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State v. Dunlap Appellant's Brief Dckt. 43220

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 43220
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR 2013-6699
v.	)	
	)	
ALLISSA BREEANNA DUNLAP,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Alissa Breeanna Dunlap pleaded guilty to one count of grand theft. The district court imposed a sentence of eight years, with two years fixed. On appeal, Ms. Dunlap asserts that the district court abused its discretion when it imposed the sentence.

Statement of the Facts & Course of Proceedings

In August of 2014, Ms. Dunlap pleaded guilty to one count of grand theft; she admitted that she was working as a housekeeper when she stole several rings that were valued at over $1,000. (Tr. 8/22/14, p.13, L.5 – p.14, L.11.) Ms. Dunlap committed the crime in the fall of 2012. (Tr. 8/22/14, p.13, Ls.5-16.) She was on probation at the time

as a result of a prior conviction in Canyon County. (Tr. 4/24/15, p.28, Ls.16-19; Presentence Report[1] (*hereinafter*, PSI), p.2.) Ms. Dunlap violated the terms of her probation by committing this offense, and the Canyon County district court revoked her probation but retained jurisdiction. (Tr. 8/22/14, p.6, Ls.3-7; 4/24/15, p.28, Ls.15-23.) After successfully completing a Rider program, the Canyon County district court placed her on probation again in August of 2013. (Tr. 4/24/15, p.28, Ls.23-24.)

In February of 2014, the Ada County prosecutor filed an information charging Ms. Dunlap with the one count of grand theft. (R., pp.38-39.) Pursuant to a plea agreement, Ms. Dunlap pleaded guilty. (Tr. 8/22/14, p.13, Ls.5-16.) In exchange, the State agreed to recommend that the district court impose a ten-year sentence, with two years fixed, which would run concurrent to the Canyon County sentence. (Tr. 8/22/14, p.5, Ls.15-19.) The State also indicated that it would be willing to recommend a lower sentence if Ms. Dunlap could pay restitution to the victim by the time of sentencing. (Tr. 8/22/14, p.7, Ls.1-10.)

At the sentencing hearing, the State recommended that the district court impose the ten-year sentence because, among other things, Ms. Dunlap had not paid the restitution and had committed two misdemeanors after the entry of plea hearing in this case. (Tr. 4/24/15, p.20, L.24 – p.23, L.15.) Citing Ms. Dunlap's mental health issues, and the fact that the Canyon County district court had placed Ms. Dunlap on probation

[1] All references to the PSI refer to the 142-page electronic document. The Presentence Report was prepared for sentencing in the Canyon County case – CR 2011- 23044, and the parties agreed that a new PSI did not need to be prepared for this case. (Tr. 8/22/14, p.6, Ls.8-11, p.16, Ls.9-25.) However, a recent mental health assessment prepared for the Canyon County case is attached to the old report along with police reports, and other documents relevant to this case.

and ordered that she participate in Mental Health Court, Ms. Dunlap's counsel requested that the district court place Ms. Dunlap on probation to run concurrent with her probation in Canyon County, so that she could get mental health treatment and pay the restitution. (Tr. 4/24/15, p.28, L.15 – p.34, L.34.) The district court imposed a sentence of ten years, with two years fixed, and ordered that Ms. Dunlap pay restitution. (Tr. 4/24/15, p.36, Ls.11-16; R., pp.71-73.) Ms. Dunlap then filed a Notice of Appeal that was timely from the district court's judgment of conviction. (R., pp.76-77.)

ISSUE

Did the district court abuse its discretion when it imposed a sentence of eight years, with two years fixed, following Ms. Dunlap's plea of guilty to grand theft?

ARGUMENT

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Eight Years, With Two Years Fixed, Following Ms. Dunlap's Plea Of Guilty To Grand Theft

Based on the facts of this case, Ms. Dunlap's sentence of eight years, with two years fixed, is excessive because it is not necessary to achieve the goals of sentencing. When there is a claim that the sentencing court imposed an excessive sentence, the appellate court will conduct an independent examination 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).

Independent appellate sentencing examinations are based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276 (Ct. App. 2000). When a sentence is unreasonable based on the facts of the case, it is an abuse of discretion. *State v. Nice*, 103 Idaho 89, 90 (1982). Unless it appears that confinement was

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," a sentence is unreasonable. *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). Accordingly, if the sentence is excessive, "under any reasonable view of the facts," because it is not necessary to achieve these goals, it is unreasonable and therefore an abuse of discretion. *Id.*

There are multiple mitigating factors that show why Ms. Dunlap's sentence is excessive under any reasonable view of the facts. First, she has struggled with severe mental health problems from a very young age. Indeed, she had to be hospitalized three times for suicide attempts before she was 20 years old, and she explained that she was first diagnosed with a bipolar disorder when she was only 8 and PTSD when she was only 10. (PSI, p.81.) These issues have not abated over time as her most recent mental health assessment indicated that she still suffers from PTSD and a bipolar disorder. (PSI, p.85.) Her mental health assessor said that Ms. Dunlap gave "the overall impression of a mood-disordered, traumatized and historically impulsive/substance-affected, yet surprisingly cooperative, polite and intelligent/thoughtful young woman . . . ." (PSI, p.84.) The assessor went on to note that Ms. Dunlap presented as "legitimately dysthymic/depressed" with a "personal psychiatric hospitalization history," and a "long family history of mood-disorder free from drug complication." (PSI, p.84.) Based on these findings, and the assessor's conclusion that, despite her problems, Ms. Dunlap was "a reliable enough historian with good insight," the assessor said that she was "a good candidate for Mental Health Court." (PSI, p.84.)

The onset of severe mental health problems at such an early age was clearly related to the fact that Ms. Dunlap was sexually and physically abused as a child. (PSI, p.7.) She explained that her parents divorced when she was a toddler, and her father raised her until she was 9 years old. (PSI, p.7.) She said that her father was an alcoholic who physically abused her. (PSI, p.7.) She also said that she was sexually abused by her father and his friends. (PSI, p.7.)

Not surprisingly, this sort of abuse led to mental health issues, problems in school, delinquent behavior, and finally drug and alcohol abuse. (*See* PSI, pp.9, 82.) She was suspended from school when she was in the ninth grade for drinking a bottle of tequila, and she was later expelled because she started a fire at school. (PSI, p.9.) She started using methamphetamine when she was 22, and was ultimately diagnosed with amphetamine dependence. (PSI, pp.82, 85.) Idaho courts recognize that mental health problems, an abusive childhood, and substance abuse are all mitigating factors to be considered at sentencing. *State v. Odiaga*, 125 Idaho 384, 391 (1994); *State v. Williams*, 135 Idaho 618, 620 (Ct. App. 2001); *State v. Nice*, 103 Idaho 89, 91 (1982).

A defendant's family support is also a long-recognized mitigating factor. *State v. Baiz*, 120 Idaho 292, 293 (Ct. App. 1991). And, despite her problems, Ms. Dunlap still enjoys the support of her family. Several friends and family members wrote letters on her behalf in June of 2013 just prior to her Rider review hearing. (PSI, pp.127–132.) Her sister-in-law—who offered to let Ms. Dunlap live with her after she was released—wrote that she had spoken with her on a weekly basis during the Rider and had "noticed a huge change in her" as the program progressed. (PSI, p.129.) She also said that Ms. Dunlap told her how much she appreciated the opportunity to engage in the

program. (PSI, p.129.) Ms. Dunlap's grandmother wrote that Ms. Dunlap had always been a "hard worker with a kind heart," and that she felt the Rider classes had "taught her many things she did not know" and seemed to "encourage her for the future." (PSI, p.132.)

Indeed, as her counsel pointed out at the sentencing hearing, because the theft occurred prior to the Rider, he believed that "the Rider had addressed what got her into trouble." (Tr. 4/24/15, p.29, Ls.1-5.) Evidently, the Canyon County district court believed the same to be true as the district court decided probation with a mental health program was the best option for Ms. Dunlap, even in light of the fact that Ms. Dunlap had committed this offense. (Tr. 4/24/15, p.29, L.23 – p.30, L.10.)

This decision was likely based in part on the Addendum to the Presentence Investigation (attached to the PSI) prepared at the end of the Rider. That document not only contained positive comments about Ms. Dunlap's progress from her supervisors, but also many statements from Ms. Dunlap herself, which indicated that she had improved a great deal and would likely continue to improve in a structured setting such as Mental Health Court. (*See* PSI, pp.90-97.) For example, the APSI writer said that Ms. Dunlap "made progress while in programming as evidence (sic) by her ability to be accountable for her actions and confronting other's behaviors when appropriate. Ms. Dunlap has taken initiative to tutor her classmates and asks for help when she needs assistance." (PSI, p.95.) When asked to comment on her progress in the program, Ms. Dunlap said that she was "proud to have completed the program with dignity" and that she looked forward to being "an asset to the community rather than a detriment." (PSI, p.96.)

Finally, Ms. Dunlap accepted responsibility and demonstrated remorse for this offense. At the sentencing hearing, she apologized to the district court and said that she was "sincerely sorry" for what she did. (Tr. 4/24/15, p.35, L.5.) She said there was "no justification or excuse" for her "horrible" actions. (Tr. 4/24/15, p.35, Ls.3-8.) She also told the district court that she had been attending "substance abuse and support group classes," and she thought Mental Health Court would help her. (Tr. 4/24/15, p.35, Ls.17-20.) A defendant's acceptance of responsibility and remorse is also considered as mitigating information. *State v. Shideler*, 103 Idaho 593, 594-95 (1982).

It is clear that, despite her strong progress on the Rider, Ms. Dunlap still needs specialized mental health treatment, and would be a good candidate for Mental Health Court. Nevertheless, the district court imposed her sentence in large part because Ms. Dunlap had not begun to pay restitution. (Tr. 4/24/15, p.35, L.24 – 36, L.2.) Given the wealth of mitigating information here, however, Ms. Dunlap's sentence was excessive because it was not necessary to achieve the goals of sentencing outlined in *Toohill*. Society would be protected if Ms. Dunlap was on probation and participated in Mental Health Court because she would be under strict supervision. This would also serve as a strong deterrent and allow her to find a job and start paying restitution. But most importantly, it would give Ms. Dunlap an opportunity to engage in meaningful therapy, to help her overcome her mental health issues and appropriately address and process the tragic events of her youth. The district court failed to adequately consider the mitigating information. Given the facts of this case, Ms. Dunlap's prison sentence was not necessary and was therefore unreasonable and an abuse of discretion.

CONCLUSION

Ms. Dunlap 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 25th day of November, 2015.

_____/s/_____
REED P. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of November, 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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_____/s/_____
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RPA/eas