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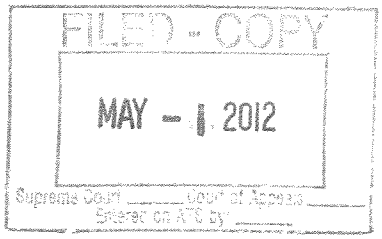
IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff/Respondent,	)	
	)	S.Ct. No. 39450
vs.	)	
	)	
DONALD G. MORRIS,	)	
	)	
Defendant/Appellant.	)	
	)	



OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fifth
Judicial District of the State of Idaho
In and For the County of Twin Falls

HONORABLE G. RICHARD BEVAN
Presiding Judge

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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from an excessive sentence imposed following Donald Morris's guilty pleas to 15 counts of possession of sexually exploitive material in violation of I.C. § 18-1507A. R 172-175.

Relief should be granted because the district court relied on irrelevant polygraph examination results and concerns about Mr. Morris's housing situation in determining not to follow the psychosexual evaluation's recommendation for community based treatment.

B. Procedural History and Statement of Facts

According to the PSI (an exhibit on appeal), in November and December of 2010, the Twin Falls police were given two computers that had previously belonged to Mr. Morris. Both were found to have contained child pornography. PSI p. 2. Mr. Morris met voluntarily with the police and told them that he had downloaded and possessed child pornography on the computers. Affidavit in Support of Complaint and Warrant of Arrest p. 2 attached as exhibit to PSI.

As a result, Mr. Morris was charged with 40 counts of possession of exploitive material. R 66-81. An agreement was reached and Mr. Morris plead guilty to Counts 1-15 and the remaining counts were dismissed. R 108.

In preparation for sentencing, a PSI and psychosexual evaluation were prepared. R 109-111. From these documents, the court learned the following.

Mr. Morris is a 44-year-old honorably discharged Gulf War veteran. PSI p. 1, 8. While he had prior convictions, he had never been charged with or convicted of any sort of sex offense. PSI p. 3-5.

Although Mr. Morris has dyslexia and can only read at a 7th grade level, he earned his GED as well as an associate degree in diesel mechanics from the College of Southern Idaho. At the time of sentencing, he was continuing his education, enrolled as a full time student in community college in Casper, Wyoming studying machining. Psychosexual Evaluation p. 2, attached as exhibit to PSI.

Prior to sentencing, Mr. Morris checked himself into inpatient treatment at the Wyoming Behavioral Institute. In fact, his inpatient status caused him to miss the initial sentencing hearing. Tr. p. 37, ln. 1 - p. 38, ln. 2.

Dr. Prypchan, his inpatient psychiatrist, diagnosed Mr. Morris with major depressive disorder without psychotic features, recurrent and moderate; PTSD, chronic type; panic disorder without agoraphobia; and having been a physical abuse victim and combat victim. Discharge orders, attached as exhibit to PSI.

Mr. Morris got a very good psychosexual evaluation. His scores on tests of presentation style showed a profile that "tends to be found in individuals who are aware of their problems and willing to communicate honestly with the evaluator regarding historical information." His Static 99 risk assessment put him at a 2 on a scale of 0 to 12 which corresponds with a medium-low risk level. His RRASOR score was 0 on a scale of 0 to 5 which corresponds with a low risk level. And, the Sexual Violence Risk-20 assessment showed him to have a low risk of sexual violence. Altogether, Mr. Morris was assessed to have a low-moderate risk to re-offend sexually. Psychosexual Evaluation p. 2, 6-7, attached as exhibit to PSI.

The evaluation noted that Mr. Morris expressed significant regret and shame at having possessed child pornography and that he recognized the need for intervention. The evaluation

concluded that even though Mr. Morris had violated the rules of society in the past, he was amenable to treatment in a community based setting. Psychosexual Evaluation p. 7, attached as exhibit to PSI.

As part of the psychosexual evaluation, Mr. Morris disclosed his prior sexual experiences and took a polygraph examination. Mr. Morris said that he had become sexually active at age 15 or 16 with a 32-year-old woman. He also reported that he had been sexually active with a girl his own age when he was approximately age 18. Psychosexual Evaluation p. 5-6, attached as exhibit to PSI. In the polygraph, Mr. Morris was asked two questions: 1) "Have you ever had sexual contact with anyone under 18 years of age?" and 2) "Regarding the issue of sexual contact with a minor, have you ever had sexual contact with anyone under 18 years of age?" Mr. Morris answered "No" to both questions which the examiner said "showed strong and consistent unresolved responses to the aforementioned relevant questions." Polygraph report, p. 3-5, attached as exhibit to PSI.

After reviewing everything, the PSI investigator recommended a rider during which there would be further opportunity to evaluate and assess Mr. Morris's amenability to community based treatment. PSI p. 13. The state asked for 20 years with 10 fixed. Tr. p. 36, ln. 15-22. And, defense counsel asked for probation so that Mr. Morris could complete the degree he was obtaining with the help of grants and scholarships in Wyoming while doing community based treatment. Tr. p. 40, ln. 14 - p. 42, ln. 24.

The court rejected all of these suggestions. Instead, it grouped the offenses into three groups of five and gave a sentence on each offense of eight years with one fixed and ordered each group of five to run concurrently with the offenses within the group and consecutively to the

other groups for an aggregate term of 24 years with three fixed. Tr. p. 48, ln. 22-p. 49, ln. 5.

In explaining the basis for this sentence, the court placed great emphasis on the results of the polygraph. The court stated:

> I also have reviewed 19-2521 of the Idaho Code, which requires me to consider your history, the background, your risk, and amenability to treatment. I, too, am concerned about [the psychosexual evaluator's] report only from the standpoint that the polygraph has not been passed, and there are significant areas of deception regarding your prior history with minor victims yourself. There's been nothing to clarify that, nothing to say what went on or what is the reason for that significant showing of deception; but to me that, coupled with what happened here, is a significant risk factor that I take into account. The polygrapher's statement was that your answer showed strong inconsistence, unresolved responses. And for a judge like me considering cases of the magnitude, unresolved responses heighten the security risk that I think folks like you pose for our community. Whether that's a risk that requires long-term incarceration, I don't believe so; but I do believe that the risk, albeit [the psychosexual evaluator] says it's mild to moderate, I believe it's more, more significant.

Tr. p. 46, ln. 18 - p. 47, ln. 17.

The court also took into consideration that Mr. Morris had been living in his car for a time between entering his plea and sentencing in rejecting the idea of community based treatment. (The court did not mention that Mr. Morris was now living in a men's shelter and was in process of securing his own apartment. PSI p. 7.) The court stated:

> Mr. Morris, I feel that, based upon this type of behavior and the nature and conduct of yourself, your history as a multiple time felon, that probation certainly is not in the cards today, sir. In fact, I am going to order a sentence of imprisonment; and again, I do so because of the risk factors that I see here. I think probation would be difficult at best to accomplish with someone who's been, not had a standard residence.

Tr. p. 47, ln. 25 - p. 48, ln. 9.

Defense counsel filed a Rule 35 motion for a reduction of the sentence; however, he failed to include any argument or evidence in support of the motion and it was denied without a

hearing. R 157-163.

This appeal timely follows. R 172-175.

III. ISSUE PRESENTED ON APPEAL

Did the district court abuse its discretion and violate the Fourteenth Amendment in imposing a sentence of imprisonment instead of probation with community based treatment based upon its fundamental misunderstanding of the relevancy of the polygraph results and Mr. Morris's housing situation?

IV. ARGUMENT

The Sentence of Imprisonment is Excessive, an Abuse of Discretion and Unconstitutional

In rejecting the recommendations for probation and community based treatment or in the alternative a rider to further evaluate the imposition of a sentence of probation with community based treatment, the district court relied on two factors: 1) that Mr. Morris had failed the polygraph; and 2) that it believed probation would be difficult to accomplish with someone who had recently not had a "standard residence." Reliance on these factors was, as will be explained, an abuse of discretion and unconstitutional and as a result, an excessive sentence was imposed. Mr. Morris is asking this Court to vacate and reduce the sentence.

Appellate review of a sentence is based upon an abuse of discretion standard. *State v. Justice,* 152 Idaho 48, 52, 266 P.3d 1153, 1157 (Ct. App. 2011).

> Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown,* 121 Idaho 386, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice,* 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). 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). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, [the appellate court] conduct[s] an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke,* 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, [the court] consider[s] the defendant's entire sentence. *State v. Oliver,* 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). In order to prevail on a claim that a sentence represents an abuse of discretion, the defendant must show in light of the criteria, [that the] sentence was excessive under any reasonable view of the facts. *State v. Charboneau,* 124 Idaho 497, 499, 861 P.2d 67, 69 (1993); *State v. Small,* 107 Idaho 504, 505, 690 P.2d 1336, 1337 (1984). Where reasonable minds might differ, the discretion vested in the trial court will be respected, and [the appellate] court will not supplant the views of the trial court with its own. *Small,* 107 Idaho at 505, 690 P.2d at 1337. In order to prevail, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment: (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. *State v. Stover,* 140 Idaho 927, 933, 104 P.3d 969, 975 (2005).

Justice, 152 Idaho at 54, 266 P.3d at 1159.

As discussed by the Court of Appeals in *Justice,* appellate sentence review serves four objectives: (1) to correct a sentence which is excessive in length, having regard for the nature of the offense, the character of the offender, and the protection of the public interest; (2) to facilitate the rehabilitation of the offender by affording an opportunity to assert grievances regarding the sentence; (3) to promote respect for the law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and (4) to promote the development and application of criteria for sentencing which are both rational and just. *Justice, supra,* citing *State v. Wolfe,* 99 Idaho 382, 384, 682 P.2d 728, 730 (1978), quoting ABA Standards Relating to Appellate Review of Sentences at 7 (Approved Draft 1968).

In this case, an abuse of discretion and a constitutional violation occurred.

In determining to impose a period of incarceration instead of the recommended probation with community based treatment, the district court looked to the fact that Mr. Morris had not passed the polygraph. However, while Mr. Morris's polygraph did show "strong and consistent unresolved responses" to two questions asked, the questions were so obviously flawed that the polygraph results did not provide any relevant information, and reliance on the polygraph as a reason to order imprisonment was an abuse of discretion.

The questions asked of Mr. Morris in the polygraph were:

1. Have you ever had sexual contact with anyone under 18 years of age?

2. Regarding the issue of sexual contact with a minor, have you ever had sexual contact with anyone under 18 years of age?

Mr. Morris's answers of "no" to these questions were deemed deceptive and may well have been so. But, the questions were irrelevant to the question of whether he had ever had illegal sexual contact with a minor. Mr. Morris had noted in his sexual history for the psychosexual evaluation that he had sexual contact with a girl his own age when he was approximately 18 years old. Presumably, the girl involved could have been 17 or 18 or 19 - all would fit the description of approximately18 years of age. And, if the girl was 17, then in answering "no" to the polygraph questions, Mr. Morris was being deceptive. Yet, sexual contact between two people who are approximately 18 years old is not a crime. See, I.C. §§ 18-1508A, 18-6101. Furthermore, there may have been other girls age 16 to 18 with whom Mr. Morris had sexual contact when he was age 16 to19. Almost all boys have some sort of sexual contact with age peers during those years and there is nothing about Mr. Morris to indicate that he would be

outside the majority in that respect. But, that sort of activity is not necessarily illegal and does not show Mr. Morris to be a present danger to children.

Had the polygraph asked a relevant question, for example whether Mr. Morris had ever had illegal sexual contact with a child, then the court would have been acting reasonably in considering any deceptive answer in assessing whether it was necessary to incarcerate Mr. Morris instead of imposing a sentence of probation. But, given the question asked, reliance upon it to impose a sentence of incarceration was an abuse of discretion. *See State v. Izaguirre,* 145 Idaho 820, 825, 186 P.3d 676, 681 (Ct. App. 2008), vacating a sentence where it was based upon unsound reasoning.

Likewise, the court abused its discretion in determining that incarceration was necessary because Mr. Morris had been homeless for a time between his plea and sentencing. The court's concern was that Mr. Morris would have difficulty completing probation because of his prior living situation. However, in making this determination, the court failed to note that Mr. Morris was no longer homeless - he had moved into a men's shelter and was in the process of securing an apartment. And, the court failed to consider that even if he had remained homeless, Mr. Morris, who was clearly aware of his problems and had already demonstrated an intent to seek help for them, both through his interactions with the psychosexual evaluator and in checking himself into an inpatient treatment facility, was the sort of person who could comply with community based treatment requirements regardless of his housing situation. Indeed, even though he was homeless for a period of time and lived in a men's shelter, Mr. Morris had enrolled in and was attending college full time. A person who could manage college despite housing challenges could certainly manage community based treatment.

Moreover, the court's concerns regarding Mr. Morris's housing situation could have been resolved by sentencing Mr. Morris to a period of retained jurisdiction. One of the matters addressed during the period of retained jurisdiction could have been determination of a stable housing situation. *See Bearden v. Georgia,* 461 U.S. 660, 672-3, 103 S.Ct. 2064, 2073 (1983), holding that only if alternative measure are not adequate to meet the state's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay fines and restitution because to hold otherwise would be contrary to the fundamental fairness required by the Fourteenth Amendment. As in *Bearden,* the decision to imprison Mr. Morris based upon his previous homelessness without consideration of alternatives violates the Fourteenth Amendment's right to fundamental fairness.

Requiring imprisonment because of Mr. Morris's previous homelessness was not sound reasoning, was unconstitutional and requires vacation of the sentence. *Izaguirre, supra, Bearden, supra.*

The district court abused its discretion in sentencing Mr. Morris to incarceration instead of probation when it based its decision on an irrelevant polygraph and an unreasonable analysis of the effect of Mr. Morris's housing situation upon his likely success on probation. *Justice, supra.*

Because the sentence was excessive, an abuse of discretion, and unconstitutional, Mr. Morris asks this Court to vacate and modify it. Mr. Morris asks either that the sentence be modified to impose a term of retained jurisdiction which will allow a further analysis of his likelihood of success on probation, or, more appropriately, to modify the sentence to a term of probation with the requirement of community based treatment.

V. CONCLUSION

For the reasons set forth above, Mr. Morris asks that this Court vacate and modify the sentence imposed upon him to either a term of retained jurisdiction or a term of probation.

Respectfully submitted this 1st day of May, 2012.

Deborah Whipple
Attorney for Donald Morris

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 16th day of May, 2012, caused two true and correct copies of the foregoing document to be placed in the United States mail, postage prepaid, addressed to:

Idaho Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Deborah Whipple