11-25-2019

State v. Anderson Appellant's Reply Brief Dckt. 46538

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 46538-2018
	)	
v.	)	ADA COUNTY NO. CR01-18-11149
	)	
EVAN DEAN ANDERSON,	)	APPELLANT'S
	)	REPLY BRIEF
Defendant-Appellant.	)	
	)	

STATEMENT OF THE CASE

Nature of the Case

Evan Anderson contends the district court abused its discretion when it imposed his sentence – deciding not to place him on probation, in part, because, the district court felt, it would be overly cumbersome to have him on probation in this case and on parole in another case. That was not a relevant factor to the sentencing analysis, and was, in fact, mistaken on its merits. The State makes several arguments in response, but does not actually address the core of Mr. Anderson's argument. Moreover, several of the State's arguments are not consistent with the applicable legal standards. As such, this Court should reject those arguments.

Statement of the Facts and Course of Proceedings

The statement of facts and course of proceedings were previously articulated in Mr. Anderson's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Whether the district court abused its discretion by imposing and executing Mr. Anderson's sentence in this case.

ARGUMENT

The District Court Abused Its Discretion By Imposing And Executing Mr. Anderson's Sentence In This Case

The State proffers two procedural points in response to Mr. Anderson's argument on appeal, neither of which are consistent with the applicable legal standards. First, its assertion that there were entirely independent analyses in the district court's determination that probation was improper in this case is contrary to the applicable legal standards. (*See* Resp. Br., pp.4-5.) A sentencing decision is, fundamentally, based on the district court's assessment of the totality of the circumstances relating to the defendant's character and the nature of his crime. *See, e.g., State v. McIntosh*, 160 Idaho 1, 8 (2015) ("In determining whether the sentencing court abused its discretion, this Court reviews *all* the facts and circumstances of the case," examining whether the sentence was excessive considering any view of those facts) (emphasis added); *State v. Mansfield*, 97 Idaho 138, 139 n.1 (1975) ("Other considerations which the Supreme Court has indicated should be take into account before sentencing and in determining whether to grant probation are not are as follows: (1) *all* the facts and circumstances surrounding the offense of which the defendant is convicted . . . .") (internal quote omitted, emphasis added). As a result, if

the district court includes an improper factor in its consideration of that totality, the whole decision is tainted and should be vacated. *Compare State v. Schreiner*, 2017 WL 361150 (Ct. App. 2017) ("However, where a trial judge considers an improper factor at sentencing, the case should be remanded for a new sentencing."), citing *State v. Camp*, 107 Idaho 36, 40 (Ct. App. 1984) (Burnett, J., dissenting in part).[1]

Here, the district court determined probation was not an option for Mr. Anderson, in part, because of its mistaken belief that it would be cumbersome to place Mr. Anderson on probation in this case, given that he would also be on parole in another case in that scenario. Since the convenience in administering the supervision was not a proper factor for the district court to consider within the totality of facts and circumstances surrounding the crime charged and the defendant's character as they relate to the goals of sentencing, the whole determination of whether Mr. Anderson was a viable candidate for probation is tainted. As such, there was no independent basis for that decision. Therefore, the case should be remanded so that decision can be made based on a consideration of the proper factors. *See Van Komen*, 160 Idaho 534, 540 (2016) (noting that the district court could have reached the same decision in a proper way, but because it had actually considered an improper factor, its decision to relinquish jurisdiction had to be vacated for the abuse of discretion that actually occurred); *Montgomery v. Montgomery*,

[1] Mr. Anderson recognizes that unpublished decisions do not constitute precedent, and he does not cite *Shreiner* as authority for a particular decision in this case. Rather, he merely references it as a historical example of how a learned court has addressed a case in which the district court considered an improper factor in making its sentencing decision. Compare *Staff of Idaho Real Estate Comm'n v. Nordling*, 135 Idaho 630, 634 (2001) (quoting *Bourgeois v. Murphy*, 119 Idaho 611, 617 (1991)) ("When this Court had cause to consider unpublished opinions from other jurisdictions because an appellant had discussed the cases in his petition, we found the presentation of the unpublished opinions as 'quite appropriat[e].' Likewise, we find the hearing officer's consideration of the unpublished opinion, not as binding precedent but as an example, was appropriate.").

147 Idaho 1, 6-7 (2009) (explaining that, where the district court's discretionary decision is tainted by legal error, the appellate courts will simply note the error and remand the case so that the district court can make the discretionary decision properly in the first instance).

Second, despite later acknowledging that Mr. Anderson had cited I.C. § 19-2521 as supporting his argument (Resp. Br., p.5), the State tries to procedurally default his appellate argument on the basis that it does not cite legal precedent. (*See* Resp. Br., p.5 (citing *State v. Zichko*, 129 Idaho 259, 263 (1996).) Since the State acknowledged that Mr. Anderson actually did cite legal precedent (the applicable statute) in support of his argument, its *Zichko* argument is frivolous. That argument is also frivolous because Mr. Anderson cited at least seven cases which discussed the scope of the sentencing considerations to demonstrate how the district court had abused its discretion by considering a factor beyond the scope of sentencing considerations. (*See* App. Br., pp.3-5.) Moreover, as discussed *infra*, his reliance on secondary source information to support his argument was also proper, and so, that is yet another reason the State's *Zichko* argument fails. For any or all these reasons, this Court should reject the State's *Zichko* argument. Finally, the State's *Zichko* argument is contrary to the applicable appellate rules, which expressly provide, in cases like this where only the severity of the sentence is being challenged, that the appellate briefs "need not contain . . . citations to authorities."[2] I.A.R. 35(i). For any or all of these reasons, this Court should reject the State's *Zichko* argument.

As indicated above, Mr. Anderson relied on secondary source information in making his argument, namely, information about the mission of the Department of Probation and Parole and how it works to achieve that mission obtained from the Department's own website. The State asserts that was somehow improper appellate argument because that information was not

[2] Nevertheless, Mr. Anderson has, and will continue to, cite the relevant precedents, as they help reveal how the district court abused its discretion in this case.

specifically argued to the district court.[3] (Resp. Br., p.5.) However, the Idaho Supreme Court has made it clear that a party may present additional, relevant authorities in grooming its position on an issue for appeal. *State v. Gonzalez*, 165 Idaho 95, ___, 439 P.3d 1267, 1271 (2019), *reh'g denied*; *Ada County Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 142 n.2 (2017).

Moreover, Idaho's courts routinely cite to websites which contain information relevant to the issues on appeal, and have done so without any indication that the information was first presented to the district court. *See, e.g., State v. Abdullah*, 158 Idaho 386, 456 (2015) (using information from the Death Penalty Information Center's website to reject one of the assertions made on appeal); *Fed'l Nat. Mortg. Ass'n v. Hafer*, 158 Idaho 694, 696 n.2 (2015) (citing the U.S. Treasury Department's website for information regarding the operation of the "HAMP" program); *State v. Hanson*, 152 Idaho 314, 321 n.1 (2012) (citing to the National Center for Biotechnology Information's website for insight as to what a diagnosis of dysthymia encompassed); *Michalk v. Michalk*, 148 Idaho 224, 227 (2009) (referring to the SANE Solution's website to explain what that program entailed); *Hyde v. Fisher*, 146 Idaho 782, 789 n.2 (Ct. App. 2009) (referring to the Nevada Department of Correction's webpage for information about its administrative regulations regarding Native American Religious Activities); *see also State v. Manzanares*, 152 Idaho 410, 430 & n.10 (2012) (Horton, J., specially concurring in part and dissenting in part) (using the Rotary Club as a contrasting example to the situation presented in that case and referring to the Rotary Club's website as the basis for the information used in the comparison).

[3] Notably, the State has not challenged the merits of Mr. Anderson's arguments based on that information (*see generally* Resp. Br.), thereby effectively conceding that the district court was mistaken regarding how the Department would supervise a person on probation in one case and on parole in another.

In fact, the Idaho Supreme Court has used a website in essentially the same way that Mr. Anderson did in this appeal – to show the underlying decision was based on a misunderstanding of the relevant principles. *See Smith v. Idaho Dep't. of Labor*, 148 Idaho 72 (2009). In *Smith*, one of the issues was whether the petitioner had timely served his notice of appeal on the Industrial Commission. *Id.* at 73-74. The applicable rule provided that the date the notice was mailed, as evidenced by the postmark, would be sufficient to make the notice timely. *Id.* The Industrial Commission found that the notice was timely served based on a private postage meter mark on the envelope. *Id.* at 74. The Supreme Court rejected the Commission's determination in that regard because, based on the Court's review of the United States Postal Service's website and the information provided there regarding what constituted a "postmark," it concluded the private postage meter mark was not the same as a postmark. *Id.* at 74-75. Mr. Anderson has relied on similar information here – information provided on the relevant entity's website to demonstrate the lower body reached an erroneous conclusion in the case. As such, the State's complaint about Mr. Anderson citing to the Probation and Parole Department's website is not well taken.

Likewise, the State's arguments on the merits of this case are irrelevant and unpersuasive. For example, it contends that, because the district court can consider the fact that the defendant was on parole at the time of the offense, and that the parole board could have decided not to continue Mr. Anderson on parole in the other case, the district court did nothing improper in this case. (Resp. Br., p.6.) Those assertions miss the point at issue on this appeal entirely.

While the district court can certainly consider the fact that the defendant was on parole at the time of the new offense and the parole board absolutely could have decided not to continue Mr. Anderson on parole in the other case, the issue on appeal is focused on the district court's

determination to not place Mr. Anderson on probation in this case (even though he had been on parole at the time of the new offense) based on its understanding of what would happen *if* the parole board chose to place Mr. Anderson back on parole in the other case. Therefore, the fact that other decisions could have been made, as the State's argument notes, is wholly irrelevant to whether the decision the district court actually made was an abuse of discretion. Compare *Van Komen*, 160 Idaho at 540.

Since the State has not challenged the merits of Mr. Anderson's argument – that the decision the district court actually made was based, in part, on its erroneous consideration of an irrelevant factor, this Court should vacate that decision for the reasons discussed in the Appellant's Brief.

CONCLUSION

Mr. Anderson 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 25th day of November, 2019.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of November, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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

BRD/eas