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State v. Bickhart Appellant's Brief Dckt. 45829

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45829
Plaintiff-Respondent,	)	
	)	SHOSHONE COUNTY NO. CR-2017-614
v.	)	
	)	
TRAVAS WAYNE BICKHART,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

STATEMENT OF THE CASE

Nature of the Case

Travas Bickhart contends the district court abused its discretion when it imposed an excessive sentence in his case because it downplayed the impact of a significant mitigating factor in a manner inconsistent with the applicable precedent. As such, this Court should either reduce his sentence as it deems appropriate or remand this case for a new sentencing hearing.

Statement of the Facts & Course of Proceedings

Prior to the offenses in this case, Mr. Bickhart "was married, gainfully employed and reports he was active in positive community based activities." (Presentence Investigation Report (*hereinafter,* PSI), pp.82-83.) At age 35, these were Mr. Bickhart first felony convictions and he

had a minimal criminal history otherwise. (PSI, pp.66, 73-74.) Defense counsel explained that that Mr. Bickhart had never not taken responsibility for his actions, that it had been his intent to admit his guilt in this case from the outset, but defense counsel had delayed that process because of his obligation to adequately investigate the case. (Tr., p.35, Ls.7-10, p.38, Ls.23-25.)

Ultimately, Mr. Bickhart admitted to three counts of rape and three counts of sexual battery on a person sixteen or seventeen years old. (R., p.68.) He agreed to pay full restitution to both victims. (R., p.68.) He also agreed to waive his right to appeal the conviction, but not the sentence. (R., p.68; Tr., p.9, Ls.1-5.) Both parties were free to recommend whatever length of sentence they felt appropriate, but the State did agree to recommend concurrent sentences. (R., p.68.) The State also agreed to dismiss or not file other charges. (R., p.68, Tr., p.10, Ls.11-13.)

Mr. Bickhart subsequently participated in a psychosexual evaluation, which included a full-disclosure polygraph, which Mr. Bickhart passed. (PSI, p.5; Tr., p.35, Ls.21-22.) The psychosexual evaluator concluded that Mr. Bickhart presented only a moderate risk to reoffend. (PSI, p.13; *see also* PSI p.81 (LSI-R score indicating the same risk).) However, both the PSE evaluator and the PSI author noted that Mr. Bickhart's disclosures about the offenses in this case contained a lot of statements which they read to be attempts at justification, victim-blaming, and showing little remorse or acceptance of responsibility. (PSI, pp.13, 83.) The PSE evaluator noted that those factors increased the risk Mr. Bickhart posed to the community, but explained those factors could be addressed by sex offender treatment, to which Mr. Bickhart was amenable, while Mr. Bickhart was on probation. (PSI, pp.13-14.) The PSI author, however, recommended the district court execute Mr. Bickhart's sentences. (PSI, p.83.)

At the sentencing hearing, Mr. Bickhart acknowledged how his previous statements sounded, but explained it was not his intent to blame the victims; he reaffirmed that the blame was his and his alone. (Tr., p.41, Ls.14-18.) Defense counsel added that, in his statements during the presentence interviews, Mr. Bickhart had been trying to articulate insight into his weaknesses and identify where and why he made the decisions he did. (Tr., p.38, L.10 - p.39, L.9.) Mr. Bickhart offered direct, unequivocal apologies to each victim. (Tr., p.42, Ls.4-10.) He also accepted that there would be consequences for his actions in this case. (Tr., p.41, L.14 - p.42, L.3.) As such, defense counsel recommended the district court impose sentences which included rehabilitative options, such as a period of retained jurisdiction, during which Mr. Bickhart could participate in the needed sex offender treatment. (Tr., p.41, Ls.1-9; *see* PSI, p.14.)

The district court acknowledged that Mr. Bickhart has "virtually no prior criminal history," but decided that was not an important factor because of the number of offenses he had admitted to. (Tr., p.43, L.21 - p.44, L.4.) It concluded, based on the nature of the offenses, that it would impose and execute identical twenty-year sentences, with ten years fixed, on each charge, to be served concurrently.[1] (Tr., p.45, L.17 - p.46, L.5.) Mr. Bickhart filed a notice of appeal timely from the judgment of conviction. (R., pp.101, 125.)

[1] Mr. Bickhart subsequently filed a motion for leniency under I.C.R. 35. (R., p.123.) As of the filing of this brief, the district court has not ruled on that motion. Therefore, Mr. Bickhart reserves the right to separately appeal that eventual decision, if need be.

ISSUE

Whether the district court abused its discretion by imposing and executing excessive sentences on Mr. Bickhart.

ARGUMENT

The District Court Abused Its Discretion By Imposing And Executing Excessive Sentences On Mr. Bickhart

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, 772 (Ct. App. 1982). Accordingly, in order to show an abuse of discretion in the district court's sentencing decision, he must show that, in light of the governing criteria, the sentence is excessive considering any view of the facts. *State v. Jackson*, 130 Idaho 293, 294 (1997); *see State v. Hedger*, 115 Idaho 598, 600 (1989) (articulating the standard for reviewing whether the district court abused its discretion).

The governing criteria, or sentencing objectives, 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*. The protection of society is the primary objective the court should consider when imposing sentence. *State v. Charboneau*, 124 Idaho 497, 500 (1993). The Idaho Supreme Court has also indicated that "rehabilitation, particularly of first offenders, should usually be the initial consideration in the imposition of the criminal sanction." *State v. McCoy*, 94 Idaho 236, 240 (1971), *superseded on other grounds as stated in State v. Theil*, 158 Idaho 103 (2015).

The district court downplayed the fact that Mr. Bickhart had no prior criminal record in this case because of the number of charges involved. (Tr., p.43, L.21 - p.44, L.4.) That analysis

is unreasonable because it fails to adhere to the point the Idaho Supreme Court made in *McCoy* − that rehabilitation of such defendants should be the district court's initial consideration. The reasoning behind that holding is that rehabilitation will provide the best protection to society in the long term since such a person does not yet have a fixed character for crime and so rehabilitation at this point is more likely. *See, e.g., State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971).

Following that rationale, the Court of Appeals has, in a related context, explained that, while the nature of convictions in such a group is a valid consideration, the general rule is still that multiple convictions which are entered on the same day or for charges raised in the same charging document count as a single "conviction." *See, e.g., State v. Parsons*, 153 Idaho 666, 669 n.2 (Ct. App. 2012) (detailing the precedential history of that rule). "This rule allows a defendant a chance to rehabilitate himself between convictions *and assure that a first time offender, committing multiple felonies in one course of conduct, is not unfairly sentenced* as a persistent violator." *State v. Harrington*, 133 Idaho 563, 565 (Ct. App. 1999) (emphasis added). This rule holds true when the defendant, like Mr. Bickhart, commits a series of crimes over a period of time that are separate parts of a common plan or scheme. *See id.*

As such, by downplaying the impact of the lack of a criminal history just because Mr. Bickhart's behavior resulted in a series charges, the district court did precisely what the *Harrington* Court indicated was improper – it effectively sentenced him, a first time offender, as a persistent violator and failed to consider the possibility of rehabilitation in doing so. As a result, the district court's sentencing decision is contrary to the Idaho Supreme Court's repeated holdings: that "rehabilitation, particularly of first offenders, should usually be the initial consideration in the imposition of the criminal sanction," *McCoy*, 94 Idaho at 240, that "'the first

offender should be accorded more lenient treatment than the habitual criminal.'" *State v. Shideler*, 103 Idaho 593, 595 (1982) (quoting *Owen*, 73 Idaho at 402).

Therefore, the district court's decision to execute rejection of the sentence recommended by defense counsel – that it should retain jurisdiction over the imposed sentences, during which time Mr. Bickhart could get the sex offender treatment he needed and was amenable to – failed to serve the primary objective of sentencing as well. Since that decision was inconsistent with the applicable legal standards, it was an abuse of the district court's discretion.

CONCLUSION

Mr. Bickhart 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 6th day of August, 2018.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of August, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
Delivered via e-mail to: ecf@ag.idaho.gov

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

BRD/eas