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State v. Cruse Respondent's Brief Dckt. 44922

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44922
Plaintiff-Respondent,)	
)	Valley County Case No.
v.)	CR-2016-2063
)	
ROBERT DOUGLAS CRUSE,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Cruse failed to establish that the district court abused its discretion, either by imposing a unified sentence of 15 years, with four years fixed, upon his guilty plea to lewd conduct with a minor under sixteen, or by denying his Rule 35 motion for a reduction of sentence?

Cruse Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Cruse pled guilty to lewd conduct with a minor under sixteen and the district court imposed a unified sentence of 15 years, with four years fixed. (R., pp.51-54, 57-60.) Cruse filed a notice of appeal timely from the judgment of conviction. (R., pp.61-64.) He also filed a timely

Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.65-145, 146-48.)

Cruse asserts that the district court abused its discretion by executing his prison sentence, rather than placing him on probation, in light of his low risk to re-offend, amenability to treatment, age, support of family and friends, purported remorse, and acceptance of responsibility. (Appellant's brief, pp.4-15.) Cruse has failed to establish an abuse of discretion.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed 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 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, "[a] sentence fixed within the limits

prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

A trial court's decision regarding whether imprisonment or probation is appropriate is within its discretion. State v. Reber, 138 Idaho 275, 278, 61 P.3d 632, 635 (Ct. App. 2002) (citations omitted); I.C. § 19-2601(4). The goal of probation is to foster the probationer's rehabilitation while protecting public safety. State v. Cheatham, 159 Idaho 856, ___, 367 P.3d 251, 253 (Ct. App. 2016) (citations omitted). A decision to deny probation will not be deemed an abuse of discretion if it is consistent with the criteria articulated in I.C. § 19-2521. Id. (citing State v. Toohill, 103 Idaho 565, 567, 650 P.2d 707, 709 (Ct. App. 1982)). Pursuant to I.C. § 19-2521(1):

The court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that imprisonment is appropriate for protection of the public because:

(a) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) A lesser sentence will depreciate the seriousness of the defendant's crime; or

(d) Imprisonment will provide appropriate punishment and deterrent to the defendant; or

(e) Imprisonment will provide an appropriate deterrent for other persons in the community; or

(f) The defendant is a multiple offender or professional criminal.

I.C. § 19-2521(1).

The maximum sentence for lewd conduct with a minor under sixteen is fixed life imprisonment. I.C. § 18-1508. The district court imposed and executed a unified sentence of 15 years, with four years fixed, which falls well within the statutory guidelines. (R., pp.51-54, 57-60.) Despite Cruse's assertions to the contrary, the district court's decision to execute Cruse's sentence, rather than place him on probation, was also consistent with the goals of sentencing and with the criteria articulated in I.C. § 19-2521.

Cruse sexually abused his seven-year-old step-granddaughter, C.B., by rubbing her vaginal area both outside of her clothes (multiple times) and under her clothes (once) over the course of many months. (PSI, pp.3-4.) Cruse himself explained the circumstances of the sexual abuse, as follows:

Sometime in late Feb. to early March 2016 ... , while C.B. was sitting on my lap playing a video game on my recording studio computer, I slowly slid my hand up her inner thigh to her crotch (over her jeans). C.B. did not protest when I did so. Over the course of the next 3 months (up to early/mid June 2016), this scenario played out a number of times as 'alone' opportunities presented themselves (4, maybe 5 time). On one occasion, she expressed how good it felt & I explained to her about the use of KY Jelly (which I had a small tube for my own use in masturbation) & how it would make it feel ever [sic] better. She was curious & likely aroused, so she agreed to have me apply some to my finger & 'touch her down there.' As soon as I touched her 'down there', she protested. I immediately stopped & apologized to her, coming to my own senses of the boundaries I was crossing. ...

(PSI, p.4.) After C.B. disclosed the abuse, C.B.'s mother placed a confrontation call to Cruse, during which he made the following statements: "I did go there, but never once has it been inside. ... She snuggled up to me too and um, ya I apologize. ... There were a few times where I did slide down into her crotch." (PSI, p.3 (verbatim, ellipses in original).) He also "commented, 'Living with [his wife] has been a fucking nightmare and no sex.'" (PSI, p.3.) In a subsequent police interview, Cruse admitted to having touched C.B. four or five times and to having felt "sexually aroused" when he did so, but he "claimed he had difficulty getting an

erection.” (PSI, p.3.) He justified and rationalized his behavior, claiming C.B. “wanted him to touch her because she moved his hand from her leg to her crotch, prompting him to rub her vaginal area.” (PSI, p.3.) He also admitted that he had been viewing child pornography for the last “year and a half.” (PSI, p.3.) Law enforcement later executed a search warrant at Cruse’s residence and found on his computer four photographs of “two (2) prepubescent female children posing in what appeared to be a shower.” (PSI, p.3.)

Consistent with his statements to C.B.’s mother and law enforcement, Cruse told the presentence investigator that the abuse he perpetrated against his step-granddaughter was the result of his addictions to sex and child pornography. (PSI, p.4.) He also “indicated his behavior was influenced by his use of alcohol and marijuana.” (PSI, p.4.) Cruse made similar disclosures to the GAIN and psychosexual evaluators, both of whom diagnosed Cruse with alcohol use and cannabis use disorders. (PSI, pp.20, 42.) The psychosexual evaluator also diagnosed Cruse with Pedophilic Disorder. (PSI, p.9.) Although the psychosexual evaluator ultimately opined Cruse presents a low risk to sexually reoffend and is “highly amenable for treatment,” he also repeatedly characterized Cruse as a pedophile who “needs to complete a sexual offender specific treatment program” to “combat those deviant sexual interests.” (PSI, pp.34-35, 41-47.)

In fashioning an appropriate sentence, the district court indicated it had reviewed all of the presentence materials, including the PSI, the psychosexual evaluation, the victim impact statements and the letters of support submitted on Cruse’s behalf. (Tr., p.47, L.18 – p.48, L.14.) The court also indicated it had considered the “four objectives of criminal sentencing,” as well as the statutory criteria “for determining whether imprisonment is appropriate.” (Tr., p.48, Ls.15-23, p.55, Ls.22-25.) The court acknowledged the psychosexual evaluator’s opinions that Cruse posed a “low risk of future sexual violence or sexual offense of any kind,” had a “very low level

of psychopathy,” and was “highly amenable to sexual offender treatment.” (Tr., p.49, Ls.2-7.) Taking the evaluator’s opinions at face value, the court concluded protection of the public and deterrence were “not the factors that rise to the top of the list to consider in this case.” (Tr., p.49, Ls.8-23.) Rehabilitation and punishment, on the other hand, were both “important factor[s],” with punishment being “very important” because of the seriousness of the crime. (Tr., p.49, L.24 – p.50, L.12.) The court specifically considered a number of mitigating factors, including that Cruse had no prior criminal record, that he “had a healthy childhood,” that he was honorably discharged from the Navy, and that he had a “responsible career.” (Tr., p.51, L.16 – p.52, L.5.) The court also noted that Cruse’s alcohol and marijuana use may have contributed to his behavior. (Tr., p.52, Ls.5-21.) The court was concerned, however, about some of the statements Cruse made that suggested he was rationalizing and minimizing his conduct. (Tr., p.52, L.22 – p.55, L.13.) The court considered but rejected the presentence investigator’s recommendation for a period of retained jurisdiction, reasoning that such recommendation did not adequately take into account “all four factors” the court had to consider, “including punishment” and “including ensuring” the sentence it imposed was not “so lenient as to depreciate the seriousness of the offense.” (Tr., p.56, Ls.3-17.) With respect to the gravity of the offense, the court found:

The defendant committed a profound breach of trust. He molested his seven-year-old step granddaughter. The circumstances suggest there was some level of plying, if you will, with opportunity to play games or do whatever on a tablet while the victim sat in the defendant’s lap.

There is I think an element of manipulation involved in that. Now, certainly the instance in which the defendant used KY Jelly in the course of this certainly suggests there was some planning involved, at least on one occasion as it seems somewhat unlikely that the defendant carries KY Jelly on him.

(Tr., p.50, L.13 – p.51, L.1.) Ultimately, the court concluded that Cruse’s behavior was “the kind of behavior that warrants a prison sentence,” and that anything less “would depreciate the seriousness of the offense.” (Tr., p.56, Ls.18-22.)

On appeal, Cruse challenges the court’s sentencing decision and, in particular, its decision to deny his request for probation. (Appellant’s brief, pp.3-15.) He argues his sentence is unreasonable in light of the governing sentencing criteria and because “[t]he court intentionally placed other factors above the good order and protection of society.” (Appellant’s brief, p.4.) Cruse’s argument fails because, as noted above, the district court specifically considered and applied the correct legal standards and reached its sentencing decision by an exercise of reason. There is no doubt that the court concluded punishment was the most important sentencing objective under the facts of this case. Contrary to Cruse’s assertions, however, such determination did not in itself constitute an abuse of discretion. While the protection of society is the paramount goal of sentencing, generally, a sentence is reasonable, and will be affirmed, if it appears necessary to achieve the protection of society *or any of the related sentencing goals* of deterrence, rehabilitation or retribution. *E.g., State v. Windom*, 150 Idaho 873, 875-76, 253 P.3d 310, 312-13 (2010). Moreover, I.C. § 19-2521(1) specifically contemplates a sentence of imprisonment when the court determines either that a “lesser sentence will depreciate the seriousness of the defendant's crime; or” that “[i]mprisonment will provide appropriate punishment and deterrent to the defendant.”

Cruse appears to argue the court abused its discretion by concluding a sentence aimed at punishment was warranted, contending the acts of sexual abuse he perpetrated on the seven-year-old victim multiple times over a several month period were not that egregious, that he was immediately and overwhelmingly remorseful, that his alcohol and/or marijuana use are

mitigating, that he has accepted responsibility for his actions, that he is a Navy veteran with an honorable service record, and that he “has already suffered enormous punishment through the shame and guilt he faces daily, the loss of his reputation, the loss of his home, the loss of his wife and her family,” and the loss of his business. (Appellant’s brief, pp.8-9.) As set forth in more detail above, the district court specifically articulated its consideration of many of these facts at the time it imposed Cruse’s sentence. That the court did not construe these facts as outweighing the need for punishment does not show an abuse of discretion. Just as he did below, Cruse continues to minimize the seriousness of his crime and justify his statements and actions. (See Appellant’s brief, pp.10-13.) He has failed, however, to show any clear error in the district court’s express findings that, in sexually abusing the victim, Cruse “committed a profound breach of trust” and that his actions were not just opportunistic but were instead manipulative and, to some extent, planned. (Tr., p.50, L.9 – p.51, L.1.) As for Cruse’s reliance on sentences imposed in other cases (see Appellant’s brief, p.14), comparative sentencing is not appropriate because: “It is well settled that not every offense in like category calls for identical punishment; there may properly be a variation in sentences between different offenders, depending on the circumstances of the crime and the character of the defendant in his or her individual case.” State v. Pederson, 124 Idaho 179, 183, 857 P.2d 658, 662 (Ct. App. 1993) (citations omitted).

The district court considered all of the relevant information and reasonably determined that a sentence of imprisonment was necessary in light of the seriousness of the crime and the circumstances under which Cruse committed it. Cruse has failed to establish an abuse of discretion.

In a single sentence of his opening brief, Cruse also asserts that the district court abused its discretion when it denied his Rule 35 motion for sentence reduction; however, he offers no

real argument or authority in support of his claim. (Appellant’s brief, pp.13-15.) “When issues on appeal are not supported by proposition of law, authority, or argument, they will not be considered.” *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

Even if Cruse’s appellate claim has not been waived, he has still failed to establish an abuse of discretion. If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. *State v. Huffman*, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Cruse must “show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion.” *Id.* Cruse has failed to satisfy his burden.

In support of his Rule 35 motion, Cruse merely reiterated that he was a low risk to reoffend, felt remorseful, could be rehabilitated outside of the prison setting, was punished too harshly, and that pornography was the catalyst for his sexual interest in children. (R., pp.67-145.) This is not “new” information that would support a reduction in his sentence. The district court explained its reasons for denying Cruse’s Rule 35 motion, stating:

The Court particularly disagrees with Cruse’s assessment of the punishment factor in this case. Cruse sexually abused a small child – his step-granddaughter – by touching her genital area on several occasions. On one of those occasions, he applied KY jelly to her genitals, apparently having convinced himself that this would increase her enjoyment of the abuse he was inflicting. This disturbing criminal behavior warranted a strong responsive measure of punishment, even though it was carried out by a man who had lead a mostly constructive, successful life.

(R., pp.146-47.) Again, that Cruse believes the district court should have given more mitigating weight to the information he presented in support of his Rule 35 motion does not show the court abused its discretion. Cruse’s sentence was reasonable as imposed, and none of the information he provided in support of his Rule 35 motion negated the seriousness of the crime he committed

or the need for a sentence that would impose a measure of punishment. Cruse has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion.

Conclusion

The state respectfully requests this Court to affirm Cruse's conviction and sentence and the district court's order denying Cruse's Rule 35 motion for a reduction of sentence.

DATED this 21st day of November, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of November, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

MICHAEL G. PIERCE
Attorney at Law

at the following email address: michael@michaelpiercelaw.com.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General