4-21-2021

State v. Verwer Appellant's Reply Brief Dckt. 48136

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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 48136-2020**
Plaintiff-Respondent,	)	
	)	**Payette County Case No.**
v.	)	**CR-2018-205**
	)	
JASON LEE VERWER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF PAYETTE

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Jason Lee Verwer appeals from his convictions and sentences on two counts of second-degree murder.

Statement Of The Facts And Course Of The Proceedings

Verwer used his car to deliberately run down two pedestrians on a sidewalk. (R., vol. 1, p. 20.) The state charged Verwer with two counts of second-degree murder. (R., vol. 1, pp. 62-63.)

Verwer moved "for a jury instruction at trial on this matter, instructing the jury to consider an affirmative defense to the charges on the basis of mental disease or defect," asserting he had a constitutional right to present the defense to a jury. (R., vol. 1, pp. 149-54.) Specifically, he sought an instruction that he could not be found guilty if he was "so mentally limited, by disease or defect, that [he could] not determine right or wrong." (R., vol. 1, p. 152.) The state objected, pointing out that the request was contrary to established precedent. (R., vol. 1, pp. 241-44.) The district court denied the motion. (R., vol. 1, pp. 246-52.)

Verwer pled guilty, preserving his right to appeal the denial of his motion seeking an insanity defense jury instruction. (R., vol. 1, pp. 264, 270; Tr., p. 7, L. 11 – p. 14, L. 17.) The district court imposed concurrent sentences of life with 25 years determinate. (R., vol. 1, pp. 480-86.) Verwer filed a timely notice of appeal. (R., vol. 1, pp. 487-89; vol. 2, pp. 1-4.)

ISSUES

Verwer states the issues on appeal as:

I. Did the district court abuse its discretion by denying Mr. Verwer's motion in limine to instruct the jury to consider insanity as an affirmative defense?

II. Did the district court abuse its discretion by imposing an excessive sentence, in light of the mitigating factors that exist in this case?

(Appellant's brief, p. 7.)

The state rephrases the issues as:

I. Has Verwer failed to show that he was constitutionally entitled to a defense based on his ability to recognize the wrongfulness of his conduct?

II. Has Verwer failed to show that the district court abused its sentencing discretion?

ARGUMENT

I.
Verwer Was Not Constitutionally Entitled To A Defense Based On An Inability To Recognize The Wrongfulness Of His Conduct

A. Introduction

The district court concluded that Verwer was not constitutionally entitled to a defense preventing conviction if Verwer was incapable of determining right or wrong due to insanity. (R., vol. 1, pp. 246-52.) "Mindful of the applicable legal authorities," Verwer argues on appeal "that the district court abused its discretion by denying his motion in limine requesting a jury instruction that insanity is an affirmative defense to the charges in this case." (Appellant's brief, p. 8.) Because the Idaho Supreme Court has repeatedly held that there is no constitutional right to assert the common law insanity defense, Verwer has failed to show error by the district court.

B. Standard Of Review

"The propriety of jury instructions is a question of law over which this Court exercises free review." State v. Anderson, 144 Idaho 743, 746, 170 P.3d 886, 889 (2007).

C. Verwer Was Not Constitutionally Entitled To A Particular Insanity Defense

Idaho law provides that "[m]ental condition shall not be a defense to any charge of criminal conduct." I.C. § 18-207(1). This statute does not "prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense." I.C. § 18-207(3). Rather, it "'merely disallows mental condition from providing a complete defense to the crime and may allow the conviction of persons who may be insane by some former insanity test or medical standard, but who nevertheless have the ability to form intent and

to control their actions.'" State v. Oxford, 167 Idaho 515, ___, 473 P.3d 784, 792 (2020) (quoting State v. Samuel, 165 Idaho 746, 770, 452 P.3d 768, 792 (2019)). The federal constitution does not require states to "adopt an insanity test turning on a defendant's ability to recognize that his crime was morally wrong." Kahler v. Kansas, ___ U.S. ___, ___, 140 S. Ct. 1021, 1037 (2020). "It is well established" in Idaho that there is no constitutional right to any particular insanity defense. State v. Winn, 121 Idaho 850, 854, 828 P.2d 879, 883 (1992). See also State v. Delling, 152 Idaho 122, 125-30, 267 P.3d 709, 712-17 (2011). "Having previously decided" the constitutionality and applicability of I.C. § 18-207, "and being presented with no new basis upon which to consider the issue, we are guided by the principle of *stare decisis* to adhere to the law as expressed in our earlier opinions." State v. Fisher, 162 Idaho 465, 467, 398 P.3d 839, 841 (2017) (quotation marks omitted). Because Verwer has not presented any argument not already rejected by the Supreme Court of the United States or the Supreme Court of Idaho, he has failed to show error by the trial court.

II.
Verwer Has Failed To Show That The District Court Abused Its Sentencing Discretion

A. Introduction

The district court imposed concurrent sentences of life with 25 years determinate on each conviction for second-degree murder. (R., vol. 1, pp. 480-86.) Verwer asserts these sentences are "excessive in light of the mitigating factors that exist in this case." (Appellant's brief, pp. 9-12.) Verwer's request that this Court re-balance the mitigating factors is contrary to the applicable legal standards. Review of the record shows no abuse of discretion.

B. Standard Of Review

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). In evaluating whether a lower court abused its discretion, the appellate court conducts a four-part inquiry, which asks "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." State v. Herrera, 164 Idaho 261, 270, 429 P.3d 149, 158 (2018) (citing Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

C. Verwer Has Shown No Abuse Of The District Court's Discretion

To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). In determining whether the appellant met this burden, the court considers the entire sentence but, because the decision to release the defendant on parole is exclusively the province of the executive branch, presumes that the determinate portion will be the period of actual incarceration. State v.

Bailey, 161 Idaho 887, 895, 392 P.3d 1228, 1236 (2017) (citing Oliver, 144 Idaho at 726, 170 P.3d at 391). To establish that the sentence was excessive, the appellant must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Farwell, 144 Idaho at 736, 170 P.3d at 401. 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.'" Bailey, 161 Idaho at 895-96, 392 P.3d at 1236-37 (quoting State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2015)).

The district court considered all of the relevant legal factors. (Tr., p. 142, Ls. 4-11.) It focused heavily on Verwer's mental state, finding that he showed both in the evaluations and in his history anger, hostility, and aggression, with poor impulse control and no remorse for acts of violence. (Tr., p. 142, L. 12 – p. 143, L. 18; see PSI, vol. 2, pp. 593-95 (electronic pages 162-66).) The district court ultimately agreed with the evaluation by Dr. Novak concluding Verwer was "psychotic and in a paranoid state" at the time of the crimes, possibly compounded by drug use. (Tr., p. 144, L. 17 – p. 145, L. 11; see PSI, vol. 1, p. 43.) However, the district court further found that Verwer did have the capacity to appreciate right and wrong and control his behavior. (Tr., p. 145, Ls. 12-24; see PSI, vol. 1, p. 44.) Finally, the district court specifically considered as mitigation the potential of age, treatment, and medication to reduce the threat Verwer presented to the community. (Tr., p. 145, L. 25 – p. 146, L. 18.)

The district court's factual findings are supported by the record. The evidence shows that Verwer chose to intentionally run down two random pedestrians, striking them

at about 57 miles per hour, so hard they left their shoes behind, and dragging their bodies under his SUV for several yards. (PSI, vol. 1, pp. 1, 70-72, 113-20, 153-59, 164-66.) He has a lengthy history of violent crimes. (PSI, vol. 1, pp. 80-84.) His crimes in this case had a substantial impact on the families of the victims. (PSI, vol. 2, pp. 611-26 (electronic pages 182-197).)

Dr. Novak's analysis showed that the "primary contributory factors" to Verwer's actions taking two lives were, first, his "anti-social personality traits" as evidenced by his history of impulsive violence; second, his "anger related to his impending loss of another marriage"; third, his "use of marijuana" which "probably worsened his paranoid state"; and fourth, the "possibility" he had used methamphetamine or some other drug. (PSI, vol. 1, pp. 44-45.) "Verwer's basic personality structure made him likely to act out violently towards others" under the stress of losing his marriage. (PSI, vol. 1, p. 45.) "Ultimately, it was his angry mental state, along with his anti-social personality structure which most likely contributed most significantly to his violent acts towards the victims in this case." (Id.) The record shows that Verwer chose to run down two innocent pedestrians because of an inability to control his anger.

On appeal Verwer argues the concurrent sentences of life with 25 years determinate "certainly serves [sic] the objective of retribution" but "does [sic] not serve the goals of deterrence, rehabilitation, or the protection of society." (Appellant's brief, p. 9.) This argument is premised on the claim that "[n]o prison sentence can deter the actions of a person in a psychotic state from committing a crime." (Appellant's brief, p. 10.) That claim is facially untrue: there is no chance Verwer will run down pedestrians in a psychotic rage while in a prison cell. He may engage in other acts of violence, but those acts are

controlled to a much greater extent while Verwer is in custody. The sentence achieves the district court's primary goal of protecting society, and will also deter him from crime and facilitate his rehabilitation.

Moreover, the district court's findings and record show there was much more to Verwer's crimes than a psychotic state, including Verwer's anti-social personality and history of violence. (Tr., p. 142, L. 12 – p. 143, L. 18; PSI, vol. 1, pp. 44-45.) Verwer has failed to show that the district court's sentence does not achieve the goals of deterrence, rehabilitation, or the protection of society.

Verwer also argues that "rehabilitation and protecting society are both met through treating Mr. Verwer's mental illness." (Appellant's brief, p. 11.) In making this argument, Verwer simply ignores the district court's factual findings. For example, he asserts he "could not comprehend the harmfulness of his actions at the time." (Appellant's brief, p. 11.) But the district court found the opposite. (Tr., p. 145, Ls. 12-24.) Verwer also relies on Dr. Jorgensen's conclusions (Appellant's brief, p. 11), but so did the district court (Tr., p. 146, Ls. 13-18). Verwer merely wishes the district court had given those findings more weight; not a viable demonstration of an abuse of discretion.

Verwer concludes that mental illness is a mitigating factor, and contends his "remorse and the potential that his Schizoaffective Disorder could be treated and managed outside of a prison setting in a manner that protects society, should have led the district court to impose a lesser sentence." (Appellant's brief, pp. 11-12.) However, the record contains a great deal of information about Verwer's mental illness, and all of it suggests he is a threat to society. (PSI, vol. 1, pp. 17-62, 93-96; vol. 2, pp. 591-95 (electronic pages 162-66).) He has a history of violence. (PSI, vol. 1, pp. 80-84.) The district court did not

abuse its discretion when it imposed concurrent sentences of life with 25 years determinate for two convictions for second-degree murder.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 21st day of April, 2021.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of April, 2021, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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