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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46236-2018
Plaintiff-Respondent,)	
)	TWIN FALLS COUNTY NO. CR42-17-12597
v.)	
)	
JOSE ANTONIO AGUSTIN,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Jose Antonio Agustin pleaded guilty to felony aggravated assault with a deadly weapon. The district court imposed a unified sentence of twelve years, with four years fixed. Mindful that he waived his right to appeal his sentence as part of the plea agreement, Mr. Agustin asserts on appeal that the district court abused its discretion when it imposed the sentence.

Statement of the Facts & Course of Proceedings

Officer Paradez of the Twin Falls Police Department responded to a reported aggravated battery at an apartment in Twin Falls. (*See Presentence Report (hereinafter, PSI), p.3.*) Upon his arrival, Officer Paradez saw the front door frame of the apartment had been destroyed. (PSI, p.3.) Jessica Ruiz was speaking with paramedics when the officer arrived. (PSI, p.3.) Ms. Ruiz had been crying, and she had scratches and red marks on her right arm and blood spots on the front of her shirt. (*See PSI, p.3.*)

Ms. Ruiz told Officer Paradez that three males, Mr. Agustin, Cesar Gonzalez-Ramos, and Gaudencia Sandoval-Carbajal, had kicked in her door and entered the apartment. (PSI, p.3.) She stated Mr. Agustin pointed a rifle at her when he entered, and the other two males had knives. (*See PSI, p.3.*) According to Ms. Ruiz, Mr. Agustin dropped the rifle, grabbed her by the arms, shoved her against a kitchen countertop, and choked her until she almost passed out a couple times. (*See PSI, p.3.*) She stated that while Mr. Agustin was choking her, the other two males went through the apartment looking for anyone else that might be there. (*See PSI, p.3.*) Ms. Ruiz also reported that before the males left, they told her that if she called the cops, they would kill her and her three-year-old daughter, who was in the apartment at the time. (PSI, p.3.)

The next day, another officer detained Mr. Gonzalez-Ramos and transported him to the Twin Falls Police Department to be interviewed. (*See PSI, p.3.*) Mr. Gonzalez-Ramos told Officer Paradez that he, Mr. Agustin, and Mr. Sandoval-Carbajal had been hanging out in Jerome when Ms. Ruiz messaged him on Facebook asking for a speaker she wanted back. (*See PSI, p.3.*) Mr. Agustin stated he did not want Mr. Gonzalez-Ramos messaging Ms. Ruiz, and he took Mr. Gonzalez-Ramos's phone and began messaging Ms. Ruiz on that phone. (*See PSI, p.3.*) Mr. Gonzalez-Ramos reported that Mr. Agustin eventually said they were leaving and asked him

if he wanted to go, and he replied yes and drove them over to Ms. Ruiz's apartment. (*See* PSI, p.3.) He read the messages while driving over there and realized what was going to happen. (PSI, p.3.) His account of what happened at the apartment generally matched Ms. Ruiz's version of the events. (*See* PSI, p.3.) Mr. Gonzalez-Ramos stated that, after they left the apartment, they agreed to tell the cops if they were questioned that they were in Jerome the whole time. (*See* PSI, pp.3-4.)

Officer Paradez also spoke with Mr. Gonzalez-Ramos's mother, who reported she had received a phone call telling her she needed to get her son out of jail so he would not talk to the police, the male caller knew where she lived, and her son better not talk to the police. (*See* PSI, p.4.) The phone number of the male caller was the same number that belonged to Mr. Agustin, which the officer had received from Ms. Ruiz. (*See* PSI, p.4.)

Later, in the presentence investigation questionnaire, Mr. Agustin wrote that he had drunk alcohol and used OxyContin and cocaine before the incident. (*See* PSI, p.4.) Mr. Agustin also reported the rifle used during the incident was a BB gun. (*See* PSI, p.5.)

The State charged Mr. Agustin by Information with burglary, felony, I.C. § 18-1401, aggravated assault with a deadly weapon, felony, I.C. §§ 18-901(b) and 18-905(a), conspiracy to commit burglary, felony, I.C. §§ 18-1701 and 18-1401, and battery, misdemeanor, I.C. § 18-903(a). (R., pp.29-32.) He initially entered a not guilty plea to the charges. (*See* R., p.34.)

Pursuant to a plea agreement, Mr. Agustin subsequently agreed to plead guilty to aggravated assault with a deadly weapon, and the State agreed to dismiss the other three charges. (*See* R., pp.44-55; Tr. May 7, 2018, p.3, L.19 – p.7, L.10.) The parties were free to make sentencing recommendations to the district court. (*See* R., p.55; Tr. May 7, 2018, p.7, Ls.7-8.) The plea agreement also provided: "By accepting this offer the defendant waives the right to:

(1) file a Rule 35 Motion regarding the initial Judgment (except as to an illegal sentence) and (2) appeal any issues in this case, including all matters involving the plea or the sentence and any rulings made the court, including all suppression issues.” (R., p.55.) Under the plea agreement, Mr. Agustin could appeal the sentence “if the Court exceeds the recommendation made by the State at sentencing regarding: (1) the determinate portion of the sentence, and/or (2) a probation recommendation, and/or (3) a retained jurisdiction recommendation.” (R., p.55.) The district court accepted Mr. Agustin’s guilty plea. (*See* R., p.44; Tr. May 7, 2018, p.9, L.22 – p.10, L.1.)

At the sentencing hearing, Mr. Agustin recommended the district court retain jurisdiction with additional “punishment components somewhere in the 9- to 12-month range,” or, if the district court were to instead execute the sentence, limit the sentence imposed to a unified sentence of eight years, with two years fixed. (*See* Tr. July 2, 2018, p.15, L.24 – p.17, L.25.) The State recommended the district court impose a unified sentence of fifteen years, with eight years fixed. (Tr. July 2, 2018, p.6, Ls.12-14.) The district court imposed a unified sentence of twelve years, with four years fixed. (R., pp.62-65.)

Mr. Agustin filed a Notice of Appeal timely from the district court’s Judgment of Conviction. (R., pp.70-73.)

ISSUE

Did the district court abuse its discretion when it imposed a unified sentence of twelve years, with four years fixed, upon Mr. Agustin following his plea of guilty to aggravated assault with a deadly weapon?

ARGUMENT

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Twelve Years, With Four Years Fixed, Upon Mr. Agustin Following His Plea Of Guilty To Aggravated Assault With A Deadly Weapon

Mindful that he waived his right to appeal his sentence as part of the plea agreement (*see* R., p.55), Mr. Agustin asserts the district court abused its discretion when it imposed the sentence. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving “due regard to the nature of the offense, the character of the offender, and the protection of the public interest.” *State v. Strand*, 137 Idaho 457, 460 (2002).

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) (internal quotation marks omitted). Mr. Agustin does not assert that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Agustin must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* 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.* An appellate court, “[w]hen reviewing the length of a sentence . . . consider[s] the defendant’s entire sentence.” *State v. Oliver*, 144 Idaho 722, 726 (2007). The reviewing court will “presume that the fixed portion of the sentence will be the defendant’s probable term of confinement.” *Id.*

Mr. Agustin asserts his sentence is excessive considering any view of the facts, because the district court did not adequately consider mitigating factors. Specifically, the instant offense

is Mr. Agustin's first felony conviction. (*See* PSI, pp.5-7; Tr. July 2, 2018, p.7, L.15 – p.8, L.14.) Additionally, Mr. Agustin now desires to get treatment for his deep-rooted substance abuse problems, which contributed to the instant offense. (*See* PSI, pp.12-13; Tr. July 2, 2018, p.9, L.9 – p.12, L.6, p.18, Ls.12-15.) Further, Mr. Agustin enjoys the support of his friends and family. (*See* PSI, pp.37-39; Tr. July 2, 2018, p.7, Ls.6-14.) Mr. Agustin is also a devoted father to his five-year-old son. (*See* Tr. July 2, 2018, p.6, L.23 – p.7, L.5, p.12, Ls.18-19.) Finally, Mr. Agustin has expressed remorse for his actions and accepted responsibility for the instant offense. (*See* PSI, pp.5, 14; Tr. July 2, 2018, p.18, Ls.7-17.) Thus, because the district court did not adequately consider the above mitigating factors, Mr. Agustin's sentence is excessive considering any view of the facts, and the district court abused its discretion when it imposed the sentence.

CONCLUSION

For the above reasons, Mr. Agustin respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 10th day of January, 2019.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 2019, 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

BPM/eas