10-31-2011

State v. Nienburg Appellant's Brief Dckt. 38656

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38656
	)	
v.	)	
	)	
RAYMOND STUART NIENBURG,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

Nature of the Case

Mr. Nienburg pled guilty to felony Driving Under the Influence (*hereinafter,* DUI) with a persistent violator enhancement. As part of that plea agreement, Mr. Nienburg agreed to pay restitution. The State submitted its restitution request, but Mr. Nienburg's attorney argued at the sentencing hearing that some of the damages included, specifically the damage to the police cruiser, could not properly be claimed as restitution under the statute. The court rejected that argument and ordered Mr. Nienburg to pay restitution in the amount requested by the State.

The District Court also sentenced Mr. Nienburg to a unified sentence of fifteen years, with four years fixed, although Mr. Nienburg had not received a DUI in the past eight years. It is from these orders that Mr. Nienburg appeals.

Statement of the Facts and Course of Proceedings

Despite a lengthy criminal record, Mr. Nienburg has attempted to change. Indicative of that desire, he entered a plea agreement in which he would plead guilty to felony DUI with a persistent violator enhancement, and in exchange, the State would drop two pending misdemeanor charges. (Tr., p.6, Ls.6-10 (citing R., p.29.)) Also included in his plea agreement was an agreement that he pay restitution that "will not exceed $1,156.98." (Tr., p.6, Ls.17-18.)

Regarding restitution, defense counsel contended that the amount claimed by the State was not properly "restitution" under the statutory definition. (*See* Tr., pp.18-24.) The damages claimed were to a police cruiser that responded to the scene. (Presentence Report Investigation (*hereinafter,* PSI), p.79.) Mr. Nienburg's dog was in the back of his car. (PSI, p.79.) Apparently, the dog was spooked by the lights

and sounds of the various responding police vehicles. (PSI, p.79.) It jumped out of the car and tried to run away when it collided with one of the police cruisers. (PSI, p.79.) The dog was killed and the cruiser was damaged. (PSI, p.79.) Mr. Nienburg argued that the damage to the police cruiser was not the result of his criminal conduct and so could not be claimed as restitution. (Tr., p.21, Ls.11-17.) The court rejected his contention, holding that Mr. Nienburg had agreed to pay all $1,156.98 as part of the plea agreement.[1] (Tr., p.23, L.25 – p.24, L.1.)

While this was Mr. Nienburg's eighth lifetime DUI, it has also been approximately eight years since his last DUI. (PSI, p.8-11.) He recognized that his choices were poor and that he would have to suffer the consequences for those decisions. (Tr., p.32, Ls.14-25.) His version of events was that he had been drinking when his wife suffered a medical emergency, and, in that emotional moment, his reason was overcome and he tried to follow the ambulance to the hospital, realized what he was doing, and turned around to go home.[2] (Tr., p.30, Ls.15-25; p.31, Ls.21-25.) At the sentencing hearing, he expressed his sincere remorse for his poor decision-making. (Tr., p.37, Ls.4-10.)

Based on all the mitigation presented, Mr. Nienburg requested that the court impose a fifteen-year sentence with two years fixed. (Tr., p.36, Ls.14-18.) The prosecutor, relying mostly on Mr. Nienburg's criminal history, requested a fifteen-year sentence, four years fixed, pursuant to the plea agreement. (Tr., pp.26-29.)

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[1] This includes the amount for the damage caused to the police cruiser by Mr. Nienburg's dog, valued at an estimated $1,088.98. (Tr., p.18, Ls.22-24.) The remaining $68.00 was for expenses incurred by the Boise City Police Department. (R., p.68.)

[2] The court did not find any evidence to corroborate this version of events. (Tr., p.37, Ls.22-24.)

The court engaged in a thorough examination of Mr. Nienburg's criminal record before imposing his sentence. (Tr., pp.37-46.) Proclaiming its sentence to be lenient and discretionary, it imposed a fifteen-year sentence with four years fixed, a $1,156.98 order for restitution, and a $1,520.50 order for fines and costs. (R., p.70, Ls.18-23.)

Mr. Nienburg timely appealed from that order. (R., p.76)

ISSUES

1. Did the District Court exceed its statutory authority when it ordered Mr. Nienburg to pay for the damage to the police cruiser, which was not the result of his criminal conduct?

2. Did the District Court abuse its discretion when it imposed a unified sentence of fifteen years, with four years fixed, upon Mr. Nienburg following his plea of guilty to felony driving under the influence with a persistent violator enhancement?

ARGUMENT

I.

The District Court Exceeded Its Statutory Authority When It Ordered Mr. Nienburg To Pay For The Damage To The Police Cruiser, Which Was Not The Result Of His Criminal Conduct

A. Introduction

Raymond Nienburg appeals from the District Court's order imposing restitution in the amount of $1,088.98 upon him after entering a plea of guilty to felony DUI with a Persistent Violator enhancement. Mr. Nienburg asserts that the damages claimed were not caused by his criminal conduct, and so could not properly be claimed as restitution. He also asserts that District Court erred in concluding that he "agreed" to pay all the restitution. Therefore, he claims that the District Court was without statutory authority to impose restitution for the damage to the police cruiser.

B. There Is No Statutory Authority To Order Restitution Damages For The Damage To The Police Cruiser

Restitution under the Idaho Code permits the court to "order a defendant found guilty of any crime which results in an economic loss to the victim to make restitution to the victim." IDAHO CODE ANN. § 19-5304(2) (2011). A "victim" is "a person or entity, who suffers economic loss or injury *as the result of the defendant's criminal conduct.*"[3] IDAHO CODE ANN. § 19-5304(1) (e) (i) (2011) (emphasis added). "Criminal conduct" is limited only to those actions for which the defendant is found guilty. *State v. Shafer*, 144 Idaho 370, 373 (Ct.App. 2007). In some cases in this area, the term "culpable act" is substituted for "criminal conduct." *See e.g. State v. Lampien*, 148 Idaho 367,

[3] There are other definitions of "victim" under this section which are inapplicable to this case. *See* IDAHO CODE ANN. § 19-5304(1) (e) (2011).

374 (2007). A defendant may be ordered to pay additional restitution if he agrees to pay such restitution as part of a plea deal. *Shafer,* 144 Idaho at 373 (citing IDAHO CODE ANN. § 19-5304(9)). A determination of restitution by the trial court is reviewed for abuse of discretion. *State v. Richmond*, 137 Idaho 35, 37 (Ct.App. 2002).

To order restitution without an agreement by the parties, a court must have statutory authority permitting the order.[4] *Id.* Idaho statutes limit the court's authority in this respect to only the damages caused by the conduct for which the defendant has been convicted. *Id.* at 38 (citing *Hughey v. U.S.*, 495 U.S. 411, 420 (1990); *see also Shafer*, 144 Idaho at 372; *State v. Schultz*, 148 Idaho 884, 886-87 (Ct.App. 2008); *State v. Aubert*, 119 Idaho 868, 870 (Ct.App. 1991), *overruled on other grounds by State v. Dorsey*, 126 Idaho 659, 662 (Ct.App. 1995). Therefore, damages caused by actions unrelated to the crime for which the defendant is found guilty cannot be claimed as restitution because the person suffering the loss is not a "victim" under the statute. *See Shafer*, 144 Idaho at 372 (citing IDAHO CODE ANN. § 19-5304(1) (e)).

To determine whether someone is a "victim" in this regard, Idaho employs the tort law causation analysis. *Lampien*, 148 Idaho at 374. Causation has two parts: actual cause and proximate cause. *State v. Corbus*, 150 Idaho 599, 602 (2011). Actual cause is determined using the "but for" test. *Id.* On the other hand, proximate cause is determined by using the "reasonably foreseeable" test. *Id.* The reasonably foreseeable test requires the court to determine "whether the injury and manner of occurrence are 'so highly unusual . . . that a reasonable person, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expect the injury

[4] Mr. Nienburg asserts that the parties did not reach an agreement regarding restitution. That particular argument will be addressed in Section C.

to occur.'" *Lampien*, 148 Idaho at 374 (quoting *Cramer v. Slater*, 146 Idaho 868, 875 (2009)). When the injury and manner of occurrence are so highly unusual that they are not reasonably foreseeable, they constitute an intervening, superseding cause. An intervening, superseding cause is "an independent act or force that breaks the causal chain between the defendant's *culpable act* and the victim's injury." *Id.* (emphasis added). It replaces the defendant's act as the proximate cause and relieves him of liability, so long as the intervening, superseding cause is unforeseeable and extraordinary. *Corbus*, 150 Idaho at 602.

1. Mr. Nienburg's Culpable Action Was Not The Actual Cause Of The Damage To The Police Cruiser

Mr. Nienburg's culpable act (DUI) did not cause the dog to exit his car, which caused the damages claimed. *Contrast with Corbus*, 150 Idaho at 603 (where the passenger in a vehicle may have acted of his own volition, but did so because Mr. Corbus was driving recklessly trying to evade police and for that reason, Mr. Corbus' culpable act (reckless driving) was deemed to be the actual cause of his passenger's injuries).

The court misapplied the "but for" test when considering the defense's argument on this point, holding that, "It wouldn't have happened but for your client running from the scene and leaving the door open and having been driving under the influence." (Tr., p.21, Ls.18-21.) The only properly considered act in this case is Mr. Nienburg's culpable act (DUI). *See e.g. Shafer*, 144 Idaho at 372. Considering the other cause (leaving the door open and running from the scene) is improper and an abuse of discretion because he was not found guilty of a crime based on those actions. *See id.*

The culpable act (DUI) cannot be the actual cause because, as the court noted, Mr. Nienburg had to engage in the other action (exiting his vehicle and leave the door open) for the dog to get out and be in a position to damage the cruiser. If the dog had been inside his car, it could not have damaged the cruiser. The DUI only got the dog to the scene. It did not, however, put him in the position to damage the cruiser. The actual cause, the action that put the dog to be in the position to cause the damage was leaving the door open. Since that is not the *culpable* act, Mr. Nienburg cannot be considered to be the actual cause.[5]

Because Mr. Nienburg's culpable act (DUI) was not the actual cause of the damage, imposing this restitution without an agreement between parties constitutes an abuse of discretion and this Court should vacate the restitution order or strike the portion of the restitution order relating to the damages to the police cruiser, or, alternatively, remand this case for a new restitution hearing with instructions that the District Court may not assess restitution for the damage to the police cruiser.

2. Mr. Nienburg's Culpable Act Was Not The Proximate Cause Of The Damage To The Police Cruiser

Mr. Nienburg's culpable act (DUI) was not the proximate cause because in manner of occurrence as it was neither foreseeable to the reasonable person nor in a chain of events uninterrupted by an intervening, superseding cause.

The manner of occurrence of the injury in this case was not reasonably foreseeable, and therefore, Mr. Nienburg's culpable action cannot be deemed to be the

[5] While it is true that Mr. Nienburg took the dog to this particular location, the proper analysis focuses on his *culpable act*. If his DUI caused the dog to be in the position to damage the cruiser, it might be deemed to be the actual cause. However, the State offered no evidence to show that fact. *See State v. Card*, 146 Idaho 111, 114-15 (Ct.App. 2008) (citing *State v. Doe*, 146 Idaho 277, 283 (Ct.App. 2008)).

proximate cause. *See Lampien*, 148 Idaho at 374. Consistent with the test articulated in both *Lampien* and *Cramer*, a reasonable person making an inventory of potential reasons for a police cruiser to be damaged due to a DUI would not include this particular manner of occurrence. Rather, a reasonable person would include a collision between the defendant's car and the police cruiser as a potential cause for damage to the cruiser. It might also be foreseeable for the defendant to run the officer off the road or for the defendant to kick or head butt the car and so cause damage to the cruiser. It is not foreseeable that a dog would get out the vehicle, react wildly to the lights and sirens, *and* run into the cruiser. Rather, the dog's reaction constitutes an intervening, superseding cause. *See Corbus*, 150 Idaho at 602. That is an extraordinary and unforeseeable response by the dog and it breaks the causal chain between Mr. Nienburg's culpable act (DUI) and the damage to the cruiser. Therefore, Mr. Nienburg's culpable action (DUI) cannot be deemed to be the proximate cause and he is relieved of liability for the damage. *Lampien*, 148 Idaho at 374; *Cramer*, 146 Idaho at 875.

Since Mr. Nienburg's culpable act (DUI) was neither the actual nor the proximate cause of the damage to the police cruiser, the State does not qualify as a victim under the restitution statute. *See* IDAHO CODE ANN. § 19-5304(1) (e). Therefore, there is no statutory authority supporting the court's restitution order.

C. Mr. Nienburg And The State Did Not Reach An Agreement On The Total For Restitution, And So That Cannot Be The Basis To Order Him To Pay For The Damage To The Police Cruiser

Plea agreements are like contracts and are analyzed under contract standards. *State v. Doe*, 138 Idaho 409, 410-11 (Ct.App. 2003). The District Court held that

Mr. Nienburg agreed to pay all the restitution claimed by the state in this case. (Tr., p.19, L.4-7.) Therefore, as part of the plea agreement, his agreement to pay restitution is also subject to contract standards.

First, it is critically important to understand the terms of the agreement. Since there is no written copy of the agreement for the record, this Court must rely on the District Court's oral recitation of the terms of the deal found in the transcript. (*See* Tr., p.6, Ls.5-21.) The critical part of the agreement was recorded as follows: "Restitution will not *exceed* $1,156.98." (Tr., p.6, Ls.17-18.) (emphasis added). When asked by the court, the defendant affirmed that to be the agreement and neither attorney objected to that formulation of the agreement. (*See* Tr., p.6, L.22.) After questioning Mr. Nienburg, the court decided to accept both pleas and set the case for sentencing. (Tr., p.16, Ls.7-13.) Therefore, under contract standards, all parties agreed to those terms and the agreement became enforceable pursuant to those terms.

The word "exceed" is the critical term and reveals why there is no agreement as to the amount of restitution. The parties in this case, as indicated by defense counsel's challenge to the ultimate amount claimed, must have intended the phrase "will not exceed" to mean that they agreed to the maximum amount that could *potentially* be included in the restitution order. In fact, the court noted at the sentencing hearing that "he [Mr. Nienburg] was free to argue for less." (Tr., p.18, Ls.5-6.) Both attorneys acknowledged that interpretation was within their understanding of their agreement. (Tr., p.18, Ls.11-12.) That interpretation also indicates that they did not have a meeting of the minds on the *actual* total that would be included in the restitution order. Therefore, at best for the State, the phrase "will not exceed" is ambiguous and open to multiple meanings. *See e.g. U.S. v. Phillips*, 174 F.3d 1074, 1076 (9th Cir. 1999) (as an

example of an ambiguity in a plea agreement specifically over the inclusion and amount of restitution).

Ambiguities in these agreements are to be resolved in favor of the defendant. *State v. Peterson*, 148 Idaho 593, 595 (2010); *see also Hughey*, 495 U.S. at 422 (applying this rule specifically to a restitution issue). Ambiguity may arise even from the statement that the defendant will pay for the "entire loss" suffered by the victim. *See Aubert*, 119 Idaho at 871. Although the court did not specifically discuss that issue, the term "entire loss" is ambiguous because the parties can dispute which damages are properly included in the "entire loss." *See e.g. State v. Hamilton*, 129 Idaho 938, 943 (Ct.App. 1997) (limiting restitution to only those damages the state was able to prove); *but see e.g. U.S. v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2003) (holding that an agreement specifying the exact amount of restitution that would be owing pursuant to the agreement was unambiguous). This is because "the restitution statute is not so broad, however, as to authorize compensation for *every* expenditure that a victim may personally deem reasonable or necessary as a response to a crime." *Card*, 146 Idaho at 114 (emphasis in original). "Nor does it authorize restitution for every out-of-pocket expenditure suffered but for the defendant's crime." *Gonzales*, 144 Idaho at 776. In that regard, "the State bears the initial burden to make a prima facie showing . . . that the expenses were reasonable and necessary to treat injuries caused by the defendant's criminal conduct." *Card*, 146 Idaho at 114-15 (citing *Doe*, 146 Idaho at 283); *see also State v. Smith*, 144 Idaho 687, 692 (Ct.App. 2007).

In this case, the State has failed to make its *prima facie* showing that Mr. Nienburg's *criminal* conduct (his culpable act of DUI) caused the damage for which it is seeking restitution. Even if the court determined that the State had made its

showing, Mr. Nienburg had not agreed that the damage to the cruiser *should* be included, only that it *might* be included. Therefore, the agreement that the restitution "will not exceed" the identified total either indicates that there is no agreement or, at best, the term is ambiguous. If there is no agreement, those damages cannot be recovered in restitution. If the term is ambiguous, it must be read in favor of the defendant. *Peterson*, 148 Idaho at 422. As a result, the agreement must be read to understand that the amount identified (including the damage to the cruiser) was the amount that might be included in a restitution order, but that there was no agreement that the damage to the cruiser *should* be included. Because there was no agreement by the parties, the restitution order cannot be based on § 19-5304(9).

There is also a sound policy reason to take this perspective. If the State is allowed to ask for any damages in restitution without question after the defendant pleads guilty, then there is nothing to stop the State from agreeing to claim "any and all restitution" and then requesting excessive restitution. As this Court has noted, such a request for restitution can result in an injustice to the defendant. *Shafer*, 144 Idaho at 373. The defendant must have a chance to challenge the reasonability of the restitution claims, or else the statute is meaningless in its restrictions. Many of these damages are more properly recovered in the civil arena. In fact, the statute provides for that alternative by establishing that a recovery of restitution does not prevent civil recovery. IDAHO CODE ANN. § 19-5304(11). For that and other reasons, the statute limits restitution claims. *See* IDAHO CODE ANN. § 19-5304(1); *see also Card*, 146 Idaho at 114; *Gonzales*, 144 Idaho at 776. Therefore, even though Mr. Nienburg agreed to

pay restitution, he must be allowed to review the damages claimed and object to those he believes inappropriate, or else the statute is meaningless.[6]

Since there was no agreement under §19-5304(9) and since the State does not qualify as a victim under §5304(1)(e), the order for restitution was improper and constitutes an abuse of discretion. *See e.g. Shafer*, 144 Idaho at 373. Therefore, this Court should vacate the restitution order or strike the portion relating to the damage to the police cruiser, or, alternatively, remand this case for a new restitution hearing with instructions that the District Court may not assess restitution for the damage to the police cruiser.

II.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Fifteen Years, With Four Years Fixed, Upon Mr. Nienburg, Following His Plea Of Guilty To Driving Under The Influence And Persistent Violator

A. Introduction

Mr. Nienburg appeals from the District Court's order imposing a fifteen year sentence, with four years fixed, after he pled guilty to felony DUI with a persistent violator enhancement. He alleges that the sentence was excessively harsh, that the court did not sufficiently consider all four sentencing objectives, and that it did not sufficiently consider the mitigating circumstances.

[6] Mr. Nienburg concedes that if the parties had agreed to a specific amount of restitution for identified damages that he could be deemed to have waived his right to challenge a corresponding restitution order. *See e.g. Pappas*, 409 F.3d at 830. However, in this case, there was no specific amount set by the parties – only a cap to what might be claimed – and therefore, he retains his right to object to the restitution order.

B. By Failing To Sufficiently Consider All The Sentencing Objectives and Mitigating Circumstances, The District Court Imposed An Excessive Sentence.

Mr. Nienburg asserts that, given any view of the facts, his unified sentence of fifteen years, with four years fixed, is excessive. 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 (Ct.App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Nienburg does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Nienburg must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). 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. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978), *overruled on other grounds by State v. Coassolo*, 136 Idaho 138 (2001)). The protection of society is the primary objective the court should consider. *State v. Charboneau*, 124 Idaho 497, 500 (1993). Ergo, a sentence that protects society and also accomplishes the other objectives will be considered reasonable. *Id.*; *see also State v. Toohill*, 103 Idaho 565, 568 (Ct.App. 1982).

In issuing Mr. Nienburg's sentence, the court focused on only two of the sentencing objectives: protection of society and punishment. (Tr., p.39, Ls.19-21, p.47, Ls.1-24.) While it is correct that protection of society is the primary goal of sentencing, the court must still consider all the sentencing objectives when crafting a sentence. *Charboneau*, 124 Idaho at 500 (citing *State v. Moore*, 78 Idaho 359, 363 (1956)). This is because the protection of society is influenced by each of the other objectives, and therefore, each must be addressed in sentencing. *Id.*; *see also Toohill*, 103 Idaho at 568.

There are several mitigating factors that a court should consider to determine whether the objectives are served by a particular sentence. *State v. Knighton*, 143 Idaho 318, 320 (2006). They include, but are not limited to: "the defendant's good character, status as a first-time offender, sincere expressions of remorse and amenability to treatment, and support of family." *Id.* Insufficient consideration of these factors has been the basis for a reduced sentence in several cases. *See e.g. Cook v. State*, 145 Idaho 482, 489-90 (Ct.App. 2008); *State v. Alberts*, 121 Idaho 204, 209 (Ct.App. 1991); *State v. Carrasco*, 114 Idaho 348, 354-55 (Ct.App. 1988), *rev'd on other grounds*, 117 Idaho 295 (1990); and *State v. Shideler*, 103 Idaho 593 (1982). In this case, several of those factors are present, but were insufficiently considered by the court as it crafted Mr. Nienburg's sentence.

While Mr. Nienburg has been a habitual offender, his situation in this instance is uniquely different. The first important fact in that regard is it has been eight years since Mr. Nienburg's last DUI. (PSI, pp. 8-11.) This fact alone indicates that there has been a significant change in his ability to control himself because, as the court noted in detail, Mr. Nienburg has not been sober during that eight year period. (Tr., p.44, Ls.1-25.)

In particular, this fact indicates that he has made an effort to not drive when he has been drinking, and had been fairly successful at that. According to him, emotion overcame reason on this particular occasion because his wife had a health emergency.[7] Regardless, his rehabilitation has been making progress. To that end, he has been building a support network to help him deal with his problems. He received three letters of support from Nancy Wilson, Nikki Collins, and the Ortiz family. (PSI, pp.23-27.) He also received a support commitment from eight individuals who are willing to help him in his rehabilitative efforts. (PSI, p.28.) These facts all show his openness to rehabilitation as well as potential for success at it.

They also show his amenability to treatment, which is another factor that must be sufficiently considered by the court. *See e.g. Cook*, 145 Idaho 489-90. In addition, he has tried to do what he can to continue getting treatment. Important in that regard is the fact that he recognizes that he needs it. (*See* Tr., p.34, Ls.10-11.) He has petitioned the court for financial aid to continue getting treatment, being that he is indigent, but the court refused to offer such assistance. (*See e.g.* R., p.48.) Undeterred, he managed to collect enough himself to pay for the SAP program himself. (Tr., p.34, Ls.12-17.) He is also willing to participate in more treatment programs, such as ABC, if he can get some financial help. (Tr., p.34, Ls.24-25 – p.35, Ls.1-3.) The structured environments some of these programs offer also seem to be effective in treating Mr. Nienburg. (Tr., p.33, Ls.1-3.) Notably, while in prison, he has earned a certain level of trust with the staff, which has led to additional privileges, and there is no evidence that he has abused those privileges. (Tr., p.35, Ls.23-25 – p.36, Ls.1-13.)

[7] The court did not find any support for that version of events, but that is his explanation for his actions. (Tr., p.37, Ls.22-24.)

Another factor the court insufficiently considered was that he showed sincere remorse for what he did. (Tr., p.37, Ls.4-10.) In addition, he accepted responsibility and pled guilty to a felony with a sentencing enhancement (felony DUI and Persistent Violator) in exchange for the State dismissing two misdemeanors. (Tr., p.6, Ls.6-10 (citing R., p.29.))

There is no indication in the record that the court gave any consideration to these factors at all. Instead, it focused on his criminal record. Ultimately, the court concluded that it would issue a sentence that punished Mr. Nienburg, subjecting him to "four years of actual sobriety and perhaps at that point, you'll take it seriously. But it's time that you pay the price." (Tr., p.47, Ls.21-24.) This sentence provides negligible deterrence, specifically to Mr. Nienburg himself, which is another of the sentencing objectives. After this sentence, there is nothing else the system can impose on him except for a life sentence. As it is, he is forty-nine years old. (*See* PSI, p.5.) After he completes this entire sentence, he will be sixty-four. This means that a life sentence may only be equivalent to or only a few years longer than this current sentence. Therefore, there is little deterrent value to this sentence since it is just about all the system can bring to bear. In that same vein, there is no carrot to induce favorable behavior in this sentence, no reason for him to try and conform his actions to the legal precepts. This creates a dangerous situation for society, since deterrence is one mechanism by which the system attempts to decrease recidivism rates. If he has no reason to conform his actions, he is not deterred from continuing with his current habits by anything other than his own conscience. And, as the court noted, "drunk drivers kill more people than people who assault people. They are extremely dangerous to our community." (Tr., p.39, Ls.19-21.)

Furthermore, this sentence gives little to no consideration to rehabilitative opportunities. According to the presentence investigator, rehabilitation should have been considered. The investigator concluded that, "[a]lthough I believe that Mr. Nienburg would like to attempt to remain alcohol-free in the future, I do not believe that he has the tools to do so at this time." (PSI, p.19.) The implication from that statement is that Mr. Nienburg would be capable of remaining alcohol-free if he were given the appropriate training and counseling to help him do so. Therefore, rehabilitative options should have been considered in this sentence. Again, by failing to sufficiently consider this objective, this sentence creates a dangerous situation for society upon his eventual release. His problem, according to the investigator, is not desire, but control. (*See* PSI, p.19.) Mr. Nienburg corroborates that perspective. (*See* Tr., p.30, Ls.2-25) Since this sentence is not a life term, he will be released at some point. By not providing rehabilitative opportunities in his sentence, there is no attempt to provide him with those tools, and so when he is released, he will be similarly unable to control himself, should an emotional situation arise.[8] This means that, despite his best efforts, he will likely be drinking and driving again, which is a danger to society. Therefore, the failure to sufficiently consider rehabilitation in the sentence puts society at more risk in the long run.

Because the court did not sufficiently consider several mitigating factors Mr. Nienburg presented at the sentencing hearing, it insufficiently considered the sentencing objectives. Instead, the court tried to protect society by focusing on punishment, but in doing so, did not consider deterrence and rehabilitation when

[8] The only attempt at rehabilitation is a recommendation that he be given the opportunity to participate in the therapeutic community. However, just because it is recommended does not mean the recommendation will be followed.

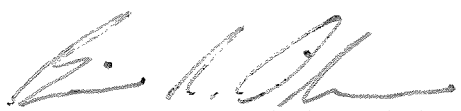
crafting Mr. Nienburg's sentence. The outcome is an excessive sentence resulting from the abuse of discretion. Therefore, this Court should amend Mr. Nienburg's sentence as it deems appropriate, or, alternatively, remand this case for a new sentencing hearing.

CONCLUSION

Mr. Nienburg respectfully requests that this Court vacate the restitution order. Alternatively, he requests that his case be remanded to the District Court for a new restitution hearing.

Mr. Nienburg 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 31st day of October, 2011.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of October, 2011, 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:

RAYMOND STUART NIENBURG
INMATE #69193
SICI
PO BOX 8509
BOISE ID 83707

CHERI C COPSEY
DISTRICT COURT JUDGE
E-MAILED BRIEF

ADA COUNTY PUBLIC DEFENDER'S OFFICE
200 WEST FRONT
BOISE ID 83702

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to the Attorney General's mailbox at the Supreme Court.

EVAN A. SMITH
Administrative Assistant

BRD/eas