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## State v. Fencil Appellant's Brief Dckt. 43120

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 43120
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR 2013-10572
v.	)	
	)	
SARAH JOANN FENCL,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Sarah Joann Fencl appeals from her judgment of conviction for operating a motor vehicle while under the influence of alcohol and a persistent violator enhancement. Ms. Fencl pleaded guilty and the district court imposed a unified sentence of fifteen years, with five years fixed. Ms. Fencl now appeals, and she asserts that the district court abused its discretion by imposing an excessive sentence.

## Statement of the Facts & Course of Proceedings

On September 26, 2013, an Information was filed charging Ms. FencI with felony, driving under the influence. (R., 41985, pp.51-52.)<sup>1</sup> An Information Part II was also filed charging Ms. FencI with being a persistent violator. (R., 41985, pp.68-69.) The charges were the result of Ms. FencI failing field sobriety tests after a traffic stop. (PSI, p.3.)

Ms. FencI entered guilty pleas to both the driving under the influence and persistent violator charges. (Tr., 41985, p.11, L.1 – p.13, L.22; R., p.71.) At the sentencing hearing, the prosecution requested imposition of a unified sentence of fifteen years, with five years fixed. (Tr., 41985, p.24, Ls.3-8.) Defense counsel recommended that the district court consider “other alternatives besides simply warehousing” Ms. FencI. (Tr., 41985, p.29, Ls.5-6.) The district court imposed a unified sentence of fifteen years, with five years fixed. (R., 41985, pp.85-87.) During sentencing, the district court noted that “[g]iven the persistent violator enhancement, it limits the sentences that I can impose since I am imposing a prison sentence in this case.” (Tr., 41985, p.33, Ls.3-5.)

Ms. FencI filed a timely Defendant’s Motion to Reconsider Sentence I.C.R. 35. (R., 41985, pp.92-94.) The district court denied the motion. (R., 41985, pp.106-108.) Ms. FencI appealed. (R., 41985, pp.95-97.)

The Court of Appeals reversed, holding that, “the district court may not have perceived the decision of whether to sentence FencI to a fixed term of imprisonment as

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<sup>1</sup> This Court has augmented the record with the record and transcript from Ms. FencI’s prior appeal, docket number 41985. (R., p.2.)

one of discretion.” *State v. Fencil*, 2014 Unpublished Opinion No. 325 (Ct. App. Jan. 28, 2015.) On remand, the district court again imposed a unified sentence of fifteen years, with five years fixed. (R., p.20.) Ms. Fencil again appealed. (R., p.25.) She asserts that the district court abused its discretion by imposing an excessive sentence.

### ISSUE

Did the district court abuse its discretion when it imposed a unified sentence of fifteen years, with five years fixed, upon Ms. Fencil following her plea of guilty to operating a motor vehicle while under the influence of alcohol with a persistent violator enhancement?

### ARGUMENT

#### The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Fifteen Years, With Five Years Fixed, Upon Ms. Fencil Following Her Plea Of Guilty To Operating A Motor Vehicle While Under The Influence Of Alcohol With A Persistent Violator Enhancement

Ms. Fencil asserts that, given any view of the facts, her unified sentence of fifteen years, with five years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. See *State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, “[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.” *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Ms. Fencil does not allege that her sentence exceeds the statutory maximum. Accordingly, in order to show an abuse

of discretion, Ms. FencI must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991) (*overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992))). The governing criteria or objectives of criminal punishment are: (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. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978) (*overruled on other grounds by State v. Coassolo*, 136 Idaho 138 (2001))).

Ms. FencI began using alcohol and marijuana at the age of 13. (PSI, p.11.) She was using alcohol about every other day prior to the instant offense. (PSI, p.12.) Although she has participated in several treatment programs and believes she has the tools to remain sober, she has not used them. (PSI, p.12.) She acknowledges that she is an alcoholic and now realizes that “alcohol has ruined my life.” (PSI, p.12.) It was recommended that Ms. FencI participate in Level 2.1 Intensive Outpatient Treatment. (PSI, p.15.)

Additionally, Ms FencI has expressed her remorse for committing the instant offense and acknowledged her substance abuse issues. In *State v. Alberts*, 121 Idaho 204 (Ct. App. 1991), the Idaho Court of Appeals reduced the sentence imposed, “In light of Alberts’ expression of remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character.” *Id.* 121 Idaho at 204.

In her comments to the presentence investigator, Ms. FencI noted that:

I have had a love/hate relationship with alcohol since the age of 13. As I’ve neared the completion of a bachelors degree, I’ve realized that my

dream of helping other women seek a better life after prison could not be realized [without] being sober myself and truly want life beyond the bar stool. Obtaining an education has helped me envision this better life and given me a reason to quit. I also want to have a good relationship [with] my kids and continue getting to know them and my future grandkids – quality of life I've denied myself in the past is only possible as long as a sober women and I feel I deserve that as well as the peace of mind that it brings.

(PSI, p.13.) At the initial sentencing hearing, Ms. FencI stated:

My record is terrible, and I take full responsibility for what I did. And I feel the sting of a terrible record all the time. Even not by the court, but, in life, so, yeah, I've made some horrible decisions, but I don't know. I don't want to drink anymore. I mean, I say that all the time, but I'm 41, and I'm not getting any younger and I feel it. And I do want to get a degree and help people, but I couldn't do that being a drunk, so, no matter what comes out of this, you know, I feel it when I'm on probation or parole or even when, you know, there's nobody looking over my shoulder, I feel it. That it's ruined my life. I've wasted my youth on it. So, yeah; that's all I have to say.

(Tr., 41985, p.30, Ls.7-20.)

Ms. FencI also addressed the district court on remand. She stated,

I just have had a lot of time to think, and I want to move forward. I mean, I'm tired of doing time drinking and losing chunks of my life for my behavior. I mean, I've lost so much from alcohol, and I don't want to lose any more of my life that I've lost already to drinking. I mean, I just – I'm tired of it, and I'm ready to do something else, something constructive. I'd like to move on and just make something of myself. I'm getting older, and it's not getting me anywhere. It's the same old lifestyle.

And, I found I am pretty good at art, and I think I want to do that, and so I've had a lot of time to think about that and get better at it, and that's about it.

(Tr., p.15, Ls.5-18.)

Additionally, Ms. FencI has several positive features. She has been attending BSU. (PSI, p.8.) She is working toward a degree in sociology and is only 25 credits away from receiving her degree. (PSI, p.8.)

Ms. FencI has also been able to maintain employment. (PSI, pp.9-10.) Prior to her most recent conviction, she was working at Maverik and was highly praised for her work performance while employed there. (PSI, pp.9-10.) Ms. Devore noted that, "She has been an exemplary employee. She shows up for all of her scheduled shifts, and comes in when we need her. She works well with her co-workers and dutifully maintains the store. She is hard working and well organized. Her continued employment is an asset to Maverik." (PSI, p.10.) Mr. Wafford wrote, "Sarah FencI has been working for me since I moved to this store as the assistant manager in November. I find her work ethics and attitude a benefit to the whole team as well. I feel that her continued employment with Maverik, would help her in becoming a productive member of society, her attitude, and helpfulness would be missed by Everyone if she were to leave for any reason." (PSI, p.10.)

Idaho courts have previously recognized that Idaho Code § 19-2523 requires the trial court to consider a defendant's mental illness as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581 (1999). Ms. FencI suffers from mental health issues. She has been diagnosed with depression and anxiety. (PSI, p.10.) At the time the presentence report was completed, she was taking Prozac, Abilify, Gabapentin, and Concerta to assist with her depression, anxiety and attention deficit disorder. (PSI, p.10-11.) She started receiving treatment for depression at the age of 11 and attention deficit disorder at the age of 35. (PSI, p.11.) At the age of 40, Ms. FencI was prescribed medication to stabilize her mood and treat he anxiety. (PSI, p.11.) She indicated this medication regime has been very helpful and she wishes she had started

it sooner. (PSI, p.11.) She was also participating in counseling through Boise State University. (PSI, p.11.)

Furthermore, in *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that family and friend support were factors that should be considered in the Court's decision as to what is an appropriate sentence. *Id.* Ms. Fencil's family supports her. Her father wrote a letter of support for her noting that she has serious substance abuse issues and asking that she be put in a treatment court. (PSI, p.6.) He also noted that she is motivated to learn, receives fair grades in college, has always been a hard worker, and has always been able to maintain employment." (PSI, p.6.) Ms. Fencil's daughter also wrote a letter of support noting that she had seen a really positive change in Ms. Fencil recently and that she would love to have her come live near her so she could have a better support network. (PSI, p.8.)

### CONCLUSION

Ms. Fencil respectfully requests that this Court reduce her sentence as it deems appropriate. Alternatively, she requests that her case be remanded to the district court for a new sentencing hearing.

DATED this 27<sup>th</sup> day of October, 2015.

\_\_\_\_\_  
/s/  
JUSTIN M. CURTIS  
Deputy State Appellate Public Defender



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27<sup>th</sup> day of October, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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E-MAILED BRIEF

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E-MAILED BRIEF

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

JMC/eas