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State v. Diffendaffer Appellant's Brief Dckt. 46909

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

SALLY J. COOLEY
Deputy State Appellate Public Defender
I.S.B. #7353
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. 46909-2019
	ADA COUNTY NO. CR01-18-12487
v.	
RUSSELL GLEN DIFFENDAFFER,	APPELLANT'S BRIEF
Defendant-Appellant.	

STATEMENT OF THE CASE

Nature of the Case

Russell Glen Diffendaffer pled guilty to one count of felony injury to a child. He received a unified sentence of ten years, with two years fixed. Mr. Diffendaffer contends that his sentence represents an abuse of the district court's discretion, as: (1) it is excessive given any view of the facts, and (2) the district court did not place Mr. Diffendaffer on probation because it erroneously believed there was an additional victim, based on a misreading of the record.

Statement of the Facts & Course of Proceedings

In 2018, a [redacted] boy whose mother was being investigated for inappropriate sexual contact with her children told law enforcement that a man named "Russ" had touched his penis over his clothes three years ago. (Presentence Investigation Report (*hereinafter*, PSI),[1] p.149.) Investigators believed "Russ" was [redacted] Russell Diffendaffer, who had lived at the same house as the child's family for a two-month period of time. (PSI, pp.147-149; R., pp.23, 83.) Law enforcement confronted Mr. Diffendaffer and asked him the incident. (PSI, p.149.) Mr. Diffendaffer admitted to once touching the boy's private area over his clothes. (PSI, pp.149, 346.) Based on these facts, Mr. Diffendaffer was charged by Information with one count of lewd conduct. (Aug., pp.1-3.)

Pursuant to a plea agreement, Mr. Diffendaffer entered an Alford[2] plea of guilty to an amended information charging him with felony injury to a child.[3] (11/30/18 Tr., p.5, Ls.10-21; p.11, L.18 – p.12, L.5; p.14, L.25 – p.15, L.13; R., pp.83-92, 94-95.) In exchange, the State agreed to recommend no more than a sentence of five years, with two years fixed, and that the district court place Mr. Diffendaffer on probation. (11/30/18 Tr., p.11, Ls.18-24; R., p.85.)

At the sentencing hearing, the State asked the district court to sentence Mr. Diffendaffer in accordance with the plea agreement—to a unified sentence of five years, with two years fixed, but to place Mr. Diffendaffer on probation. (3/8/19 Tr., p.21, Ls.1-11.) Mr. Diffendaffer's counsel asked the district court place him on probation with an underlying sentence of five years,

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[1] Appellant's use of the designation "PSI" includes the packet of documents grouped with the electronic copy of the PSI, and the page numbers cited shall refer to the corresponding page of the electronic file.

[2] *North Carolina v. Alford*, 400 U.S. 25 (1970).

[3] Mr. Diffendaffer suffered a stroke while in Ada County Jail and does not remember the events that led up to charges being filed. (PSI, p.152.) He can no longer walk and is in a wheelchair due to the stroke. (PSI, p.152.)

with two years fixed. (3/8/19 Tr., p.22, L.13 – p.24, L.12; p.26, Ls.3-6.) However, Mr. Diffendaffer was sentenced to ten years, with two years fixed and was *not* placed on probation. (3/8/19 Tr., p.28, Ls.8-14; R., pp.104-107.) Mr. Diffendaffer filed a notice of appeal timely from the judgment of conviction. (R., pp.108-110.)

ISSUE

Did the district court abuse its discretion when it imposed a unified sentence of ten years, with two years fixed, upon Mr. Diffendaffer following his plea of guilty to felony injury to a child?

ARGUMENT

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Ten Years, With Two Years Fixed, Upon Mr. Diffendaffer Following His Plea Of Guilty To Felony Injury To A Child

Mr. Diffendaffer asserts that, given any view of the facts, his unified sentence of ten 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 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). In reviewing a trial court's decision for an abuse of discretion, the relevant inquiry regards four factors:

> Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg v. My Fun Life, 163 Idaho 856, 863 (2018).

Mr. Diffendaffer does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show the district court abused its discretion by failing to reach its

decision by the exercise of reason, Mr. Diffendaffer must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *State v. Jackson*, 130 Idaho 293, 294 (1997). 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*.

In light of the mitigating factors present in this case, Mr. Diffendaffer's sentence is excessive considering any view of the facts.

One mitigating factor in this case is that Mr. Diffendaffer does not have extensive criminal record—this was his first felony charge. (PSI, pp.152-55.) The Idaho Supreme Court has "recognized that the first offender should be accorded more lenient treatment than the habitual criminal." *State v. Hoskins*, 131 Idaho 670, 673 (Ct. App. 1998) (quoting *State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227 (1971)); *see also State v. Nice*, 103 Idaho 89, 91 (1982).

Mr. Diffendaffer asserts that the district court also failed to properly consider his age and physical and mental infirmities. Mr. Diffendaffer was incarcerated in this case for 358 days before he was sentenced. (R., p.105.) While in jail, Mr. Diffendaffer was taken to the hospital and it was confirmed that he had suffered an acute ischemic stroke the previous day. (PSI, pp.160, 182, 345.) Approximately ten days after his release from the hospital, he was found unconscious after an apparent seizure. (PSI, pp.160, 188.) Mr. Diffendaffer has high blood pressure and takes seven medications for his medical conditions. (PSI, pp.159-160.) His speech

is slurred/garbled, he had difficulty swallowing, and he exhibits difficulty with word finding. [4] (PSI, pp.182-83, 191.)

Mr. Diffendaffer does have a supportive family to assist him in his rehabilitation. He has twice been married and divorced, and his children from these two relationships are a good source of support for him. (PSI, pp.157-58.) He is close to his three youngest children, all of whom are adults. (PSI, pp.157-58.) He is close to his siblings, especially his twin sister. (PSI, p.343.) *See State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who had the support of his family and employer in his rehabilitation efforts).

Mr. Diffendaffer's sentence is excessive considering any view of the facts, but particularly in light of the fact that Mr. Diffendaffer does have a good work history. He was regularly employed prior to his incarceration. Mr. Diffendaffer was a welder at Mobile Components for twenty years. (PSI, p.159.) When the business closed, he sought employment wherever he could, working as a dishwasher at the Black Bear Diner for five years and then at McDonalds up until he was arrested for this offense. (PSI, p.159.) Idaho recognizes that good employment history should be considered a mitigating factor. *See State v. Nice*, 103 Idaho 89, 91 (1982); *see also State v. Shideler*, 103 Idaho 593, 595 (1982).

Further, Mr. Diffendaffer expressed remorse and has accepted responsibility for his actions, despite being unable to recall the incident due to a severe stroke that left him seriously incapacitated. (11/30/18 Tr., p.5, Ls.10-21; p.11, L.18 – p.12, L.5; p.14, L.25 – p.15, L.13; PSI, p.40.) Idaho recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *Shideler*, 103 Idaho at 595; *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

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[4] Mr. Diffendaffer also had difficulty providing detailed information to the PSI investigator and could not recall some areas of his past. (PSI, p.163.)

The issue of reducing a sentence because a defendant expresses remorse has been addressed in several cases. For example, in *Alberts*, the Idaho Court of Appeals noted that some leniency is required when the defendant has expressed "remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character." *Alberts*, 124 Idaho at 209.

The Idaho Supreme Court has also reduced a defendant's term of imprisonment because the defendant expressed regret for what he had done. *Shideler*, 103 Idaho at 595. In *Shideler*, the Idaho Supreme Court ruled that the prospect of Shideler's recovery from his poor mental and physical health, which included mood swings, violent outbursts, and drug abuse, coupled with his remorse for his actions, was so compelling that it outweighed the gravity of the crimes of armed robbery, assault with a deadly weapon, and possession of a firearm during the commission of a crime. *Id.* at 594-95. Therefore, the Court reduced Shideler's sentence from an indeterminate term not to exceed twenty years to an indeterminate term not to exceed twelve years. *Id.* at 593.

Based upon the above mitigating factors, Mr. Diffendaffer 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 remorse, physical condition, and his family support, it would have imposed a less severe sentence.

Mr. Diffendaffer also asserts that the district court did not reach its decision by an exercise of reason where the district court's primary reason for incarcerating Mr. Diffendaffer (instead of placing him on probation as the parties had requested) was because:

> I am giving a great deal of weight to the reports from his own daughter that reports a history of repeatedly sexual touching by Mr. Diffendaffer when she was [redacted] That gives me a great deal of concern for the protection of society.

(3/11/19 Tr., p.27, L.21 – p.28, L.1.) However, the court's perception is incorrect and not based on the facts in the record. While Mr. Diffendaffer's daughter was interviewed and said that her father and mother divorced because of "inappropriate touching,"[5] there is no indication that she or another of Mr. Diffendaffer's children was being touched. (PSI, p.158.) It is highly likely that the incident Mr. Diffendaffer discussed with law enforcement—that which occurred with one of his daughter's friends whereby he massaged her and brushed his hand against the side of her breast—was the "inappropriate touching" that his daughter was referring to. Mr. Diffendaffer's daughter described the incident precipitating the divorce as occurring when she was [redacted] (PSI, p.158), and Mr. Diffendaffer told law enforcement that it happened when the other girl and his daughter were in sixth grade (PSI, p.269). The district court erred by sentencing Mr. Diffendaffer based on an erroneous reading of the PSI materials.

CONCLUSION

Mr. Diffendaffer 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 October, 2019.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

[5] The PSI investigator paraphrased the daughter's statements, writing: "His daughter indicated she was not surprised as she believed he had an issue with inappropriate touching when she was 11 or 12." (PSI, p.163.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of October, 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

SJC/eas