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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	No. 40941
Plaintiff-Respondent,)	
)	Bingham Co. Case No.
vs.)	CR-2012-6867
)	
KENNY CARL STRUHS,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

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STATEMENT OF THE CASE

Nature Of The Case

Kenny Carl Struhs appeals from the judgment of conviction and restitution order entered upon his guilty plea to vehicular manslaughter. Struhs claims the district court erred in awarding restitution for insurance premiums paid by Struh's victim's widow prior to sentencing and that the district court abused its sentencing discretion.

Statement Of Facts And Course Of Proceedings

Brent Hansen, a young father of five children, was taking his six-year-old daughter on a motorcycle ride one day when Struhs, who was driving with a blood alcohol content of .157, failed to stop at an intersection, causing Brent's motorcycle to collide with the side of Struhs' Blazer. (R., pp.15, 22; Sent. Tr., p.11, Ls.15-16.) Brent's motorcycle caught on fire and Brent suffered major trauma to his head. (R., p.22.) Brent died that same day. (R., p.23.) Fortunately, Brent's daughter survived but was understandably "very traumatized by what she saw and experienced." (Sent. Tr., p.13, Ls.18-22; see R., p.22.)

Although Struhs was aware of the collision, he fled the scene, driving in an erratic manner, nearly hitting some children who were playing outside and a mother who was putting her four-year-old son inside her car. (R., pp.15, 23, 27.) Struhs wrecked his car into a chain link fence shortly thereafter. (R., p.15.) When law enforcement confronted Struhs, he was clearly under the influence and "stated he knew he was too drunk to drive." (R., p.15.) Struhs self-reported

drinking anywhere between eight and 15 beers before getting behind the wheel. (R., pp.15-16.)

The state charged Struhs with vehicular manslaughter and felony leaving the scene of an accident. (R., pp.112-113.) Pursuant to a plea agreement, Struhs pled guilty to vehicular manslaughter and the state agreed to dismiss the leaving the scene charge; there was no agreement as to sentencing. (Change of Plea Tr., p.4, Ls.7-11, p.16, Ls.21-23; R., pp.136-143.) The court imposed a unified 15-year sentence with 10 years fixed. (R., pp.190-192.) The court also ordered Struhs to pay restitution, including \$761.85 for three months worth of insurance premiums paid by Brent's widow, Emilie. (R., pp.207-214.)

Struhs filed a timely notice of appeal from the judgment of conviction. (R., pp.197-199.)

ISSUES

Struhs states the issues on appeal as:

1. Did the district court abuse its discretion by ordering Mr. Struhs to pay the cost of medical insurance purchased by the victim's wife after the victim's death, as it was not a direct consequence of Mr. Struhs' criminal conduct?
2. Did the district court abuse its discretion by imposing upon Mr. Struhs a unified sentence of 15 years, with 10 years fixed, stemming from his guilty plea to vehicular manslaughter, in light of the mitigating factors that exist in this case?

(Appellant's Brief, p.3.)

The state rephrases the issues as:

1. Does the Idaho Supreme Court's recent opinion in State v. Straub, 153 Idaho 882, 292 P.3d 273 (2013), preclude an award of restitution for insurance premiums, equal to the amount previously paid by the decedent's employer, incurred between the date of the offense and the date of sentencing?
2. Has Struhs failed to show a unified 15-year sentence with 10 years fixed for vehicular manslaughter is an abuse of discretion based on the nature of the offense and the character of the offender?

ARGUMENT

I.

Struhs Has Failed To Show The District Court Abused Its Discretion In Awarding Restitution For The Insurance Premiums Paid By The Victim's Widow

A. Introduction

Following her husband's death, Emilie Hansen lost her health insurance coverage, which was provided through her husband's employer. (Rest. Hrg. Tr., p.11, Ls.12-16.) Emilie therefore had to obtain new insurance coverage and the district court awarded her \$761.85 in restitution for three months worth of health insurance premiums paid between the date of the offense and the date of sentencing.¹ Struhs asserts the district court abused its discretion by awarding restitution for these premiums, claiming "[u]nder Idaho law, medical insurance purchased after the victim's death is not considered a direct consequence of the defendant's criminal conduct and, thus, is not awardable under I.C. § 19-5304." (Appellant's Brief, p.4.) A review of the authority upon which Struhs relies shows the Idaho Supreme Court has not squarely addressed whether a court may properly award restitution for insurance premiums paid between the date of the offense and the date of sentencing. The district court correctly concluded such an award was appropriate.

B. Standard Of Review

The decision whether to order restitution and in what amount is committed to the trial court's discretion. State v. Hill, 154 Idaho 206, 211, 296 P.3d 412,

¹ The district court also awarded restitution for other losses, which Struhs does not challenge on appeal. (R., pp.207-214; Appellant's Brief, p.4 n.4.)

417 (Ct. App. 2013). The trial court's factual findings in relation to restitution will not be disturbed if supported by substantial evidence. State v. Straub, 153 Idaho 882, 885, 292 P.3d 273, 276 (2013).

C. The Restitution Award For Three Months Of Insurance Premiums Was Appropriate

Idaho Code § 19-5304(2) authorizes a 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." For purposes of Idaho's restitution statute, a "victim" includes any "person or entity, who suffers economic loss or injury as the result of the defendant's criminal conduct and shall also include the immediate family of . . . the actual victim in homicide cases." I.C. § 19-5304(1)(e)(i). "Manslaughter is included in the category of homicide cases." Straub, 153 Idaho at 888, 292 P.3d at 279 (citing State v. Ellington, 151 Idaho 53, 65, 253 P.3d 727, 739 (2011)). "Economic loss" includes, but is not limited to, "lost wages, and direct out-of-pocket losses or expenses, such as medical expenses resulting from the criminal conduct." I.C. § 19-5304(1)(a).

Included in the state's motion for restitution was \$761.85 for insurance premiums for three months. (R., pp.167, 180.) At the restitution hearing, the prosecutor explained that Emilie had to obtain health insurance after her husband died because the insurance was previously being provided through Brent's employer. (Rest. Hrg. Tr., p.11, Ls.12-16.) The state requested premiums for December 2012 and January-February 2013. (Rest. Hrg. Tr., p.11, Ls.19-20.) This timeframe begins after the vehicular manslaughter, which

occurred on August 2, 2012 (R., p.15), and before the sentencing hearing, which occurred on March 12, 2013 (R., p.188). The court awarded Emilie the requested amount for insurance premiums, concluding it was an “out-of-pocket expense [that] directly resulted from Struhs’ criminal conduct.” (R., p.213.)

On appeal, Struhs contends the district court’s restitution award for insurance premiums is precluded by the Idaho Supreme Court’s recent opinion in Straub, supra. (Appellant’s Brief, pp.5.) Straub may, however, be distinguished.

Straub pled guilty to vehicular manslaughter for the death of David Webster. Straub, 153 Idaho at 884, 292 P.3d at 275. The district court awarded restitution for several categories of expenses including “expenses in securing three years of medical insurance coverage; coverage that was previously provided through the Decedent’s employer.” Id. at 887, 292 P.3d at 278. That portion of the restitution award included “twelve months of medical insurance premiums paid to date, and \$30,697.20 for the balance of already purchased future medical insurance premiums.” Id. at 887-888, 292 P.3d at 278-279. Straub appealed the “award of future medical insurance premiums.” Id. at 890, 292 P.3d at 281. The Idaho Supreme Court concluded such losses were not compensable as restitution, stating:

On the award of future medical insurance premiums, Straub specifically disputes the \$30,697.20 for “anticipate insurance premiums.” According to the district court, these future premiums are not based on speculation. The premiums are for continuation of the COBRA health coverage program that the Websters’ purchased after the accident but before the restitution hearing. However, there is a distinction between medical expenses and medical insurance. Medical expenses are expressly included in the definition for economic loss in I.C. § 19-5304(1)(a) if they are a direct result of the criminal conduct. In contrast, the acquisition of

medical insurance does not directly correlate as a direct consequence of the criminal conduct. Although it is foreseeable that the death of the lone family breadwinner would leave the family without health insurance, foreseeability does not equal a “direct” result.

Straub, 153 Idaho at 890, 292 P.3d at 281.

Because Straub did not challenge the restitution award for premiums paid prior to the restitution hearing, but instead only challenged future premiums related to the acquisition of insurance for future months, the Court’s opinion does not squarely address the question presented in this case. Struhs acknowledges as much, but contends “the Court’s holding is not based upon when the expense occurred; rather, the Court’s holding is based upon its finding that purchasing medical insurance is not a ‘direct consequence’ of the criminal conduct.” (Appellant’s Brief, pp.5-6.) That is true, but only in the context as it relates to the “anticipated insurance premiums” Straub was challenging. Straub, 153 Idaho at 890, 292 P.3d at 281. The district court in this case did not, however, award restitution for anticipated insurance premiums; it awarded restitution for premiums Emilie already paid and had to pay after Struhs killed her husband because her husband’s employer previously provided those benefits. In that sense, the insurance premiums are akin to lost wages, which are expressly identified as an “economic loss” in I.C. § 19-5304(1)(a).² As recognized in Straub, “actual out-of-pocket medical expenses and lost wages up to the date of

² Because the lost premiums are akin to lost wages, the state acknowledges that restitution would only be appropriate in an amount equal to that being paid by the employer. Remand for determination of the difference between the amount Emilie was awarded, and the amount previously paid by her husband’s employer may, therefore, be appropriate.

sentencing may be included in a restitution order consistent with the language of I.C. § 19-5304.” Straub, 153 Idaho at 889, 292 P.3d at 280. When considered as a component of lost wages, restitution for insurance premiums paid up to the date of sentencing is appropriate.

The district court’s restitution award was not directly contrary to Straub and was consistent with compensable losses under the restitution statute. Struhs has, therefore, failed to establish the district court abused its discretion in awarding restitution for insurance premiums paid prior to sentencing.

II.

Struhs Has Failed To Show The District Court Abused Its Sentencing Discretion

A. Introduction

Struhs contends the district court abused its sentencing discretion “in light of his remorse, his alcohol addiction and willingness to seek treatment, and the support he has from family and friends.” (Appellant’s Brief, p.6.) The record supports the sentence imposed.

B. Standard Of Review

“Where the sentence imposed by a trial court is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion.” State v. Miller, 151 Idaho 828, 834, 264 P.3d 935, 941 (2011) (quotations and citations omitted). “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” Id.

C. A Unified 15-Year Sentence With 10 Years Fixed For Vehicular Manslaughter Is Not Excessive

“[T]he most fundamental requirement [of sentencing] is reasonableness.” Miller, 151 Idaho at 834, 264 P.3d at 941 (quotations and citation omitted). “When reviewing the reasonableness of a sentence this Court will make an independent examination of the record, having regard to the nature of the offense, the character of the offender and the protection of the public interest.” Id. A review of the record demonstrates that a unified 15-year sentence with 10 years fixed for the death of Brent Hansen that resulted from Struhs driving under the influence is not excessive. Struhs has failed to establish otherwise.

The four objectives of sentencing are well-established. They are “(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution.” State v. Knighton, 143 Idaho 318, 319-320, 144 P.3d 23, 24-25 (2006) (quotations and citations omitted). “A sentence need not serve all sentencing goals; one may be sufficient.” State v. Sheahan, 139 Idaho 267, 285, 77 P.3d 956, 974 (2003) (citing State v. Waddell, 119 Idaho 238, 241, 804 P.2d 1369, 1372 (Ct. App. 1991)).

In imposing sentence, the court noted the objectives of sentencing and the statutory factors to consider in determining whether to place Struhs on probation or to impose a sentence of incarceration. (Sent. Tr., p.42, L.24 – p.43, L.8.) The court then noted “some things” it found “very important in this case,” including Struhs’ criminal history and Struhs’ “atrocious” driving record. (Sent. Tr., p.44, Ls.5-9.) That history shows Struhs has seven convictions for driving

without privileges and convictions for failing to stop at an accident, inattentive driving, driving under the influence (amended from felony aggravated driving under the influence), and disturbing the peace. (PSI, pp.5-9.) Struhs also has three convictions for open container. (PSI, pp.7, 9-10.) The court also noted Struhs' "severe substance abuse problem." (Sent. Tr., p.45, L.12.) Based on the circumstances, Struhs' history, and the "paramount" need to protect society, the court imposed a unified 15-year sentence with 10 years fixed. (Sent. Tr., p.51, Ls.2-12.)

In claiming the court abused its sentencing discretion, Struhs notes that "[f]rom his first contact with the police throughout the criminal proceedings, [he] took responsibility and expressed remorse for his crime." (Appellant's Brief, p.7.) This assertion, while technically true, essentially ignores the fact that Struhs fled the scene after colliding with Brent and was confronted by law enforcement shortly thereafter because he wrecked his car. Taking "responsibility" at that point was certainly in his best interest.

Struhs next cites his remorse as a mitigating circumstance. (Appellant's Brief, pp.7-8.) The court addressed this specifically at sentencing, stating:

The presentence report writer indicates that they [sic] saw very little remorse on your part for this accident. You've expressed that sorrow here today. It's hard to understand whether that sorrow exists or not by just reading paper. And only you know. I know it's been expressed here today. But at the same time, I'm not sure you completely grasp the severity of your substance abuse problem and how it's played into your life.

(Sent. Tr., p.47, Ls.10-18.) The court gave Struhs' purported remorse all the consideration it was due.

As for Struhs' alcoholism, upon which he relies, as explained by the Idaho Supreme Court in State v. Oliver, 144 Idaho 722, 727, 170 P.3d 387, 392 (2007), the defendant's "serious alcohol problem" did not require a reduction in his sentence for felony driving under the influence. Rather, Oliver's history of alcohol abuse and crimes related thereto "show[ed] the proper exercise of discretion," not the abuse of discretion claimed by Oliver. Id.

Finally, Struhs cites the support he has from his sister and others who find him caring, giving, kind, and loving. (Appellant's Brief, pp.8-9.) This is little comfort when that support does not deter Struhs from abusing alcohol and driving under the influence. Neither this factor, nor any other factor Struhs cites, demonstrates an abuse of the district court's sentencing discretion.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of conviction and order of restitution.

DATED this 11th day of February, 2014.



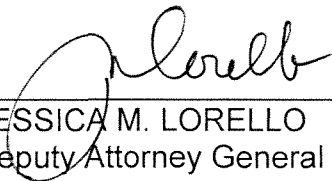
JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of February, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JASON C. PINTLER
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.



JESSICA M. LORELLO
Deputy Attorney General