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### State v. Nolen Respondent's Brief Dckt. 48559

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 48559-2021
Plaintiff-Respondent,	)	
	)	
v.	)	Ada County Case No. CR01-19-46930
	)	
JAMES DELL NOLEN,	)	
	)	RESPONDENT’S BRIEF
Defendant-Appellant.	)	
_____	)	

Has James Dell Nolen failed to show that the district court abused its discretion by sentencing him to thirty years with ten years determinate for robbery?

ARGUMENT

Nolen Has Failed To Show That The District Court Abused Its Discretion

A. Introduction

In 2019, James Dell Nolen entered Umpqua Bank in downtown Boise. (PSI, p. 11 (citations to electronic file named “Appeal Confidential Exhibits 07-23-2021 . . .”).) Nolen passed a note to a bank teller, which read that this was a robbery, and that Nolen wanted no dye packs, a

stack of \$100 bills, a stack of \$50 bills, and a stack of \$20 bills. (PSI, p. 11.) Nolen told the bank teller that this was not personal, and the bank teller handed Nolen \$3000. (PSI, p. 11.) Nolen then left the bank on foot, and Boise Police detained him a couple blocks from the bank. (PSI, p. 11.)

The state charged Nolen with one count of robbery and one count of burglary. (R., pp. 35-36.) Nolen pleaded guilty to robbery, and the state agreed to dismiss the burglary charge. (R., pp. 55-65.) The district court sentenced Nolen to thirty years with ten years determinate and credit for 409 days served. (R., pp. 68-70.) Nolen then filed a timely appeal. (R., pp. 72-73.)

On appeal, Nolen argues that “the district court abused its discretion by imposing an excessive sentence.” (Appellant’s brief, p. 1.) Nolen has failed to show that the district court abused its discretion by sentencing him to thirty years with ten years determinate for robbery.

#### B. Standard Of Review

“Appellate review of a sentence is based on an abuse of discretion standard. Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable and, thus, a clear abuse of discretion.” State v. Schiermeier, 165 Idaho 447, 451, 447 P.3d 895, 899 (2019) (internal quotations and citations omitted). “A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case.” Id. at 454, 447 P.3d at 902 (internal quotation omitted). “A sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion.” Id. “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” State v. Matthews, 164 Idaho 605, 608, 434 P.3d 209, 212 (2019).

The decision whether to retain jurisdiction is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). The primary purpose of a district court retaining jurisdiction is to enable the court to obtain additional information regarding whether the defendant has sufficient rehabilitative potential and is suitable for probation. State v. Jones, 141 Idaho 673, 677, 115 P.3d 764, 768 (Ct. App. 2005). Probation is the ultimate goal of retained jurisdiction. Id. There can be no abuse of discretion if the district court has sufficient evidence before it to conclude that the defendant is not a suitable candidate for probation. Id.

C. Nolen Has Shown No Abuse Of The District Court’s Discretion

The sentence imposed is within the statutory limits of I.C. § 18-6503. The record shows the district court perceived its discretion, employed the correct legal standards to the issue before it, and acted reasonably and within the scope of its discretion.

At the sentencing hearing, the district court took “into account all of the information contained in the presentence report,” and noted that Nolen’s “LSI score, Level of Service Inventory score, was 45, which puts [him] in the high risk group, high risk of recidivism.” (12/18/2020 Tr., p. 22, L. 23 – p. 23, L. 2.) The district court considered “all of the factors set forth in the Idaho Supreme Court’s case law regarding sentences, such as, State versus Toohill,” and “the factors set forth in Idaho Code 19-9521.” (12/18/2020 Tr., p. 23, Ls. 3-6.) The district court considered “the mental-health evaluation that was ordered and performed and submitted to the court under Idaho Code 19-2524,” and “[e]verything that the prosecutor said about [Nolen’s] prior record.” (12/18/2020 Tr., p. 23, Ls. 7-9, 13-14.) The district court stated that “[e]ven if [Nolen] didn’t have a gun in [his] pocket when [he] threatened the bank teller, certainly, it’s the type of crime . . . that [he] must have understood that the potential consequence is that . . . somebody would have pulled

out their own gun and shot [him].” (12/18/2020 Tr., p. 23, Ls. 17-22.) The district court stated that “[w]hen you engage in this kind of conduct, whatever the excuse is for that type of conduct, you put people at grave, grave risk, and given [Nolen’s] prior record, [the district court] think[s] this is an appropriate sentence for the protection of the public.” (12/18/2020 Tr., p. 23, L. 22 – p. 24, L. 1.) The district court took into account Nolen’s “substance use disorder and [his] diagnosed mental health.” (12/18/2020 Tr., p. 24, Ls. 2-4.) The district court noted that Nolen was “at the State Hospital South for a period of time and that [he] required medication for these . . . various disorders that [he has],” but “for protection of the public, this is an appropriate sentence.” (12/18/2020 Tr., p. 24, Ls. 4-8.)

On appeal, Nolen argues that the mitigating factors—substance abuse and mental health issues—support a “lesser prison sentence or a retained jurisdiction.” (Appellant’s brief, pp. 4-8.) Nolen’s argument does not show an abuse of discretion. His LSI score is forty-five, placing him in the high risk to reoffend category. (PSI, p. 13.) Nolen’s extensive criminal history consist of nine prior felonies, including assault with a deadly weapon, burglary and robbery. (PSI, pp. 20-22.) The presentence investigator stated that “[w]hile he expressed remorse for this crime, he rationalized it by saying it was not a malicious act, implying it was not as bad as it could have been because he did not use a weapon.” (PSI, p. 24.) Nolen admitted that he researched the possible prison sentence of robbing a bank, and caught a bus from Ontario, Oregon to Boise when he thought the maximum prison sentence would be five-years. (PSI, p. 24.) At the time of the instant offense, Nolen was absconding from parole in California. (PSI, p. 24.) The presentence investigator determined that “[i]t appears a long-term commitment to mental health treatment will be [Nolen’s] only option if he wants to live within the community long term,” and that “Nol[e]n’s

substance use began when he was [REDACTED], and it appears that is not going to change anytime soon.” (PSI, p. 25.)

Nolen’s extensive criminal history and high LSI score show that there is an undue risk that he will reoffend. Nolen committed the instant offense while on parole, showing that he is not amenable to community supervision, and a period of retained jurisdiction is not necessary to determine his suitability for probation. Nolen’s criminal conduct and risk to reoffend presents a risk to the community, and the imposed sentence provides appropriate protection to the community. The sentence imposed provides proper punishment for Nolen’s criminal behavior and deterrence to him and other possible offenders. A lesser sentence would depreciate the seriousness of the instant offense, and retained jurisdiction would not provide any more information to the district court regarding Nolen’s suitability for probation. Nolen has failed to show that the district court abused its discretion by sentencing him to thirty years with ten years determinate for robbery.

#### CONCLUSION

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

DATED this 27th day of July, 2021.

/s/ Andrew V. Wake  
ANDREW V. WAKE  
Deputy Attorney General

ZACHARI S. HALLETT  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of July, 2021, served a true and correct copy of the attached RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

JACOB L. WESTERFIELD  
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/s/ Andrew V. Wake  
ANDREW V. WAKE  
Deputy Attorney General