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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38656
	)	
vs.	)	
	)	
RAYMOND STUART NIENBURG,	)	
	)	
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 CHERI C. COPSEY
District Judge

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Supreme Court Court of Appeals
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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

STATEMENT OF THE CASE

Nature Of The Case

Raymond Stuart Neinburg appeals from the sentence and restitution order imposed upon his conviction for driving under the influence as a persistent violator.

Statement Of The Facts And Course Of The Proceedings

Nienburg, while intoxicated, drove through the Pizza Hut drive-through, demanding to be served a pizza. (PSI[1], pp.89-90.) Pizza Hut staff, noting Nienburg's apparent intoxication and watching as he drank from an open bottle of vodka, reported Nienburg to the police. (Id.) When Nienburg saw them calling the police, he sped away from the Pizza Hut, driving erratically through the parking lot and burning rubber. (Id.) Soon thereafter, Nienburg returned and pounded on the Pizza Hut's front door, then left again to go home. (Id.)

Officer Cook was dispatched to investigate. (PSI, pp.76-81.) En route, Officer Cook learned that the registration on Nienburg's vehicle had been cancelled. (Id.) Officer Cook located Nienburg as Nienburg was driving down Ustick toward a trailer park. (Id.) Officer Cook attempted to enforce a traffic stop, but Nienburg gave no heed. (Id.) As Nienburg pulled into his driveway, Officer Cook shouted, "Stop! Police!" but Nienburg fled, attempting to jump the fence into his backyard. (Id.) Officer Cook called for backup and then pursued Nienburg, apprehending Nienburg before he made it over the fence. (Id.) Nienburg tried to fight off the officer, tearing Officer Cook's pant leg in

[1] The Presentence Investigation Report is attached to the record as an electronic exhibit. Citations to the PSI reflect the electronically stamped pagination numbers that run throughout the exhibit, which do not correspond to the page numbers of the individual documents.

the scuffle. (Id.) Nienburg later admitted that he fled because he had active warrants for his arrest. (Id.) Placed under arrest for driving under the influence, Nienburg was taken to the county jail for BAC testing where he blew a .247 and .235. (Id.) Nienburg's German shepherd, left unsecured in his truck when Nienburg attempted to flee police, rushed out into the street where it collided with the backup patrol vehicle en route to the scene, resulting in the dog's death and moderate damage to the cruiser. (Id.)

The State charged Nienburg with felony driving under the influence, driving without privileges, resisting arrest, and an additional persistent violator enhancement. (R., pp.28-30, 44-46.) Nienburg and prosecutors negotiated a plea agreement wherein Nienburg would plead guilty to the felony driving under the influence and the persistent violator enhancement, the State would dismiss the remaining counts and recommend a unified sentence of 15 years with four years fixed, allowing the defendant to argue for less time, and Nienburg agreed to pay restitution not to exceed $1,156.98. (R., pp.56-63; see also Tr., p.5, L.4 – p.6, L.19.) Pursuant to the plea agreement, the State submitted a restitution order for $1,156.98. (R., pp.67-68.) Restitution included $68.00 for the police pants and $1,088.98 for the cost of repairing the damage to the cruiser. (Id.; see also PSI, pp.64-70.)

The district court entered judgment of conviction, sentencing Nienburg to 15 years with four years fixed and ordering $1,156.98 in restitution, among other fees and fines. (R., pp.67-72.) Nienburg filed a timely notice of appeal. (R., pp.76-78.)

ISSUES

Nienburg states the issues on appeal as:

> 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?

(Appellant's brief, p.4.)

The State rephrases the issues as:

1. Has Nienburg failed to establish that the district court abused its discretion when it ordered Nienburg to pay the $1,156.98 in restitution he agreed to pay pursuant to his plea agreement for losses sustained by the State as a result of his criminal conduct?

2. Has Nienburg failed to establish an abuse of the district court's sentencing discretion in imposing a unified term of 15 years with four years fixed upon Nienburg's conviction for felony driving under the influence as a persistent violator of the law?

ARGUMENT

I.
Nienburg Has Failed To Establish That The District Court Abused Its Discretion When, Consistent With The Plea Agreement, It Ordered Nienburg To Pay Restitution For Losses Arising From Dismissed Criminal Conduct

A. Introduction

Nienburg contends that the district court's determination that he consented to pay restitution pursuant to his plea agreement was legally wrong. (Appellant's brief, pp.5-13.) Nienburg's argument is without merit. The plea agreement unambiguously required Nienburg to pay restitution not to exceed $1,156.98. Even if the amount of restitution was ambiguous, the requirement that Nienburg pay some restitution for the damages to Officer Cook's pants and the patrol vehicle was not. During the sentencing hearing the district court clarified that the plea agreement required Nienburg to pay $1,156.98 for the damages caused by his criminal conduct, and Nienburg acknowledged and accepted the plea agreement with that understanding. The district court's restitution order should be affirmed.

B. Standard Of Review

Generally, whether to order restitution, and in what amount, are matters to be determined within the discretion of the trial court. State v. Richmond, 137 Idaho 35, 37, 43 P.3d 794, 796 (Ct. App. 2002). Interpretation of a plea agreement is governed by contract law standards. State v. Lankford, 127 Idaho 608, 903 P.2d 1305 (1995); State v. Holdaway, 130 Idaho 482, 484, 943 P.2d 72, 74 (Ct. App. 1997). Whether a contract is ambiguous is a question of law reviewed *de novo.* State v. Claxton, 128 Idaho 782, 785, 918 P.2d 1227, 1230 (Ct. App. 1996). The interpretation and legal effect of a clear

and unambiguous plea agreement are matters of law reviewed *de novo*. State v. Barnett, 133 Idaho 231, 234, 985 P.2d 111, 114 (1999). However, the interpretation of ambiguous language in an agreement presents a question of fact. Id. "Such interpretations require a trier of fact to discern the intent of the contracting parties, generally by considering the objective and purpose of the provision and the circumstances surrounding the formation of the agreement." State v. Allen, 143 Idaho 267, 272, 141 P.3d 1136, 1141 (Ct. App. 2006). Appellate courts will defer to the trial court's findings of fact unless they are clearly erroneous. State v. Thomas, 133 Idaho 682, 686, 991 P.2d 870, 874 (Ct. App. 1999). "Findings are clearly erroneous only when unsupported by substantial and competent evidence in the record." Id.

C. The District Court Correctly Found That Nienburg Agreed To Pay Restitution In The Amount Of $1,156.98

Idaho Code § 19-5304(9) provides that "[t]he court may, with the consent of the parties, order restitution to victims, and/or any other person or entity, for economic loss or injury for crimes which are not adjudicated or are not before the court." I.C. § 19-5304(9). In accordance with the terms of the plea agreement entered into by Neinburg and prosecutors, the district court ordered Nienburg to pay $1,156.98 in restitution arising from criminal charges which the State had dismissed. (R., pp.69-72; Tr., p.25, Ls.20-24.) Contrary to Nienburg's assertions on appeal, Nienburg unambiguously agreed to pay $1,156.98 in restitution.

Nienburg was originally charged with felony driving under the influence, driving without privileges, and resisting arrest. (R., pp.28-30.) In exchange for Nienburg's guilty plea to the felony DUI and an additional persistent violator enhancement, the

State agreed to dismiss the remaining criminal charges. (R., pp.56-63; Tr., p.5, L.9 – p.6, L.19.) As part of that agreement, Nienburg was required to pay restitution on the damages which arose from the dismissed charge of resisting arrest, not to exceed $1,156.98. (Id.)

At the sentencing hearing, the district court ensured that all the parties had the same understanding of the plea agreement. (See Tr., pp.17-24.) The district court briefly rehearsed the terms of the agreement, including that Nienburg agreed to pay restitution, and that the amount was approximately $1,156.98, although Nienburg was "free to argue for less." (Tr., p.17, L.4 – P.18, L.12.) The State presented its proposed restitution order for $1,156.98, the figure previously mentioned by the district court. (Tr., p.18, Ls.13-15.) The district court asked if Nienburg was "willing to pay that restitution amount." (Tr., p.18, Ls.16-17.) Nienburg's counsel agreed that paying restitution was "certainly part of the plea agreement," but asked the district court to consider not ordering restitution for the damages done to the police cruiser. (Tr., p.18, L.18 – p.19, L.3.) The district court responded:

> He agreed – he agreed that he would pay that restitution. I'm sorry. That was part of the discussion. And we even – they even talked about the amount.
>
> So if he wants to violate the plea agreement, then the plea agreement's gone and the state's free to argue for imposition of up to life.

(Tr., p.19, Ls.4-11.) Nienburg's counsel responded that "he definitely [did not] want to violate the plea agreement." (Tr., p.19, Ls.12-13.) The district court continued,

> Well, as I understand the plea agreement, he agreed to pay that restitution and the amount was actually stated as part of that.

> So if he doesn't want to pay the restitution, we can – then in my view he's violating the plea agreement.

(Tr., p.19, Ls.14-19.)

The district court then requested the parties' positions on the restitution issue. (Tr., p.19, L.20; p.20, Ls.10-11.) The State responded that, through documented email exchanges, "that figure ha[d] certainly been discussed," that the State was clearly seeking restitution for the damage to the police cruiser, and that "Nienburg has already agreed that that is part of the plea agreement." (Tr., p.19, L.21 – p.20, L.9.) Nienburg responded that the damages to the cruiser were caused by his dog, not directly by him, and would not have occurred if the officers had not been there. (Tr., p.20, L.12 – p.21, L.17.) The district court countered, "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 district court went on to explain that, if restitution was part of his plea agreement, Nienburg could not argue that he was not responsible for those damages. (Tr., p.22, Ls.3-12.) The district court continued:

> If it's part of the plea agreement, and that's the way it was stated when it was read at the time that I heard it, then if he wants to back out, then he doesn't have a plea agreement. He can't have it both ways. It's a contract.

(Tr., p.22, Ls.16-21.) Nienburg's counsel agreed, stating that "the bottom line [was thar Nienburg was] willing to pay restitution and if he's ordered that, he'll do that," because he did not want to evade the plea agreement. (Tr., p.22, L.22 – p.23, L.8.)

The dialogue continued:

> THE COURT: Well, it says here as a result of the plea in your case, have you been advised that you may be required to pay restitution to any victim

in this case pursuant to 19-5304. He said yes. If yes, to whom. He wrote Ada County.

MR. LOJEK: Okay. All right. Looks like it's part of the plea agreement.

MS. DUNN: And, Your Honor, I did just provide counsel with some of the e-mail train with Miss Buttram where she is clearly indicating that the whole amount is part of the package.

THE COURT: That's what I wrote down and that's what my clerk wrote down, that that's what the agreement was. It says – in fact, you stated – I have it here in the minutes, you said he'd plead guilty to Count One, guilty to the Info Part II, 15, four plus eleven, and he would pay restitution not to exceed $1,156.98. That's you, Mr. Lojek, saying it.

So either it's part of the plea agreement – and if it is, and it seems to me it is, then if he wants to back out –

MR. LOJEK: He doesn't want to back out, Your Honor. He'll stand by his plea.

THE COURT: He'll stand by the plea agreement?

MR. LOJEK: Yes.

(Tr., p.23, L.9 – p.24, L.10.) The district court then went on to order the $1,156.98 in restitution. (Tr., p.25, Ls.20-21.)

On appeal, Nienburg argues that the phrase "not to exceed" in the plea agreement allows him to renege on his promise to pay restitution by arguing that he was not the cause of the damages sought in restitution. (Appellant's brief, pp.9-13.) Nienburg's argument is wholly contrary to law: Where a defendant has agreed to pay restitution, the State has no burden to prove the defendant's culpability, but need only show the value of the economic loss by a preponderance of the evidence. I.C. § 19-5304(6), (9); see also State v. Shafer, 144 Idaho 370, 373-74, 161 P.3d 689, 692-93

(Ct. App. 2007). Nienburg unambiguously agreed to pay restitution. (R., pp.56-63.) As clarified by the district court, that restitution included damages both to Officer Cook's pants and to the police cruiser. (See Tr., pp.17-24, discussed *supra*.) At most, the language "not to exceed" would allow Nienburg to challenge the dollar amount on the restitution requested by the State, arguing, for instance, that the pants cost less than $68.00 or that repairs for the damages to the police cruiser cost less than $1,088.98. Nienburg did not raise any such argument below, nor does he make one on appeal. The only argument Nienburg raises is that he be totally absolved from paying any restitution on the police cruiser, an argument unambiguously foreclosed by the parties' plea agreement and the district court's clarification of that plea agreement.

Taken in the context of the plea agreement, the $1,156.98 figure clearly shows that the parties contemplated restitution for both the damages to the officer's pants and the police cruiser. By the time prosecutors and Nienburg entered into the plea agreement on February 5, 2011, the State had already established that Nienburg owed at least $1,156.98 in restitution on the charge of resisting arrest. (See PSI, pp.64-70.) That sum was reached by adding the known losses of $68.00 for the pants (PSI, p.65) and the known losses of $1,088.98 for the damages to the police cruiser (PSI, pp.66-70.) As noted by the Boise City Attorney's Office, that $1,088.98 represented the "costs presently paid" to repair the cruiser on the "total damages to date." (PSI, p.66.) It was possible that there were still additional costs and damages that would be discovered going forward, but as consideration for the plea agreement, the State limited restitution to those damages already known when the agreement was entered. As correctly noted

by Nienburg on appeal, the plea agreement only provided a cap on any future restitution. (Appellant's brief, p.13 n.6.)

Even if the unambiguous plea agreement did not foreclose Nienburg's causation argument, he has still failed to show that his criminal conduct of resisting arrest did not cause the damages sought in restitution. On appeal, Nienburg essentially argues that the damages caused to the police cruiser were not his fault; they were his dog's fault. Therefore, he should not be required to pay restitution. (Appellant's brief, pp.6-9). Nienburg's argument that his dog represents an intervening cause is entirely without merit. Nienburg negligently released his German shepherd into the highway while resisting arrest by unlawfully fleeing police, and is therefore liable for the damages his dog caused when it collided with the police cruiser that was lawfully at the scene. See McLain v. Lewiston Interstate Fair & Racing Ass'n, 17 Idaho 63, 104 P. 1015, 1016 (1909) ("Where a dog invades and trespasses upon the legal rights of a person and injures person or property, and such invasion and trespass is the result of the negligence of the owner, the owner of such dog is liable for the damages done."). A dog's reaction to being startled does not constitute an intervening or superseding cause. See Isham v. Dow's Estate, 41 A. 585 (Vt. 1898). Regardless, because Neinburg agreed to pay that restitution, the State has no burden to prove his culpability, but need only show the value of the economic loss by a preponderance of the evidence. I.C. § 19-5304(6), (9); Shafer, 144 Idaho at 373-74, 161 P.3d at 692-93.

In this case, Nienburg's fleeing from Officer Cook's lawful demands for him to stop, and then wrestling with Officer Cook as the officer forcibly placed Nienburg under arrest, caused $68.00 worth of damages to Officer Cook's pants. (PSI, p.65.) When

Nienburg resisted arrest by fleeing his truck on foot, he left his truck door open, allowing his large German shepherd to escape into the street where it collided with the cruiser, causing at least $1,088.98 in damages. (PSI, pp.66-70.) Thus, Nienburg's criminal act of resisting arrest led to damages totaling at least $1,156.98, both through Nienburg's intentional act of scuffling with Officer Cook and his negligent act of releasing his dog into the highway while unlawfully fleeing from police. The district court correctly found that Nienburg agreed to pay restitution, and correctly ordered $1,156.98 in restitution. Nienburg has failed to show clear error in the district court's factual findings or an abuse of discretion in the amount of restitution ordered by the district court. The judgment of the district court should therefore be affirmed.

II.
Nienburg Has Failed To Establish An Abuse Of The Sentencing Court's Discretion

Nienburg asserts that the district court abused its discretion when it imposed and executed a unified sentence of 15 years with four years fixed following his felony driving under the influence conviction with a persistent violator enhancement, arguing that the district court only considered two sentencing factors and failed to give sufficient weight to allegedly mitigating factors. (Appellant's brief, pp.9-12.) Contrary to Nienburg's assertions, the district court properly considered all of the appropriate factors when it crafted Nienburg's sentence. Nienburg has failed to establish an abuse of the district court's sentencing discretion. The judgment of the district court should be affirmed.

Where a sentence is within statutory limits, an appellant is required to establish that the sentence is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To

carry this burden, the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. 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." State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Though courts review the whole sentence on appeal, the presumption is that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). In deference to the trial judge, the Court will not substitute its view of a reasonable sentence where reasonable minds might differ. Toohill, 103 Idaho at 568, 650 P.2d at 710.

Both the nature of the crime and Nienburg's character as a repeat offender support the sentence imposed. In the present crime, Nienburg admitted to drinking several fruit punch and cranberry flavored Mike's Hard Lemonades. (PSI, pp.7-8.) He then drove himself out to Pizza Hut. At Pizza Hut, he came through the drive-through and demanded a pizza. (PSI, pp.89-90.) While watching Nienburg drink from an open vodka bottle in his vehicle, the staff called police and reported what they saw, that Nienburg smelled strongly of alcohol, and that his breath also smelled "somewhat fruity." (Id.) When Neinburg realized what they were doing, he fled, driving erratically through the parking lot. (Id.) He later returned to pound on the Pizza Hut's front doors before going back home. (Id.)

Dispatched to the scene, Officer Cook learned while en route that Nienburg's vehicle's registration had been cancelled. (PSI, pp.76-81.) Officer Cook located

Nienburg and, with his lights flashing, followed Neinburg all the way into the driveway of Neinburg's trailer house. (Id.) Officer Cook shouted at Neinburg to, "Stop! Police!" but Nienburg attempted to flee the scene. (Id.) Officer Cook called for assistance and pursued Nienburg. (Id.) Officer Cook apprehended Nienburg as Neinburg attempted to jump over a gate. (Id.) Neinburg scuffled with Officer Cook, trying to escape until the officer threatened to "taze" him. (Id.) Nienburg admitted to Officer Cook that he attempted to flee because he had active warrants for his arrest. (Id.) Placed under arrest for driving under the influence, Neinburg was transported to the county jail for BAC testing where he blew a .247 and .235. (Id.)

Nienburg has a lengthy history of driving under the influence. He received his first DUI while in Washington in 1994 (PSI, p.8), he got another while in Oregon in January, 1996 (id.), a third while in Idaho in August, 1996 (PSI, p.9), a fourth in July, 2000 (id.), and a fifth the very next month (id.); his first felony DUI came in April, 2002 (PSI, p.10), and his second in July, 2002 (id.). This is Nienburg's third felony DUI and eighth DUI overall. Nienburg has had multiple opportunities to stop driving under the influence, yet consistently chooses to drive while intoxicated.

And Nienburg's criminal history, encompassing the past two decades, is not limited to DUI's. Additionally, Nienburg has been charged with many felonies and misdemeanors, including burglary, assault, trespass, failure to comply, domestic battery, battery, resisting arrest, failure to give notice of accident, possession of paraphernalia, driving without privileges, providing false information, failure to provide insurance, multiple probation and parole violations, and several failures to appear. (PSI, pp.8-11.) Nienburg's criminal history, especially his pattern of resisting arrest and

several failures to appear, displays an utter disregard for the law and an aversion to taking personal responsibility for his criminal actions.

Nienburg argues that the district court failed to properly consider all of the Toohill sentencing objectives of protection of society, deterrence, rehabilitation, and retribution when crafting its sentence. (Appellant's brief, pp.14-15.) This argument is flatly contradicted by the district court at the sentencing hearing. (See Tr., p.37, Ls.12-17, "in an exercise of discretion in sentencing, I have considered the Toohill factors.") Besides, "[t]he primary consideration [in crafting a reasonable sentence] is ... the good order and protection of society. All other factors are, and must be, subservient to that end." State v. Charboneau, 124 Idaho 497, 500, 861 P.2d 67, 70 (1993) (quoting State v. Moore, 78 Idaho 359, 363, 304 P.2d 1101, 1003 (1956), ellipses original). The sentence imposed by the district court answers the primary consideration of protecting society, while also addressing the other salient sentencing factors in this case. Neinburg has failed to establish an abuse of the district court's discretion.

Nienburg further argues that his history of alcohol abuse and currently professed willingness to undergo treatment should have been weighed as stronger mitigating factors. (Appellant's brief, pp.15-16.) This argument is unavailing. A history of alcohol abuse is not a mitigating factor in relation to a crime which requires not only the repeated abuse of alcohol, but *driving* while abusing alcohol. See Oliver, 144 Idaho at 727, 170 P.3d at 392. It is even less availing in Nienburg's case where, as noted by the district court, he already professed a willingness to change and undergo treatment, but did not do it. (Tr., p.38, Ls.14-25; see also PSI, pp.104, 121.

Nienburg also argues that the support of family and friends should result in a more lenient sentence. (Appellant's brief, p.16.) Nienburg's argument, however, does not change the fact that despite such support in the past, Nienburg still repeatedly chose to drink and drive. Because the support of family members has yet to protect the community from Nienburg's driving under the influence, Nienburg has failed to show that the district court was required to conclude that it somehow would this time.

The district court addressed the relevant factors to be considered at the sentencing hearing and exercised its discretion in imposing a reasonable sentence. Nienburg has failed to establish any abuse of the district court's sentencing discretion. The judgment of the district court should therefore be affirmed.

CONCLUSION

The State respectfully requests that this Court affirm the district court's order awarding restitution in the amount of $1,156.98, and affirm Nienburg's sentence.

DATED this 8th day of December, 2011.

RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of December 2011, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm