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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 47236-2019**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-19-7095**
	)	
CHRISTOPHER DIRK BAAY,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE THOMAS J. RYAN
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Christopher Dirk Baay appeals from the sentence imposed upon his conviction for felony domestic assault and for being a persistent violator.

Statement Of Facts And Course Of Proceedings

According to the Presentence Report ("PSI"), Baay's conviction for felony domestic assault is based upon the following facts gleaned from a Boise police officer's report:

> "Suspect Chris Baay is married to Trisha Baay. They live together at 12132 W. Ramrod Dr. Trisha's mother Carma Addis also lives there. Chris Baay is on probation for a prior incident of felony domestic battery, including strangulation, against Trisha. All parties reported there was an argument at the house tonight. Trisha and Carma reported that during the argument, Chris moved closer to Carma and raised his arm as if he was going to hit her. Trisha attempted to intervene to keep Chris from striking Carma. Trisha and Carma reported that Chris then attempted to punch Trisha but missed and struck Carma. I observed that Carma's nose, left cheek and upper lip had red marks consistent with being struck in the face. Chris fled the scene barefoot despite several inches of snow on the ground. Chris was found at his mother's house. When Chris was interviewed, he denied committing a battery or domestic assault. I arrested him for battery and domestic assault and transported him to jail."

(PSI, p.3.)

The state charged Baay with felony domestic violence or assault (prior felony within 15 years) and misdemeanor battery, and alleged that he was a persistent violator of law. (R., pp.47-48, 60-61, 111-112.) At trial, a jury convicted Baay of felony domestic violence or assault, and acquitted him of misdemeanor battery. (R., pp.113-123, 151.) Baay then entered an admission to being a persistent violator. (R., p.123.) The district court sentenced Baay to ten years with five years fixed, and placed him on a rider. (R., pp.157-161.) Baay timely appealed. (R., pp.162-165.)

ISSUE

Baay states the issue on appeal as:

> Did the district court abuse its discretion when it sentenced Mr. Baay to ten years, with five years fixed, based on its misunderstanding that the persistent violator statute required at least five years fixed?

(Appellant's brief, p.5)

The state rephrases the issue on appeal as:

Has Baay failed to show that the district court's sentencing determination was based upon a misunderstanding of its sentencing discretion with regard to the persistent violator enhancement?

ARGUMENT

Baay Has Failed To Show That The District Court's Sentencing Determination Was Based Upon A Misunderstanding Of Its Sentencing Discretion With Regard To The Persistent Violator Enhancement

A. Introduction

Baay contends that the district court was not aware that the persistent violator sentencing enhancement permitted it to impose a fixed term of incarceration of less than five years, and that it therefore abused its discretion in imposing its sentence. (Appellant's brief, pp.6-10.) However, a review of the record reveals that the district court was aware of the applicable law and the scope of its discretion.

B. Standard Of Review

Sentencing determinations are reviewed for an abuse of discretion. State v. Fuhriman, 137 Idaho 741, 745, 52 P.3d 886, 890 (Ct. App. 2002). When evaluating a claim that the trial court has abused its discretion, the sequence of the appellate court's inquiry is first, whether the trial court correctly perceived the issue as one of discretion; second, whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices availability to it; and finally, whether the trial court reached its discretion by an exercise of reason. Sun Valley Shopping Ctr., Inc. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

C. The District Court's Sentencing Determination Was Not Based Upon A Misunderstanding Of The Scope Of Its Discretion

The Idaho persistent violator sentencing enhancement provides that upon a third conviction for a felony, an individual "shall be sentenced to a term in the custody of the state board of

correction which term shall be for not less than five (5) years and said term may extend for life." I.C. § 19-2514.

In State v. Harrington, 133 Idaho 563, 566-568, 990 P.2d 144, 147-149 (Ct. App. 1999), the Court of Appeals, analyzing the language of I.C. § 19-2514 and applying the rule of lenity, held that the persistent violator sentencing enhancement did not prohibit district courts from imposing suspended sentences upon persistent violators. Id. In State v. Toyne, 151 Idaho 779, 781-783, 264 P.3d 418, 420-422 (Ct. App. 2011), the Court of Appeals similarly held that the district court abused its discretion when at the sentencing hearing, it expressed a belief that I.C. § 19-2514 required it to impose a minimum sentence of five years fixed. Id. Therefore, pursuant to I.C. § 19-2514, as interpreted by Harrington and Toyne, the district court in the present case had the discretion to impose a *unified* sentence of between five years and life, and to suspend the sentence if it so chose.

After indicating that the fixed term was required to be at least five years, the court asked both counsel to advise him of their views. The following conversation ensued:

> THE COURT: Mr. Baay, in a moment I'm going to give you an opportunity to speak on your own behalf.
>
> Counsel, however, I want to inquire. The recommendation from the State is two-plus-six or a unified sentence of eight years. But correct me if I am wrong, but that would be an illegal sentence given the fact he has admitted being a persistent violator. It's no less than five years and up to life that I need to impose here. So it would appear that the Court couldn't accept the State's recommendation.
>
> Am I correct about that?
>
> [PROSECUTOR]: That's an interesting question, Your Honor, because in my experience different district court judges here in Ada County view that five-to-life differently. Some have – and it appears to be your view – that you have to at least impose a minimum of five years fixed and go up to life. But in my experience, the majority feel that the sentence has to be at least five, that it cannot add up to less than five.

> And, [defense counsel], is that your experience here as well?
>
> [DEFENSE COUNSEL]: So my understanding – is it 2520? I don't know if anybody remembers off the top of their head.
>
> THE COURT: It's 2514.
>
> [DEFENSE COUNSEL]: 2514. My understanding – and I have had people who get persistent violator convictions who have actually been placed on probation – is that, whatever sentence you get has to be at least five years in its entirety. For instance, you couldn't send him to prison for a one-plus-two or zero-plus-three, but it doesn't have to be fixed. It says that – although I can't quote you a case, I have read case law that reflects, again, that it does have to be a prison sentence. But it says shall be sentenced to a term in custody of the State Board of Corrections for not less than five and may extend to life.
>
> The language, I believe, mirrors robbery. Robbery says sentenced to the Department of Corrections for a minimum of five up to life. And I think in the Court's experience, you can give people riders; you can give people probation on robberies. So I just believe – I believe what you have to do is obviously divide out the sentence, so I think you can give a two-plus-six, but you have to say something like I'm giving a, you know, two-plus-three for the offense, and I am extending that for purposes of the persistent violator to a zero-plus-three consecutive.
>
> THE COURT: Thank you for that clarification.

(Sent. Tr., p.30, L.4 – p.32, L.8 (explanations added).)

By the end of the above discussion, the district court recognized it had discretion to sentence Baay to something other than a *mandatory* five-year fixed term (i.e., no suspension, no rider) of at least five years because it subsequently suspended Baay's sentence and placed him on a rider. Having been effectively advised by both the prosecutor and defense counsel that I.C. § 19-2514 required only that the unified sentence total at least five years – not the fixed term alone – and thanking counsel for "that clarification," the court must have understood the law (i.e., I.C.

§ 19-2514), and simply made the discretionary decision to sentence Baay to an underlying sentence of ten years with five years fixed.[1]

Further, the district court's comment that it needed to "add extra time" to Baay's sentence was in apparent reference to the state's recommendation that Baay be sentenced to two years fixed plus six years indeterminate (eight years unified).[2] (See Sent. Tr. p.17, Ls.5-25; p.38, Ls.17-18.) By adding three years onto the fixed term recommended by the state, but reducing the recommended indeterminate term by one year, the court's comment about needing to "add extra time" was plainly focused on the fixed term of Baay's sentence. The court would not have needed to add three years to the fixed term (making it five years) if it believed a five-year fixed term was statutorily required. Therefore, the court must have recognized it had discretion to sentence Baay to a fixed term less than five years.

Even if the district court misperceived its sentencing discretion, it is clear from the record that any such misunderstanding did not impact the court's sentencing determination. Any such error is therefore harmless. See State v. Morgan, 109 Idaho 1040, 1043, 712 P.2d 741, 744 (Ct. App. 1985) (holding that in the context of sentencing, error is harmless, and remand is unnecessary, "if it is plain from the judge's reasoning that the result would not change or if it appears that any different result would represent an abuse of the judge's discretion."); see also State v. Ish, ___ P.3d ___, 2014 WL 2619597 *3 (Ct. App. 2014).

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[1] Later in the sentencing hearing, the district court referred to the prior discussion about the persistent violator statute, stating, "Now, I understand that there may be a difference of an opinion with regard to how to allocate the time on a persistent violator. But I have always taken the view that it is a minimum of five years." (Sent. Tr., p.37, Ls.3-7.) It is not clear whether the court was referring to a unified sentence, or the fixed portion of a sentence.

[2] Apart from recommending a rider, Baay's trial counsel did not make any specific sentencing recommendation. (See generally Sent. Tr., p.18, L.13 – p.19, L.7.)

There is no indication in the record that the district court would have imposed a lesser fixed sentence if it was aware of its discretion to do so. Instead, the court's comments at the sentencing hearing show that it wanted to ensure the underlying sentence got Baay's full attention and gave him incentive to become a law-abiding person, to wit:

> The Court in this case finds that, indeed, *the Court needs to add extra time*. You have put yourself in a position where you're now treated as a persistent violator. *The reality is you ever commit any other offense, you're – the rest of your life, you're pretty much going to be in prison. That's where you got yourself.* Three felony convictions. *And I'm going to fashion a sentence that makes sure that that happens because I think there needs to be a sufficient deterrence for you to make sure that you need to change your life around.*
>
> So the Court – the underlying sentence is going to impose or sentence you to five years fixed and five years indeterminate for this particular case. Now, I will retain jurisdiction, however, and allow for the rehabilitative program – programming in that retained jurisdiction program which could last up to 365 days. If I were the sentencing judge on all three cases involving the probation violations, I would impose the sentence in the other two felony offenses placing you in a position where you're either in the custody of the Department of Corrections undergoing their programming or in the rider program. But that's how close you are.

(Sent. Tr., p.38, L.17 – p.39, L.17 (emphasis added).)

As discussed, the district court's comment that it needed to "add extra time" to Baay's sentence shows it recognized it had discretion to sentence Baay to a fixed term of less than five years. (See Sent. Tr. p.17, Ls.5-25.) The court's justifications for adding "extra time" included (1) another felony conviction would likely result in Baay being imprisoned for life; (2) Baay got himself into this situation by committing three felonies and becoming a persistent violator; and (3) the sentence was intentionally fashioned to make sure that, if Baay committed more crimes, he would likely go to prison for the rest of his life – in order to provide "sufficient deterrence" for him to "change [his] life around." (Sent. Tr., p.38, L.18 – p.39, L.3.) With the concerns of the sentencing court in mind, it is unrealistic to conclude that, if the court understood it had discretion to sentence Baay to a fixed term of less than five years (assuming it did not before), it would have

sentenced him to a fixed term of less than five years. In sum, it is "plain from the judge's reasoning that the result would not change" if the judge had understood he had discretion to sentence Baay to a fixed term of less than five years. Morgan, 109 Idaho at 1043, 712 P.2d at 744.

CONCLUSION

The state respectfully requests that this Court affirm the district court's sentence of Baay.

DATED this 19th day of May, 2020.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of May, 2020, 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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/s/ John C. McKinney
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JCM/dd