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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 48533-2020
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-18-50441
v.)	
)	
RICHARD ARLAN BERGESEN,)	APPELLANT’S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

A jury found Richard Bergesen guilty of misdemeanor violation of a protection order, and the magistrate sentenced him to serve 365 days in jail, with 185 days suspended. Acting in its appellate capacity, the district court affirmed Mr. Bergesen’s conviction and sentence. Mr. Bergesen asserts that his sentence is excessive, and therefore the district court committed reversible error by affirming the magistrate’s sentencing decision.

Statement of the Facts & Course of Proceedings

The State filed an amended complaint charging Mr. Bergesen with misdemeanor violation of a protection order. (R., pp.49-50.) Mr. Bergesen, a former practicing Idaho attorney, elected to waive his right to counsel and represent himself at trial. (Ex., p.3, L.6 – p.5, L.9.)¹ The evidence at trial showed that Leslie Montgomery, Mr. Bergesen’s ex-girlfriend, had a valid protection order preventing Mr. Bergesen from contacting her, and Mr. Bergesen’s friend, Tim Severa, sent Ms. Montgomery a text message stating that Mr. Bergesen wanted Ms. Montgomery to call him so he could return some property of hers. (Ex., p.150, L.19 – p.189, L.6; Conf. Ex., p.1.) Although Mr. Severa testified that Mr. Bergesen did not actually ask him to send Ms. Montgomery the text message, the jury found Mr. Bergesen guilty. (Ex., p.198, L.9 – p.225, L.19; R., p.52.)

During the sentencing hearing, the State asked the magistrate court to impose a 365-day jail term, with 245 days suspended, and to place Mr. Bergesen on probation (Ex., p.283, L.19 – p.284, L.1), while Mr. Bergesen asked the court to impose a suspended 30-day jail term (Ex., p.296, Ls.4-5). The magistrate court imposed a 365-day sentence, with 185 days suspended, and placed Mr. Bergesen on probation for two years. (R., pp.58-60; Ex., p.302, L.11 – p.303, L.7.)

Mr. Bergesen filed a timely notice of appeal, and was appointed counsel to represent him on appeal in the district court. (R., pp.65-67, 72-73, 76.) Mr. Bergesen argued that the magistrate abused its discretion when it refused to allow Mr. Bergesen to cross-examine the protected party about her purported prior felony conviction, that the magistrate failed to sufficiently advise him of the dangers of self-representation, and that the magistrate imposed an

¹ Transcripts from the magistrate court proceedings are included as an exhibit in the appellate record. Citations to these transcripts will include the designation “Ex.” and will include the page and line numbers associated with the transcripts.

excessive sentence. (R., pp.204-15.) The district court affirmed Mr. Bergesen’s conviction and sentence. (R., pp.249-64.) Mr. Bergesen filed a timely Notice of Appeal from the district court’s opinion affirming his conviction and sentence. (R., pp.267-69.)

ISSUE

Did the district court commit reversible error when it affirmed the sentence imposed by the magistrate, as that sentence was excessive considering any reasonable view of the facts?

ARGUMENT

The District Court Committed Reversible Error When It Affirmed The Sentence Imposed By The Magistrate, As That Sentence Was Excessive Considering Any Reasonable View Of The Facts

Mr. Bergesen asserts the district court committed reversible error when it affirmed the magistrate court’s sentencing decision. He asserts that, given any view of the facts, his 365-day jail sentence, with 185 days suspended, is excessive.

On review of a decision made by the district court in its intermediate appellate capacity, the appellate court directly reviews the district court’s decision to determine whether that decision should either be affirmed or reversed. *State v. Phipps*, 166 Idaho 1, 4 (2019) (citations omitted). This Court reviews the magistrate’s decision to determine whether factual findings were supported by substantial and competent evidence, and whether the magistrate’s legal conclusions are supported by its factual findings. *Id.*

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record considering the nature of the offense, the character of the offender, and the protection of the public interest. 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.

Mr. Bergesen asserts that the district court committed reversible error by affirming the magistrate's sentencing decision, because the nature of the offense did not justify the court ordering him to serve a six- to twelve-month jail sentence. This was not a circumstance in which Mr. Bergesen repeatedly flouted the civil protection order, or threatened any type of violence. Instead, the protection order had been in place for 10 months when Mr. Bergesen's friend sent the protected part a text message stating, "Hey Leslie, rick asked me to see if you would call him. He has some things of yours he would like to give back to you. Not sure how you feel about that," and included Mr. Bergesen's phone number. (Conf. Ex., pp.1-5.)

In pronouncing its sentence, the magistrate court expressed its concern that Mr. Bergesen knew that he was violating the protection order when his friend sent the text message, that Mr. Bergesen had minimized his conduct, and that it did not believe that Mr. Bergesen would comply with the no contact order it would place upon him. (Ex., p.296, L.12 – p.301, L.15.) But these concerns did not justify the sentence imposed. The fact that Mr. Bergesen knew that he was violating the protection order is an element of the offense for which he was found guilty, not an aggravating factor. On the spectrum of protection order violations, Mr. Bergesen's conduct was in fact minimal. He did not directly contact the protected party, and did not threaten her with any violence. Mr. Bergesen merely noting these facts when making his own sentencing argument, should not be considered an aggravating factor. Finally, the magistrate's belief that Mr. Bergesen would violate the no contact order it intended to impose was unsupported by evidence in the record, as this was the only protection order that Mr. Bergesen had ever been charged with violating. More importantly, if Mr. Bergesen were alleged to violate the no contact

order in the future, he could be charged with a new crime, and have the right to due process of law to contest any such charges. But retribution for presumed future criminal conduct (as opposed to protection of society) is inconsistent with the applicable sentencing criteria.

In light of the facts and circumstances surrounding his conviction, Mr. Bergesen asserts that the magistrate court imposed an excessive sentence, and thus the district court committed reversible error when it affirmed the magistrate's decision.

CONCLUSION

Mr. Bergesen respectfully requests that this Court reverse the district court's decision affirming the magistrate court's sentencing decision, and remand his case to the magistrate court for a new sentencing hearing.

DATED this 12th day of July, 2021.

/s/ Jason C. Pintler
JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, 2021, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served as follows:

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

JCP/eas