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State v. Cooper Appellant's Brief Dckt. 46448

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	
Plaintiff-Respondent,	NO. 46448-2018
	TWIN FALLS COUNTY NO. CR42-18-604
v.	
STACEY GERARD COOPER II,	APPELLANT'S BRIEF
Defendant-Appellant.	

STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, the jury found Stacey Gerard Cooper II guilty of felony possession of a controlled substance (marijuana) with the intent to deliver. The district court imposed a unified sentence of five years, with one year fixed, to be served consecutively to the sentence in a separate case. On appeal, Mr. Cooper asserts the district court abused its discretion when it imposed his sentence.

Statement of the Facts & Course of Proceedings

The State charged Mr. Cooper by Information with possession of a controlled substance (marijuana) with the intent to deliver, felony, I.C. § 37-2732(a)(1)(B). (R., pp.17-19.) Mr. Cooper entered a not guilty plea. (R., p.20.)

During Mr. Cooper's jury trial, Probation and Parole Officer Kathy Felder testified that she had been supervising Mr. Cooper, and she had attempted to perform a house check on him at an apartment in Twin Falls. (Tr. 8/1/18, p.100, L.15 – p.101, L.23.) A female voice answered her knock on the door, and Officer Felder called for backup while waiting several minutes before the female opened the door. (*See* Tr. 8/1/18, p.102, L.5 – p.103, L.22.) Mr. Cooper and two other persons were in the apartment, and Officer Felder testified she saw him move a towel to cover something up on the floor. (*See* Tr. 8/1/18, p.103, L.23 – p.106, L.6.)

Officer Justin Cyr with the Twin Falls Police Department indicated he responded to Officer Felder's call for assistance. (*See* Tr. 8/1/18, p.113, L.2 – p.115, L.13.) Officer Cyr testified he looked under the towel and found a box for a digital scale, with nothing inside. (Tr. 8/1/18, p.117, L.15 – p.118, L.3.) He searched the residence and Mr. Cooper's car, and inside the car he found numerous small clear plastic baggies and sandwich bags, including a sandwich bag with one of the corners ripped off. (Tr. 8/1/18, p.118, Ls.4-19.) Above the center console of the car, Officer Cyr found two pictures of Jesus Malverde, who the officer described as the patron saint of narco traffickers. (Tr. 8/1/18, p.119, L.16 – p.120, L.10.) Inside the bedroom of the apartment, Officer Cyr found about $400. (Tr. 8/1/18, p.121, Ls.10-19.) He also found more money on Mr. Cooper's person, for a total sum of about $516. (Tr. 8/1/18, p.122, Ls.7-14.)

Officer Cyr then testified: "Underneath the sink, I located a heat-sealed Ziploc[] bag that had been opened. Inside this heat-sealed Ziploc[] bag was wax paper. Inside of this wax paper was a brown tar substance that I recognized to be drugs." (Tr. 8/1/18, p.122, L.18 – p.123, L.1.) The officer found the digital scale next to the substance. (Tr. 8/1/18, p.123, Ls.13-15.) He recognized the substance as "butane heated oil, BHO butter," an oil extracted from marijuana using butane. (Tr. 8/1/18, p.123, Ls.8-12, 18-22.) The substance was also known as "shatter." (Tr. 8/1/18, p.124, Ls.18-20.) Officer Cyr testified that he usually saw shatter in amounts under a gram when he seized marijuana, and the amount of shatter was unusual. (Tr. 8/1/18, p.134, L.24 – p.135, L.21.) When the officer questioned Mr. Cooper about the marijuana, Mr. Cooper said it belonged to him and was for personal use. (Tr. 8/1/18, p.136, L.15 – p.137, L.10.)

Scott Hellstrom, a forensic scientist with the Idaho State Police, testified the substance contained marijuana. (*See* Tr. 8/1/18, p.182, Ls.10-22.) On cross-examination, he confirmed that the total weight of the substance was 22.23 grams. (*See* Tr. 8/1/18, p.184, L.22 – p.185, L.25.)

Mr. Cooper's mother testified for the defense that Mr. Cooper had identified with the Hispanic community in Jerome when he was younger, and Jesus Malverde had been a symbol of good luck among Mr. Cooper's male adult role models. (*See* Tr. 8/1/18, p.204, L.12 – p.205, L.13.) Mr. Cooper's mother also testified that she had provided Mr. Cooper with $1,500 the weekend before his arrest, and he used $800 of that to pay the rent and deposit for the apartment. (*See* Tr. 8/1/18, p.211, L.3 – p.212, L.10.) However, the prosecutor's office had filed a claim to forfeit the $516 found at the scene. (*See* Tr. 8/1/18, p.225, L.15 – p.226, L.18, p.239, L.21 – p.243, L.10.)

The jury found Mr. Cooper guilty of possession of a controlled substance (marijuana) with the intent to deliver. (R., pp.53-54.) Mr. Cooper waived the preparation of a presentence report. (Tr. 8/1/18, p.297, Ls.4-10.)

At the sentencing hearing, the State recommended the district court impose a unified sentence of five years, with three years fixed, to be served consecutively to the sentence in Mr. Cooper's 2015 case.[1] (*See* Tr. 8/21/18, p.300, Ls.8-12.) Mr. Cooper, "recognizing that we cannot seek anything other than prison," recommended the district court "consider 1 year fixed, 3 years indeterminate and allow the parole board to be the one who can make the best informed decision on how he's doing on the program and whether or not he should be released." (Tr. 8/21/18, p.307, L.24 – p.308, L.5.) Mr. Cooper did not request the sentence here be served consecutively to the sentence in the 2015 case. (*See* Tr. 8/21/18, p.302, L.13 – p.308, L.5.)

The district court imposed a unified sentence of five years, with one year fixed, to be served consecutively to the sentence in the 2015 case. (R., pp.106-09.)

Mr. Cooper filed a Notice of Appeal timely from the district court's Judgment of Conviction. (R., pp.113-16.)

ISSUE

Did the district court abuse its discretion when it imposed a unified sentence of five years, with one year fixed, upon Mr. Cooper following his conviction for possession of a controlled substance (marijuana) with the intent to deliver?

[1] In the 2015 case, Jerome County No. CR 2015-788, Mr. Cooper had a unified sentence of five years, with two years fixed, following his conviction for possession of a controlled substance (methamphetamine). (*See* Tr. 8/21/18, p.303, Ls.11-12, p.310, Ls.2-5, p.311, Ls.12-14.) At the time of the instant offense, Mr. Cooper had been on parole in the 2015 case for about three months. (*See* Tr. 8/21/18, p.300, L.25 – p.301, L.2, p.310, Ls.2-5.)

ARGUMENT

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Five Years, With One Year Fixed, Upon Mr. Cooper Following His Conviction For Possession Of A Controlled Substance (Marijuana) With The Intent To Deliver

Mr. Cooper asserts the district court abused its discretion when it imposed a unified sentence of five years, with one year fixed, upon him following his conviction for possession of a controlled substance (marijuana) with the intent to deliver. The district court should have instead followed Mr. Cooper's recommendation by imposing a unified sentence of four years, with one year fixed. (*See* Tr. 8/21/18, p.307, L.24 – p.308, L.5.) Further, considering Mr. Cooper did not recommend the sentence here be served consecutively to the sentence in the 2015 case, the district court should have ordered the sentence run concurrently with the sentence in the 2015 case.

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. Cooper does not assert that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Cooper 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. Cooper asserts the sentence imposed by the district court is excessive considering any view of the facts, because the district court did not adequately consider mitigating factors. During the sentencing hearing, Mr. Cooper's counsel explained that in the time leading up to the instant offense, Mr. Cooper "had sustained a serious injury while at work. Because of that, he was not working and, in fact, required surgery. It was the plan to return back to his employment; however, that time had not yet come, and this charge was picked up prior to that time." (Tr. 8/21/18, p.303, Ls.16-22.) Further, Mr. Cooper had moved from a halfway house to his new residence only a few days before the incident. (Tr. 8/21/18, p.303, L.23 – p.304, L.1.) Defense counsel also informed the district court that Mr. Cooper "does have a wonderful support group," and Mr. Cooper's mother was seeking out the possibility of having Mr. Cooper continue his college education while incarcerated. (*See* Tr. 8/21/18, p.304, Ls.13-25.) Additionally, Mr. Cooper suffered from "serious mental health diagnoses", including "an absolutely severe form of anxiety" and "personality disorders." (Tr. 8/21/18, p.305, Ls.1-9.) Mr. Cooper's counsel told the district court that Mr. Cooper had issues with addiction, and he took responsibility for possessing the substance. (Tr. 8/21/18, p.306, Ls.7-24.)

Addressing the district court, Mr. Cooper stated he agreed with the prosecutor that he had ruined "my chances with any rider or probation and that prison is probably necessary." (*See* Tr. 8/21/18, p.308, Ls.20-23.) However, he asked the district court to give him a "respectable sentence in this case, what my attorney is offering you, so that I can get back out and continue

setting my goals, because I'm not a complete failure. I'm a drug addict. I've got a substance abuse issue. I'm not a hardened criminal, so I'd just see if you could respectfully take into consideration our plea—or little agreement." (Tr. 8/21/18, p.308, L.24 – p.309, L.6.)

Because the district court did not adequately consider the above mitigating factors, the sentence imposed is excessive considering any view of the facts. Thus, the district court abused its discretion when it imposed Mr. Cooper's sentence. The district court should have instead followed Mr. Cooper's recommendation by imposing a unified sentence of four years, with one year fixed. The district court also should have ordered that the sentence here be served concurrently with the sentence in the 2015 case.

CONCLUSION

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

DATED this 9th day of August, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of August, 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