12-28-2011

State v. Nienburg Appellant's Reply Brief Dckt. 38656

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY 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

There are two issues which require a reply from Mr. Nienburg. First is whether there was an ambiguity in the plea agreement relating to restitution. This Court exercises free review over the question of whether such an ambiguity exists. The District Court did not find an ambiguity, and so made no findings of fact that this Court must defer to on this matter. And if an ambiguity does exist, the law requires that it must resolve in Mr. Nienburg's favor. As one exists regarding whether he agreed to pay for the damage to the police cruiser, the ambiguity resolves in his favor, meaning he did not agree to pay for that damage. And since those damages were not a result of his culpable action (Driving Under the Influence (*hereinafter,* DUI)), the damage to the police cruiser cannot be claimed as restitution under the statute, and the order of restitution should be modified accordingly.

Second is whether the District Court *sufficiently* considered the sentencing factors. The District Court's and State's continued reliance on immutable and unchangeable facts from his record to justify an extensive (and excessive) sentence is inappropriate and insufficiently considers the sentencing objectives in light of Mr. Nienburg's demonstrated ability to abide by the laws for the last eight years and participate in rehabilitative programs. These factors reveal that a sufficient examination of the sentencing objectives concludes that a more lenient sentence is justified in this case. Thus, Mr. Nienburg's sentence is excessive and constitutes an abuse of discretion.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Nienburg's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Whether there was an ambiguity in the restitution agreement as to which of the claimed amounts were properly included as restitution, and which should be resolved in Mr. Nienburg's favor, making the restitution order for the damage to the police cruiser improper?

2. Whether the District Court erred by not sufficiently considering the sentencing objectives by not sufficiently considering the mitigating factors – notably the fact that it had been eight years since Mr. Nienburg had been charged with a DUI?

ARGUMENT

I.

There Was An Ambiguity In The Restitution Agreement As To Which Of The Claimed Amounts Were Properly Included As Restitution, And Which Should Be Resolved In Mr. Nienburg's Favor, Making The Restitution Order For The Damage To The Police Cruiser Improper

A. Introduction

The applicable standard of review in this case is *de novo*, as the District Court did not find that there was an ambiguity in the restitution agreement, and therefore, made no findings of fact on this issue to which this Court is required to defer. Therefore, this Court reviews, *de novo*, whether ambiguity existed. If it does, the law requires that the ambiguity resolves in favor of the defendant. Therefore, if the plea agreement was ambiguous regarding which damages were to be included in the restitution agreement, it must resolve in Mr. Nienburg's favor. Ergo, because there was an ambiguity, there was no agreement, and the damages to the police cruiser may not be included in the restitution order. Furthermore, since those damages were not the result of Mr. Nienburg's culpable act (DUI), including the damage to the police cruiser as restitution is inappropriate as they are not within the scope of the statute.

B. The Applicable Standard Of Review In This Case Is *De Novo* Because The District Court Did Not Find An Ambiguity Existed

Plea agreements are governed by contract law standards. *State v. Gomez*, Docket No. 36545, ___ P.3d ___, (Ct. App. 2011) (citing *State v. Fuhriman*, 137 Idaho 741, 744 (Ct. App. 2002)). The determination of whether a contract is ambiguous is a question of law, and thus subject to *de novo* review. *Coward v. Hadley*, 150 Idaho 282, 286-87 (2010). If that instrument is ambiguous, then interpretation of that instrument is

a matter for the trier of fact. *Id.* at 286. However, in restitution cases, ambiguities must be resolved in favor of the defendant. *State v. Peterson*, 148 Idaho 593, 595 (2010); *see also Hughey v. U.S.*, 495 U.S. 411, 422 (1990) (applying this rule specifically to a restitution issue). Therefore, if an ambiguity is found, it is to be resolved in Mr. Nienburg's favor – specifically, that he did not agree to pay for the damage to the cruiser, regardless of the lower court's findings. This is because the District Court did not find an ambiguity.[1] Thus, it did not engage in a fact-finding inquiry or make findings of fact to which this Court must defer, even though the State tries to suggest it should. (*See* Resp. Br., pp.5-10.)

Therefore, the first step is to determine whether the agreement is ambiguous, which is a *de novo* review. *Coward*, 150 Idaho at 286-87. A contract is ambiguous when it is reasonably susceptible to more than one interpretation. *See Trinity Universal Ins. Co. v. Kirsling*, 139 Idaho 89, 92 (2003); *see also Best Hill Coalition v. Halko, LLC*, 144 Idaho 813, 817 (2007). In this case, the agreement is ambiguous because it is reasonably susceptible to more than one interpretation. (*See* Pet. Br., pp.9-13 and Resp. Br., pp.5-10.) Mr. Nienburg claims the agreement included only the damages which could properly be included as restitution under I.C. § 19-5304.[2] He asserts that

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[1] The Court's clear and repeated assertion was that "he agreed" to pay restitution and that the claimed amount was part of the agreement. (Tr., p.19, Ls.4-7; p.19, Ls.14-16; p.22, Ls.3-21; and p.23, L.20 - p.24, L.4.) Those constant assertions that the agreement included those damages reveal that the court did not consider that term of the agreement to be ambiguous.

[2] This statute allows the court to consider only "the amount of economic loss sustained by the victim as a result of the offense. . . ." I.C. § 19-5304 (7); *see also* I.C. § 19-5304 (1)-(2). If, as Mr. Nienburg claims, the damages are not such a result, there would need to be an agreement pursuant to § 19-5304(9) for those damages to be included in a restitution order.

the damage to the cruiser was not a result of his culpable act (DUI), and, as a result, not claimable under the statute. (*See* Pet. Br., pp.5-8.) Therefore, they were not included in his agreement with the State to pay restitution. Contrarily, the State asserts that by agreeing to "pay restitution," Mr. Nienburg is foreclosed from challenging the amount it claims, since those damages were discussed during the course of the plea negotiations.[3] (Resp. Br. pp.5-10.) Therefore, because it is susceptible to multiple reasonable interpretations, the agreement is ambiguous as to the damages for which Mr. Nienburg agreed to pay restitution. Since the agreement is ambiguous, it then becomes a matter for the trier of fact to determine what the ambiguous term was intended to mean. However, because the District Court did not find an ambiguity, it did not engage in an evidentiary hearing to determine how the ambiguous term should be interpreted. Therefore, there are no findings of fact to which this Court can properly defer in this regard. As a result, at the very least, this case should be remanded for an evidentiary hearing to determine what the ambiguous term was intended to include.

However, since the law clearly requires the arnbiguity to be resolved in favor of Mr. Nienburg, remanding this case for that purpose would be superfluous. The result will be that Mr. Nienburg did not agree to pay for the damage to the police cruiser because the ambiguity must be resolved in the defendant's favor. *See Peterson*, 148 Idaho at 595; *see also Hughey*, 495 U.S. at 422. Therefore, including the damages to the police cruiser as restitution based on I.C. § 19-5304 (9) is improper because there was no agreement that those damages should be included and the issue must be

[3] Mr. Nienburg does not concede that the State's interpretation is a correct statement of the law or of his plea agreement, but he does recognize that it may be a reasonable interpretation of the agreement.

resolved in Mr. Nienburg's favor. Therefore, this Court should vacate those damages from the restitution order, since they are not properly included as restitution under the statute. (*See* Pet. Br., pp.5-8.)

C. The District Court's Determination That Mr. Nienburg Agreed To Pay For The Damage To The Police Cruiser Is Clearly Erroneous In Light Of The Whole Record

Should this Court decide to review the findings made by the District Court in this matter, the ultimate conclusion is that those findings were clearly erroneous and constitute an abuse of the District Court's discretion. *See Herrera v. Estay*, 146 Idaho 674, 678-79 (2009) (holding a District Court's findings of fact will not be disturbed unless they are clearly erroneous). The State argues that, based on the court's recitation of the plea agreement, it is clear that Mr. Nienburg agreed to pay the entire restitution claimed by the State. (Resp. Br., p.6.) That, however, is disproved by the record. In this regard, the court stated, "And, in addition, he agreed that he would pay the restitution and it's in an amount of *approximately* or a little bit more than $1,156.98 and *he was free to argue for less*. . . ." (Tr., p.18, Ls.2-6 (emphasis added).)

There are two critical points in that statement that clearly demonstrate there was no agreement as to the amount of restitution. First is the word "approximately." That word means "nearly correct or exact." MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS, 38 (2007). Since, by definition, the court recognized that the stated amount was not correct, it is logically impossible for there to be an agreement that the stated amount was, in fact, correct. Since there was no agreement as to the correct amount, finding that there was an agreement as to the amount of restitution is clearly erroneous.

Second is the recognition that Mr. Nienburg was "free to argue for less." (Tr., p.18, Ls.5-6.) If Mr. Nienburg had agreed to pay the amount claimed by the State, there would be absolutely no reason for him to preserve the right to argue for less as part of the plea agreement. However, by preserving that right in the plea agreement, he clearly demonstrated his disagreement with that total claimed by the State. In fact, his attorney immediately exercised that right, which demonstrated Mr. Nienburg's *disagreement* with that total amount. Therefore, the finding that Mr. Nienburg agreed to the State's claimed amount of restitution is clearly erroneous.

Specifically, defense counsel argued that the $1,088.98 claimed for damages to the police cruiser should not be included in the restitution calculation. (Tr., p.18, Ls.16-24.) The court's question and counsel's answer in this regard are revealing and demonstrate that the court's finding of an agreement on this point is clearly erroneous. The court asked, "And is your client willing to pay that restitution amount?" (Tr., p.18, Ls. 16-17.) To which defense counsel responded, "Your Honor, as a general matter he is and it's certainly part of the plea agreement that he pay restitution. We would like the court to consider perhaps that the second figure listed on page two of the state's proposed order, $1,088.98 is not actually restitution."[4] (Tr., p.18, Ls.18-24.) This answer reveals that Mr. Nienburg was not opposed to the idea that he should pay restitution, but he was only agreeing to pay for damages that were properly claimable as restitution. Defense counsel also argued that the reason it was not restitution is that the damages were not the direct result of Mr. Nienburg's culpable act (DUI) pursuant to the

[4] It is unclear whether the damage to the uniform is even claimable under the statute, but as that amount was not disputed below, it is not challenged on appeal.

restitution statute (§ 19-5304). (Tr., p.21, Ls.11-15.) This argument makes no sense if Mr. Nienburg had agreed to pay the entire amount claimed by the State. However, it makes perfect sense if he has only agreed to the principle of paying restitution, but not the total amount. Ergo, the determination that Mr. Nienburg agreed to pay the entire amount claimed by the state is clearly erroneous.[5]

The State also does not refute the policy rationales for rejecting its assertion that agreeing in principle to pay restitution forecloses an argument as to properly-included damages and total amount.[6] (*See* Pet. Br., pp.12-13.) Those rationales are sufficiently discussed in Section I, C of Appellant's Brief, and need not be reiterated here, but are incorporated herein by reference thereto.

D. The Damages To The Police Cruiser Are Not Claimable Under I.C. § 19-5304 (1), And Therefore Cannot Be Included As Restitution In Absence Of An Agreement By The Parties

In absence of an agreement, the damages must be the direct result of Mr. Nienburg's culpable act (DUI) in order to be properly claimed as restitution. I.C. § 19-5304 (1)[7]. (*See* Pet. Br., Section I, B, 1.) The State attempts to counter this

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[5] In actuality, the agreement was only that Mr. Nienburg pay restitution for damages that were properly claimable under I.C. § 19-5304, but not for the damages to the police cruiser that were not claimable as restitution.

[6] For an example of the State's assertion (embodied by a statement from the District Court) which reveals the abusive result of its position, see Respondent's Brief at page 7. Under this rationale, if a defendant agrees to pay restitution and thus promotes a plea resolution in this case, he is foreclosed from challenging any damages that the State includes in its claims.

[7] The Court also attempts to order this restitution pursuant to I.C. § 18-8003(2). (R., p.67.) However, that is inappropriate, as that section only permits restitution orders for "reasonable costs incurred by law enforcement agencies to withdraw blood samples, perform laboratory analysis, transport and preserve evidence, preserve evidentiary test results and for testimony relating to the analysis in judicial proceedings, including travel costs associated with the testimony." I.C. § 18-8003(2). Damage to a police cruiser is not covered by this provision.

position by citing to archaic, and sometimes non-jurisdictional, tort law.[8] However, modern Idaho restitution law recognizes that not *every* expenditure may be claimed under the restitution statute. *State v. Card*, 146 Idaho 111, 114 (Ct. App. 2008) (emphasis from original); *see also State v. Gonzales*, 144 Idaho 775, 776 (Ct. App. 2007). Rather, it limits claims from what might be otherwise claimed in a civil proceeding (i.e. in a tort claim) to only those damages that "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).

The damage to the police cruiser was not caused by Mr. Nienburg's criminal conduct – the culpable act for which he was found guilty – which was DUI. (*See* Pet. Br., pp.5-8.) As the court articulated, it was the result of Mr. Nienburg "running from the scene and leaving the door open." (Tr., p.21, Ls.19-20.) Those actions, however, are not part of driving a vehicle while intoxicated, nor a result of it. Mr. Nienburg was found guilty of an enhanced DUI. (R., p.69.) DUI only requires a showing that the defendant was "intoxicated" (by one of several methods), that he was in actual physical control of a

[8] The State relies entirely on the 1909 Idaho case of *McLain v. Lewiston Interstate Fair & Racing Ass'n* and the 1898 Vermont case of *Isham v. Dow's Estate* in this portion of its argument. (*See* Resp. Br., pp.10-11.) In any event, the fact that Mr. Nienburg was the dog's owner does not subject him to *per se* liability for his animal's actions in tort. *See e.g. Adamson v. Blanchard*, 133 Idaho 602, 608 (1999) (where the animal owner was able to establish he was not liable for his animal's damage to a vehicle); *see also Griffith v. Schmidt*, 110 Idaho 235, 239 (1985) (where the Supreme Court cites several cases in which an animal owner may avoid liability for damages caused by his animals); *Stanberry v. Gem County*, 90 Idaho 222, 227 (1965) (implying that the animal's owner would not be liable for damage done to a car by that animal if the driver was contributorily negligent).

vehicle, and that the vehicle is on a public roadway or private property open to the public. I.C. § 18-8004(1)(a). The persistent violator enhancement only requires a showing that this was the defendant's third commission of a felony. I.C. § 19-2514. As neither exiting the vehicle nor leaving the scene are elements of these offenses, the damage resulting from such actions cannot be said to be caused as a result of Mr. Nienburg's *criminal conduct*. Therefore, it is not the result of a culpable action for the purpose of determining restitution. *See State v. Shafer*, 144 Idaho 370, 372 (Ct. App. 2007) (citing I.C. § 19-5304 (1)(e)); *see also State v. Lampien*, 148 Idaho 367, 374 (2007). Ergo, without an agreement by the parties that these damages will be included in the restitution agreement, they cannot be claimed under the modern *restitution* statute, regardless of whether Mr. Nienburg would be liable for those damages under tort law, antiquated or modern.

Therefore, since the damage to the police cruiser cannot be claimed under §19-5304, this Court should vacate that portion of the restitution order.

II.

The District Court Erred By Not Sufficiently Considering The Sentencing Objectives By Not Sufficiently Considering The Mitigating Factors – Notably The Fact That It Had Been Eight Years Since Mr. Nienburg Had Been Charged With A DUI

A. Introduction

The question under review as to an excessive sentence is whether the District Court *sufficiently* considered the sentencing objectives. In this case, by failing to sufficiently consider the mitigating factors – most notably, Mr. Nienburg's efforts to not drink and drive, which had been successful for the last eight years – the District Court

did not *sufficiently* consider all the sentencing objectives. Rather, both the court and the State continue to point to the immutable and unchangeable history established in Mr. Nienburg's record as a justification to impose an extensive (and excessive) sentence. Such an approach is inappropriate and constitutes an abuse of discretion. This Court should remedy that abuse.

B. The Continued Reliance On Historical And Unchanging Facts And The Failure To Sufficiently Consider Evidence Demonstrating A Departure From Those Facts Results In An Excessive Sentence And Abuse Of Discretion In This Case

When imposing a sentence, the District Court must sufficiently consider the governing criteria of sentencing, or else it abuses its discretion. *State v. Jackson*, 130 Idaho 293, 294 (1997) (citation omitted). Those criteria are the four sentencing objectives set forth in *State v. Toohill*, 103 Idaho 565. *State v. Charboneau*, 124 Idaho 497, 500 (1993). In order to sufficiently consider those objectives, the court needs to sufficiently consider mitigating factors that may be present in a particular case. *See, e.g., State v. Knighton*, 143 Idaho 318, 320 (2006). Included in those mitigating factors are the defendant's character and amenability to treatment. *See, e.g., State v. Shideler*, 103 Idaho 593, 595 (1982); *see also Cook v. State*, 145 Idaho 482, 489-90 (Ct. App. 2008).

The State appears to contend that any consideration by the court is sufficient, based on the court's assertion that it considered all four sentencing objectives. (Resp. Br., p.14 (citing Tr., p.37, Ls.12-17).) While the court may have "considered" them, in that it took them into account, it does not mean that its consideration was *sufficient*. A trial court may consider a factor, but not do so sufficiently, and its decision will still constitute an abuse of discretion. *See, e.g., State v. Nice*, 103 Idaho 89, 91 (1982)

(finding that the trial court considered and rejected rehabilitative options, yet still failed to sufficiently consider the defendant's alcohol problem, record, or character, and so had imposed a sentence in an abuse of its discretion). Therefore, just because the court considered all four objectives does not mean that it *sufficiently* considered them.

In this case, the District Court, as well as the State in its response, fails to sufficiently consider several mitigating factors and instead relies on Mr. Nienburg's immutable and unchangeable criminal record to justify an extensive (and excessive) unified sentence of fifteen years, with four years fixed. (Tr., pp.37-46; Resp. Br. pp.13-14.) For example, the State argues that his familial and community support should not be considered in mitigation because it has not helped increase the protection to society, as Mr. Nienburg has continued to drink and drive. (Resp. Br., p.15.) This argument, which focuses on his history of DUI in combination with this event, ignores the last eight years, in which Mr. Nienburg has demonstrated an ability to avoid drinking and driving.[9] It applies similar rationale in its responses to the other mitigating factors present in this case. (*See* Resp. Br., pp.13-15.) Continuing to rely on these immutable and unchangeable facts in light of such rehabilitation, which demonstrates a decrease in the risk the defendant poses to society, constitutes an insufficient consideration of the sentencing objectives. *See, e.g., Cook*, 145 Idaho at 489 (citing *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988)). This Court recognized in *Eubank* that sentences are

[9] The State also argues that Mr. Nienburg has other, non-driving related offenses on his record, which should be considered. (Resp. Br., pp.13-14.) Again, its argument fails to recognize that no such offenses have been charged, much less successfully prosecuted, for nearly a decade. (PSI, pp.5-7.) This further demonstrates its reliance on only immutable and unchangeable facts and ignorance of the rehabilitative efforts Mr. Nienburg has made over the last decade.

to be crafted so that they do not force the prison system to continue detaining a person once rehabilitation or age has decreased the risk of recidivism. *Eubank*, 114 Idaho at 639. This Court recently reaffirmed that principle in *Cook*. *Cook*, 145 Idaho at 489.

Mr. Nienburg demonstrated that he can be rehabilitated. He has done all he can to get continuing treatment, even though he is indigent. (*See, e.g.,* Tr., p.34, Ls.12-17 (where defense counsel explained to the court Mr. Nienburg's efforts to secure funds so he could attend outpatient treatment).) Beyond that, his actions in general demonstrate his dedication to avoid driving when he has been drinking, which is the action the State correctly identifies as the one to be deterred. (Resp. Br., p.14 (citing *State v. Oliver*, 144 Idaho 722, 727 (2007)).) While Mr. Nienburg does have a history of DUIs, he has not received a new DUI charge since 2002. (PSI, pp.10-11.) This demonstrates a significant change, which he was able to maintain for nearly a decade, and which has a major impact on how best to protect society going forward from this incident. Mr. Nienburg has demonstrated an ability to comply with the law, but now needs to focus specifically on maintaining that fundamental change in his life so as to avoid falling back into his old ways. While similar to his initial issues, these new issues are different enough that new goals in treatment will be useful to him, and thus a more lenient sentence (one that provides the opportunity for that treatment now is appropriate) so as to offer the best overall protection to society. Furthermore, timing of rehabilitation is an important aspect that the court needs to consider in this respect. *See State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971); *see also Nice*, 103 Idaho at 91. This Court has continued to recognize the principle that rehabilitation needs to be both timely

and effective. *See e.g. Cook*, 145 Idaho at 489; *see also Eubank*, 114 Idaho at 639. However, based on the policies of the Department of Corrections, Mr. Nienburg is unlikely to receive such treatment until he begins the pre-parole process, some three years into his sentence.

The District Court's and State's rationale – that his past history justifies extensive (and excessive) sentences, regardless of rehabilitative efforts – is impermissible. Were it permitted to stand, it would establish a precedent where, regardless of an individual's efforts to rehabilitate himself, he will always be subject to extensive (and excessive) sentences, should he lose control of his situation at any point in the future. This approach actually detracts from the sentencing objectives. If no improvement will ever separate the individual from the immutable and unchangeable facts in his past, there will be no reason for him to engage in rehabilitation. That means more people will simply be required to serve time in prison and be released without effective treatment, resulting in a decrease in prevention of recidivism. The ultimate result is that society is less protected. The reason the court's and State's approach is impermissible has been best phrased by the California Supreme Court, as it considered this same concern in a parole context:

> under the circumstances of the present case—in which the record is replete with evidence establishing petitioner's rehabilitation, insight, remorse, and psychological health, and devoid of any evidence supporting a finding that she continues to pose a threat to public safety—petitioner's [rights] were violated by the Governor's reliance upon the immutable and unchangeable circumstances of her commitment offense. . . .

In re Lawrence, 44 Cal.4th 1181, 1227 (Cal. 2008). Following that same principle, the Idaho Supreme Court and this Court have continuously recognized that failing to

sufficiently consider the evidence in the record, regardless of the offense, constitutes grounds to vacate a sentence and impose a more lenient one. *See, e.g.*, *Owen*, 73 Idaho at 420 (First Degree Murder); *State v. Shideler*, 103 Idaho 593, 595 (1982) (Armed Robbery); *Nice*, 103 Idaho at 91 (Lewd and Lascivious Conduct with a Child under Sixteen); *Cook*, 145 Idaho at 489-90 (Grand Theft by Deception); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991) (Sexual Abuse of A Child Under Sixteen); *State v. Carrasco*, 114 Idaho 348, 354-55 (Ct. App. 1988), *rev'd on other grounds*, 117 Idaho 295 (1990) (Unlawful Delivery of Cocaine and Heroin); *Eubank*, 114 Idaho at 639 (First Degree Burglary and Sexual Abuse of a Child).

The District Court failed to *sufficiently* consider all the mitigating factors present in this case, and in so doing, failed to *sufficiently* consider all the sentencing objectives. Instead, it (and the State) relied on Mr. Nienburg's immutable and unchangeable criminal history to justify its extensive (and excessive) sentence. Therefore, the sentence imposed was excessive and constitutes and abuse of discretion.

CONCLUSION

Because the plea agreement is ambiguous as to which damages would be properly included as restitution, there was no agreement to pay for the damage to the police cruiser. Those damages were not caused by Mr. Nienburg's culpable act (DUI). As such, Mr. Nienburg respectfully requests this Court vacate the restitution order in that regard, or alternatively, remand this case for a new restitution hearing.

Because the District Court did not sufficiently consider the sentencing objectives and the mitigating factors, it imposed an excessive sentence. As such, Mr. Nienburg respectfully requests this Court reduce his sentence as it deems appropriate, or alternatively, remand this case for new sentencing.

DATED this 28th day of December, 2011.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of December, 2011, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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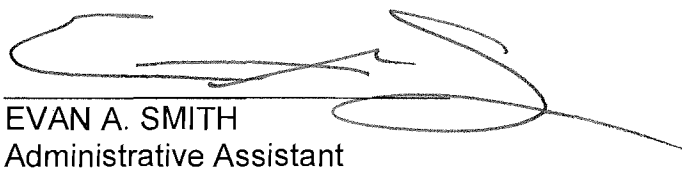

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