-95.)

At sentencing, district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Clingerman's sentence including his criminal record, the seriousness of the offense, and his failure to rehabilitate or be deterred despite previous legal sanctions and treatment. (3/7/18 Tr., p.31, L.14– p.36, L.9.) The state submits that Clingerman has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal.

Conclusion

The state respectfully requests this Court to affirm Clingerman's conviction and sentence.

DATED this 27th day of September, 2018.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of September, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

ELIZABETH ANN ALLRED
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

1 that's why I stopped going.
2 And, like, that's where my -- it all started.
3 And, like, if I would have just kept going on the right
4 path, I would have, you know, made better decisions, and
5 that's what I could work on in the future.
6 THE COURT: Okay. Anything else?
7 THE DEFENDANT: That's it.
8 THE COURT: Are you fully satisfied with the
9 representation that Mr. Crane has provided?
10 THE DEFENDANT: Yes.
11 THE COURT: Do you know of any legal reason why I
12 should not sentence you today?
13 THE DEFENDANT: No.
14 THE COURT: I read this material carefully,
15 Mr. Clingeman. Just to summarize, you have a lengthy
16 juvenile record which involved attempts over the years
17 to work with you on a number of levels including lengthy
18 detention with the Department of Correction -- Juvenile
19 Corrections during which you received considerable
20 psychosexual counseling.
21 You went through a sex offender treatment program
22 there, and I was a bit -- I was more than a bit
23 concerned that it's clear from Dr. Hatzenbuehler's
24 recitation that in spite of that, there continued to be
25 inappropriate sexual contact through that time,

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1 use drugs and sex to cope. You are -- she says that you
2 are a -- that the prognosis for being helped with sex
3 offender treatment at this time is poor, and that your
4 "risk for reoffense is well above average," in her
5 terms.
6 That's -- she derives that after looking at three
7 or four instruments which assess that ** some were high,
8 some were above average, but she kind of puts them all
9 together and says "well above average."
10 The issue is that even though there's been
11 significant intervention over the last -- since you were
12 ten years old -- with these sexual issues, you still
13 have that problem. And she says you shouldn't ever be
14 allowed in the presence of young females without
15 supervision in any regard until you are determined
16 clinically to not be a risk to them.
17 I'm going -- I'll reference this in a minute
18 again, but my duty as a judge is to make whatever --
19 take whatever steps I deem as necessary to protect
20 others from that potential damaging activity. When
21 you -- regardless of what Mr. Dewey talked about in
22 terms of willingness of the victim here, no 13-year-old
23 should be exposed to or have to undergo the type of
24 social contact -- sexual contact you had with her, even
25 though no intercourse. It just shouldn't occur.

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1 including with other individuals in the system, male and
2 female.
3 And then we have this situation occurring, which
4 in spite of all that training, there should have been
5 red flags in your brain about what you were doing, given
6 the age of this victim, and your disregard for her
7 wellbeing in satisfying your sexual interests.
8 Dr. Hatzenbuehler goes through the assessments
9 thoroughly -- and I'm referring here to page 18 of her
10 report -- where she says that the primary areas of
11 concern are your use of sexual activity to help you
12 cope -- that's called "sex as coping" -- with negative
13 life circumstances, your impulsivity, your lack of
14 concern for others, your sexual preoccupation, and your
15 poor problem-solving skills.
16 There's also some evident concern about capacity
17 for relationship stability, hostility toward women,
18 significant social influences, deviant social
19 preferences, negative emotionality, general social
20 rejection, and cooperation with supervision, and no
21 clear -- no clear clinically significant concern for the
22 emotional condition of children.
23 In conclusion, she says that you have a
24 preference for young, pubescent females. You
25 demonstrate sexual -- some sexual preoccupation. You

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1 She's not developmentally prepared for that yet,
2 and it's damaging to her to have to undergo that at that
3 age, and then she will never be able to live a decent
4 adolescence. She'll be preoccupied with this stuff.
5 You've moved her along that path considerably. And
6 that's -- if she doesn't receive considerable
7 counseling, she will end up having a difficult life
8 sexually as a result. At least, that's my observation
9 after having done this for many, many years. So I'm
10 highly concerned that I must take some steps to make
11 sure that doesn't occur again.
12 Based upon your plea of guilty, it is the
13 judgment of the Court that you are guilty of the crime
14 of child sexual abuse of a minor under 16. In addition
15 to the Presentence Investigation Report, I have reviewed
16 the objectives of criminal punishment adopted by the
17 Idaho Supreme Court.
18 My primary duty as I've stated is to protect
19 society and members of society from this activity. I
20 must deter you if I can from this. I'm not terribly
21 optimistic about that because you haven't been deterred
22 in the past, including what Mr. Dewey said about being
23 arrested on this and then getting out and doing it
24 again. You don't seem to respond to the threat of
25 incarceration as a deterrent to your activities.

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1 I must see to your rehabilitation if I can. I'm
2 not as much concerned about punishment as I am
3 protection of the community. I have also reviewed and
4 considered the criteria in 19-2521. I think we all
5 agree this is not a case for probation.
6 So based upon all of the circumstances of the
7 case, it shall be the judgment of the Court that you be
8 sentenced to the custody of the Idaho Board of
9 Correction for a minimum period of two and a maximum
10 period of 20 years. I am going to give a longer tail
11 than was requested. I think the Department of
12 Correction needs time to supervise you potentially for a
13 long, long time.
14 You shall be fined -- excuse me. You shall
15 pay -- what was it 1300 for the Hatzenbuehler?
16 MR. DEWEY: Yes, Your Honor, 1300 for the
17 psychosexual and 500 --
18 THE COURT: And 500 for Landers?
19 MR. DEWEY: Correct.
20 THE COURT: You will reimburse the county \$500
21 for the services of the public defender. You will pay
22 court costs, per statute and victims relief, per
23 statute. I don't have those numbers, but we'll get them
24 in the judgment.
25 You will provide a DNA sample and a thumbprint

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1 exemplar as required. You will register as a sex
2 offender upon any release.
3 I'm not going to retain jurisdiction here,
4 Mr. Crane. If I felt that there was more of a potential
5 for some immediate amelioration of the condition in that
6 program, I would order it, but I am discouraged. I
7 think he needs to be worked with a longer period of time
8 before he's potentially released to the community. So
9 I'm going to send him directly to Corrections.
10 All right. You do you have any question about
11 that sentence, Mr. Clingerman?
12 THE DEFENDANT: No.
13 THE COURT: You are advised that you have the
14 right to appeal to the Idaho Supreme Court from this
15 judgment. You have a right to be represented by an
16 attorney on that appeal. If you can't afford an
17 attorney, one will be appointed to assist you at public
18 expense, but you only have 42 days from today's date to
19 file any notice of appeal.
20 You may have up to 120 days under Rule 35 to ask
21 for relief if you wish, and you may have up to a year
22 under the Uniform Post-Conviction Relief Act to ask for
23 relief if you qualify.
24 Is there anything else at this time, Mr. Dewey?
25 MR. DEWEY: Yes, Your Honor, a couple of things.

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1 I didn't catch whether there was a fine.
2 THE COURT: I did not fine. I don't think
3 there's a potential for paying that was reasonable, so I
4 did not fine.
5 MR. DEWEY: Okay. And the other thing, Judge,
6 the current no contact order expires in 2020.
7 THE COURT: The no contact order shall be in
8 effect the entire duration of the sentence, so I'll make
9 that adjustment in the file.
10 MR. DEWEY: Thank you.
11 THE COURT: Anything else at this time,
12 Mr. Crane?
13 MR. CRANE: No, Your Honor.
14 THE COURT: You are hereby remanded to the
15 custody of the Sheriff of Bonneville County for delivery
16 to the proper agent of the Idaho Department of
17 Correction and execution of sentence.
18 Anything else?
19 MR. DEWEY: No.
20 THE COURT: Thank you.
21 (Proceedings concluded.)
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2 BONNEVILLE COUNTY, IDAHO
3 MARCH 27, 2018
4 RULE 35 HEARING
5 THE COURT: Let's go on the record in Bonneville
6 County Case CR-2017-8242, State of Idaho v. Christopher
7 Michael Clingerman. Mr. Clingerman is present along
8 with counsel, Mr. Jordan Crane. The State of Idaho is
9 present represented by Mr. John Dewey. We're here today
10 for a Rule 35. We are taking this just a couple minutes
11 early.
12 Let me ask either counsel if they have witnesses
13 or expect any testimony today. Mr. Crane?
14 MR. CRANE: We just have argument, Your Honor.
15 THE COURT: Mr. Dewey?
16 MR. DEWEY: I hadn't planned on any, Your Honor.
17 The victim and her mother were not present for the
18 sentencing. And we didn't have any indication that they
19 would want to be here today.
20 THE COURT: All right. Let me indicate I have
21 read the briefing on this as well as went back and
22 looked at the PSI, but anything --
23 Go ahead, Mr. Crane with your motion, sir.
24 MR. CRANE: Thank you, Your Honor. We're here to
25 ask the Court to consider a reduction of the sentence

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