

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37376

STATE OF IDAHO,)	2011 Unpublished Opinion No. 601
)	
Plaintiff-Respondent,)	Filed: August 31, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
CODY VEALTON THOMPSON,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Judgment of conviction and sentences for male rape, intimidating a witness, and being a persistent violator and order of restitution, affirmed.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Cody Vealton Thompson appeals from the judgment of conviction entered upon a jury verdict finding him guilty of male rape, intimidating a witness, and being a persistent violator and from the order of restitution entered in regard to the rape conviction. For the reasons set forth below, we conclude the district court did not err in imposing the sentences or in ordering restitution.

I.

FACTS AND PROCEDURE

While serving a combined thirty-year unified sentence for several offenses, Thompson briefly shared a cell with C.W., who received medication to treat several conditions. Occasionally, C.W. would sell his medication to other inmates. On one occasion, “Mike,” a

friend of Thompson's and a fellow member of the "Aryan Knights,"¹ wished to purchase C.W.'s medication; however, C.W. refused. Mike threatened C.W. from another cell, and Thompson asked Mike whether Mike wanted C.W. "beaten up." Thompson then struck C.W. three times in the face and did a "karate chop" to his throat. Thompson then ordered C.W. to remove his clothes and stated that if he did not comply, something might "happen" to him, which C.W. interpreted as a threat to his safety. Thompson then orally and rectally penetrated C.W.

Approximately one month later, Thompson wrote C.W. a letter, which C.W. interpreted as a threat to him and his family if he did not recant his accusation of rape. Thompson was indicted for male rape, Idaho Code § 18-6108, and attempted intimidation of a witness, I.C. § 18-2604. He was also charged by information with being a persistent violator, I.C. § 19-2514. A jury found Thompson guilty of both counts alleged in the indictment and of being a persistent violator. The court imposed a determinate life sentence enhanced for being a persistent violator on the male rape conviction and a consecutive two and one-half years determinate for the intimidating a witness conviction. The court also ordered Thompson to pay \$3,208.13 in restitution for C.W.'s medical expenses. Thompson now appeals challenging the length of his sentences and the order of restitution.

II. ANALYSIS

A. Sentences

Thompson contends that, given any view of the facts, his combined sentences of determinate life plus two and one-half years are excessive. Additionally, he asserts the district court violated his right to association under the First Amendment by improperly considering his racist beliefs and affiliation with a racist group when imposing sentence and that it failed to adequately consider applicable mitigating factors.

An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). 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 385, 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*,

¹ The particulars of the "Aryan Knights" are not detailed in the record; however, it is apparently a racist "gang."

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, we conduct 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, we consider the defendant’s entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). In regard to constitutional issues, we exercise free review of whether constitutional requirements have been satisfied in light of the facts found. *State v. Julian*, 129 Idaho 133, 135, 922 P.2d 1059, 1061 (1996).

In arguing that his sentences are excessive, Thompson references the seriousness of the imposition of a fixed life sentence, noting the Idaho Supreme Court has stated a determinate life sentence is a “serious penalty, and should not be imposed lightly.” *State v. Jackson*, 130 Idaho 293, 294, 939 P.2d 1372, 1373 (1997). According to the *Jackson* Court:

[A] fixed sentence should not be regarded as a judicial hedge against uncertainty. To the contrary, a fixed life term, with its rigid preclusion of parole or good time, should be regarded as a sentence requiring a high degree of certainty--certainty that the nature of the crime demands incarceration until the perpetrator dies in prison, or certainty that the perpetrator never, at any time in his life, could be safely released.

Id. at 294-95, 939 P.2d at 1373-74 (quoting *State v. Eubank*, 114 Idaho 635, 638, 759 P.2d 926, 929 (Ct. App. 1998). *Eubank*, 114 Idaho at 638, 759 P.2d at 929, further states:

[A] fixed life sentence may be deemed reasonable if the offense is so egregious that it demands an exceptionally severe measure of retribution and deterrence, or if the offender so utterly lacks rehabilitative potential that imprisonment until death is the only feasible means of protecting society. Unfortunately, in making these determinations, a judge has complete information only in regard to retribution and deterrence, which are based on the nature of the offense. The character of the offender is not completely known because it may evolve over time. The judge must attempt to predict the defendant’s future response to rehabilitative programs and the degree of risk he might pose to society if eventually released.

Thompson contends that the district court did not give appropriate weight to the “numerous mitigating factors” that existed in regard to his case. First, he contends that the court failed to “adequately consider his troubling childhood.” Specifically, Thompson states he was sexually molested at the hands of several family members and physically abused by his mother’s boyfriend. Additionally, his mother was incarcerated for drug trafficking when he was a child, and he began using drugs and alcohol at age twelve. Second, Thompson contends that he has “mental health issues,” having attempted suicide several times and having been treated for both depression and anxiety. In sum, Thompson contends that if he were “properly treated for his addictions, childhood issues, and mental health problems, he could become rehabilitated and ultimately function outside of the prison system.”

After a review of the record, we find no abuse of discretion in the district court’s determination that Thompson lacked rehabilitative potential such that a fixed life sentence was appropriate. While the mitigating issues advanced by Thompson were before the court in the Presentence Investigation Report (which was clearly examined by the court and referenced by the State at the sentencing hearing), the overwhelming amount of evidence regarding Thompson’s history, character, and prior opportunities for rehabilitation supports the district court’s conclusion.

As the State points out, Thompson first entered the criminal justice system at age fourteen on multiple counts of burglary. He was adjudicated on several of those counts and placed on two years of probation. Throughout this probationary period, he was adjudicated on numerous additional offenses including robbery, willful concealment, possession of a controlled substance, an alcohol/tobacco violation, battery, grand theft, escape, and burglary. Based on these offenses, he received a variety of punishments including commitment to the Department of Juvenile Corrections, community service, and county detention, as well as additional opportunities for probation. Undeterred, Thompson continued to commit crimes and was charged with his first felony--burglary--at age eighteen and was charged with battery one month later.

Thompson was given a five-year sentence on the battery conviction but the court retained jurisdiction. Jurisdiction was later relinquished and Thompson’s subsequent petition for parole was denied by the Parole Commission due to numerous disciplinary actions against Thompson while he was incarcerated, including battery on another inmate. Additionally, during that period

of incarceration, Thompson was convicted of battery upon a jailer after he struck a female jailer in the face, for which the court imposed a unified four-year sentence with three months determinate.

In 2001, Thompson escaped from the Twin Falls Community Work Center and as a result, received an additional unified two-year sentence with one and a half years determinate. He was released on parole in February 2006, but following a parole violation his parole was revoked in September 2006. He was discharged from prison several months later. Approximately one year later, Thompson pleaded guilty to eluding a police officer, aggravated driving while under the influence, injury to a jail, two counts of burglary, grand theft, and being a persistent violator, for which he received combined sentences totaling thirty years with ten years determinate--the sentences which he was serving when he committed the instant offenses.

Also, as the State points out, throughout Thompson's lengthy involvement with the criminal justice system he has been given numerous opportunities for rehabilitation through both the juvenile justice system and adult correctional system. In addition, the record is clear that each time he was released into society, he shortly began to reoffend and refused to participate in community-based treatment and supervision.

Thompson's ability to be rehabilitated must also be examined in light of the egregiousness of his instant crime--which the court clearly took into consideration. Specifically, Thompson victimized C.W., a "vulnerable," physically smaller, younger victim who suffered from mental health problems, as retribution for C.W.'s refusal to sell Thompson's friend and fellow gang member C.W.'s prescribed medication. Thompson battered C.W. in the face and throat, and then orally and rectally raped him. Afterwards, Thompson wrote a letter to C.W., which C.W. understood to be a threat against him and his family if he did not recant his accusation of rape against Thompson.

Taking all of these factors into account, we conclude that the district court did not fail to properly credit any mitigating factors and did not abuse its discretion in determining that Thompson was not amenable to rehabilitation. Thompson has repeatedly shown his inability to comply with the law (accruing nine felony convictions), even while participating in rehabilitative programs. He has shown a propensity to engage in violent behavior both in and out of incarceration, and an inability to submit to supervision while living in the community. These factors, combined with the abhorrent and violent crime perpetuated against C.W. in the instant

case, support the district court's determination that Thompson is not amenable to rehabilitation and thus, while a serious penalty, a determinate life sentence is appropriate.

Thompson also contends that the district court violated his First Amendment right to associate by relying on his affiliation with an "allegedly" racist group when imposing sentence. Particularly, Thompson points to the district court's statement at the sentencing hearing that, in addition to his extensive criminal record and numerous disciplinary issues while incarcerated, "he was involved in the Aryan Knights, [a] high-ranking member of the Aryan Knights."

The First Amendment's protection of an individual's right to free speech and to peaceably assemble has been interpreted to include an individual's right to join groups and to associate with others holding similar beliefs and prohibits imposition of a criminal sentence on the basis of a defendant's abstract beliefs. *State v. Warfield*, 136 Idaho 376, 378, 34 P.3d 37, 39 (Ct. App. 2001). On the other hand, the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment. *Id.* Rather, the question is one of relevancy--if the evidence is relevant to legitimate sentencing issues, it may be considered in imposing sentence. *Id.* at 379, 34 P.3d at 40.

Even if we assume that the district court did take Thompson's affiliation with the Aryan Knights into account--a proposition which is unclear given the court's cursory, passing reference to his membership in the group--such a consideration was allowable in this instance where Thompson's apparent willingness and motive for carrying out the rape was to enforce the group's directives on behalf of a fellow member. Also in this same vein, the district court recognized the necessity of deterring other incarcerated persons from engaging in gang enforcement activities--with deterrence being a legitimate sentencing objective. *Toohill*, 103 Idaho at 568, 650 P.2d at 710. Accordingly, Thompson has failed to establish that the district court violated his First Amendment right to association by considering the relevance of his association to the Aryan Knights to the crime committed.

B. Restitution

Thompson contends that the district court abused its discretion by ordering him to pay restitution in the amount of \$3,208.13 for the victim's medical expenses, because he does not, given his determinate life sentence, have the ability to pay. The decision whether to require restitution is committed to the trial court's discretion, whose findings of fact will not be disturbed

if supported by substantial evidence. *State v. Schultz*, 148 Idaho 884, 886, 231 P.3d 529, 531 (Ct. App. 2008); *State v. Smith*, 144 Idaho 687, 692, 169 P.3d 275, 280 (Ct. App. 2007).

In response to Thompson's argument below, that it would be inappropriate to order restitution where he is serving a determinate life sentence because he will not have the opportunity to be gainfully employed, the district court stated:

[Thompson] may also be able to earn income working in prison. In *State v. Bybee*, 115 Idaho 541, 768 P.2d 804, the court held the trial court did not abuse its discretion in ordering [the] defendant to pay restitution of over 1.6 million dollars, even though [the] defendant was 61 years old with no present assets, and no present earning capacity or ability to pay due to his 14 year[] sentence.

Here, the restitution is only \$3208.13. [Thompson] is 31 years of age. It is likely he could live another 40 to 50 years. He may receive an inheritance, or monies from an outside source, or he could be given the opportunity to earn income working in the prison. In the event [Thompson] is able to obtain some assets, the victim should have access to the assets for satisfaction of its loss.

On appeal, Thompson argues that, "due to the nature of the instant offenses, it is highly unlikely that [he] will be permitted to work or allowed the same privileges as other incarcerated individuals" and the court's assertion that he may come into an inheritance or other monies was "mere speculation." Thompson's arguments fail. First, Thompson's assertion on appeal that it is "highly unlikely" that he will be permitted to work given his offenses is not supported by any evidence on the record, and thus we do not consider it persuasive. *See State v. Beason*, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991) (holding that in the absence of an adequate record on appeal to support the appellant's claims, we will not presume error).

In addition, the offender's ability to pay is only one of several factors for the court's consideration when it makes a discretionary determination on a claim for restitution. *State v. Taie*, 138 Idaho 878, 880, 71 P.3d 477, 479 (Ct. App. 2003) (affirming a restitution order despite the defendant's argument that he would not be able to pay given his incarceration and injuries that would prevent him from obtaining employment in his previous field); *State v. Bybee*, 115 Idaho 541, 543, 768 P.2d 804, 806 (Ct. App. 1989) (affirming a restitution order imposed on sixty-one-year-old man despite concluding that it was "unlikely that [the defendant] will ever meet the full amount of restitution ordered"). At the restitution hearing in this case, Thompson's argument of financial inability was presented to and considered by the district court, but the district court concluded that the order of restitution was nevertheless appropriate. Thompson has not shown that the restitution order exceeded the bounds of the district court's permissible

choices, was inconsistent with applicable legal standards, or was not based upon an exercise of reason. *See Taie*, 138 Idaho at 880, 71 P.3d at 479; *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989); *State v. Richmond*, 137 Idaho 35, 37, 43 P.3d 794, 796 (Ct. App. 2002). Therefore, we find no abuse of discretion in the district court's decision to order restitution or in the amount ordered to pay.

III. CONCLUSION

We conclude the district court did not impose excessive sentences based on the district court's determination of Thompson's inability to be rehabilitated. We also conclude the district court did not violate Thompson's First Amendment right to association by considering his membership in a racist gang for sentencing purposes. Additionally, we conclude the district court did not err in ordering restitution of \$3,208.13, as his present ability to pay was only one of several considerations in the court's decision. Thompson's judgment of conviction and sentences, as well as the order of restitution, are affirmed.

Chief Judge GRATTON and Judge LANSING **CONCUR.**