

8-3-2016

## State v. Howell Respondent's Brief Dckt. 43731

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LORI A. FLEMING  
Deputy Attorney General

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 43731
Plaintiff-Respondent,	)	
	)	Ada County Case No.
v.	)	CR-2015-8883
	)	
DUSTIN JACK HOWELL,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Howell failed to establish that the district court abused its discretion by imposing a unified sentence of five years, with one year fixed, upon the jury's verdict finding him guilty of battery on a police officer?

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

A jury found Howell guilty of battery on a police officer and the district court imposed a unified sentence of five years, with one year fixed. (R., pp.75-77.) Howell filed a notice of appeal timely from the judgment of conviction. (R., pp.79-81.)

Howell asserts his sentence is excessive in light of his mental health issues, substance abuse, plan to stay sober, past completion of the Therapeutic Community rider program, and acceptance of responsibility. (Appellant's brief, pp.3-6.) The record supports the sentence imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The maximum prison sentence for battery on a police officer is five years. I.C. § 18-915(3). The district court imposed a unified sentence of five years, with one year fixed, which falls well within the statutory guidelines. (R., pp.75-77.) At sentencing, the district court articulated its reasons for imposing Howell's sentence. (11/9/15 Tr., p.190, L.19 – p.194, L.24.) The state submits that Howell has failed to establish an abuse of

discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm Howell's conviction and sentence.

DATED this 3rd day of August, 2016.

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

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of August, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JENNY C. SWINFORD  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

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

# APPENDIX A

189	191
<p>1 giving me tools to stay sober and make better                  2 decisions in the future. I would like to thank                  3 the courts and Honorable Judge Bail for your time                  4 and consideration in my case. And if given                  5 another chance, I won't prove you wrong. Once                  6 again I ask for grace and mercy.</p> <p>7 I don't know if I should read this or                  8 get a copy. But this is pretty much a plan of                  9 action about when I'm released. One of them is to                  10 definitely stay drug and alcohol free.</p> <p>11 First is to find full-time employment.                  12 If I can do that by filling out applications,                  13 going door to door, on line, five days a week,                  14 eight hours a day until I find full-time                  15 employment. Go to the Commerce of Labor, update                  16 resume, print them off, look for job leads until I                  17 find a full-time job.</p> <p>18 Two: Go to at least seven AA meetings                  19 a week, find a sponsor, healthy support group,                  20 work 12 steps. At least three meetings a week.</p> <p>21 Three: Would be go to church,                  22 Celebrate Recovery once a week. Find a sponsor                  23 support that can help me get there on a weekly                  24 basis. Start working steps.</p> <p>25 Four: Start paying fines, restitution,</p>	<p>1 control largely because you had been drinking.                  2 When the police officers went to arrest                  3 you, you bent forward and then slammed your head                  4 back. It was very deliberate. And it was                  5 unacceptable and there is a consequence for that.</p> <p>6 Now, you're coming before the Court                  7 with a significant prior record in terms just on                  8 the amount of cases that you picked up. And two                  9 thoughts that really jumped out when you were                  10 talking to me. Number one, you talk about                  11 battling addiction. But honestly it sounds to me                  12 and it looked to me like from reading the                  13 presentence materials that you didn't battle, you                  14 surrendered. And you resumed your addiction                  15 pretty fast after you got off your TC rider.</p> <p>16 It was only a few months after you got                  17 off the rider that you started drinking. Quit                  18 your job, so your probation officer couldn't find                  19 you. And you absconded. That doesn't sound like                  20 a fight to me. That sounds like somebody who has                  21 decided to go back to their old ways.</p> <p>22 The other thought I had when you were                  23 reading your letter to me was that you show an                  24 ability to think things through more                  25 constructively and come up with a better sharper</p>
190	192
<p>1 COS, make at least \$150 payments a month towards                  2 fines and restitution. Make monthly COS payments.                  3 Another one that is important for me I believe is                  4 work out at least five days a week, which helps                  5 me, my mental stability I believe. Find a gym                  6 that works for me. And go to it steady.</p> <p>7 Another one is work on personal                  8 relationship with my daughter, father, brother and                  9 other close family. Make efforts to spend time                  10 with them at least once a week. Make efforts to                  11 mend my relationship with my daughter's mom.                  12 Start making child support payments, so it is not                  13 so hard to see my daughter. So other than that,                  14 again, I apologize and that's it.</p> <p>15 THE COURT: Is there a legal cause why we                  16 should not proceed?                  17 MR. WHITE: No, Your Honor.                  18 MR. MARX: No, Your Honor.</p> <p>19 THE COURT: Well, I did hear the trial in                  20 this case. I don't think there is any question                  21 that the jury's verdict was solidly based.</p> <p>22 It's pretty clear that what happened                  23 that night was that you drank too much. Your                  24 father called the police because you were breaking                  25 stuff at his house and being difficult and out of</p>	<p>1 plan that would be more workable if you followed                  2 through on it. So pretty clearly when you're                  3 sober and you're thinking about things, you have                  4 an ability to work up a practical plan that would                  5 get you in better shape.</p> <p>6 The issue is you have got to follow                  7 through with it and that's definitely left in                  8 question by how you handled your probation after                  9 your rider. Because based on what you did is you                  10 got off the rider in January. This offense                  11 happened in June. You started drinking again in                  12 April. Your probation officer told you to report                  13 to testing. The next day after it became apparent                  14 that you relapsed. And then you basically took                  15 off and were couch surfing and dodging                  16 supervision. That doesn't give evidence that                  17 you've changed directions.</p> <p>18 And there is a point and the point has                  19 passed in your case where a person racks up so                  20 many offenses that you have to say where you need                  21 to give evidence that you are willing to make                  22 changes. You can go in a structured setting, but                  23 you continued to make some very poor choices once                  24 you're back in an unstructured setting. There is                  25 no question that you have some serious addiction</p>

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1 issues. I mean, that's been there for a while.  
 2 I think it's reasonable that there be a  
 3 penalty for this offense. There are warrants  
 4 outstanding for you. You know there would be  
 5 warrants outstanding for you when the police  
 6 officer placed you in custody because you  
 7 absconded. And your actions were unjustified,  
 8 unreasonable and unacceptable and they warrant a  
 9 penalty.  
 10 You need a greater period of time of  
 11 sobriety. I think that's pretty clear. And then  
 12 you need to follow through. There are 150 some AA  
 13 groups in this Valley. They don't cost anything.  
 14 People can move around and find one that they  
 15 like. There are different kinds of groups that  
 16 work well for different sorts of people. But it's  
 17 a question of sincere commitment.  
 18 So next time instead of surrendering to  
 19 your addictions you might want to give some  
 20 thought to how you can battle it effectively. And  
 21 one key way is to be active in AA. And the second  
 22 infallible way is not to purchase, possess or  
 23 consume alcohol.  
 24 What I am going to do in this case, the  
 25 statute requires a consecutive sentence. What I

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1 am going to do in this case is impose a sentence  
 2 of one year fixed followed by four years  
 3 indeterminate for a five year sentence. That does  
 4 have to be consecutive. I think there does need  
 5 to be a penalty. Your behavior was unreasonable  
 6 and unwarranted. And that warrants a penalty.  
 7 I think that putting it so that you can  
 8 earn your way back is more beneficial to a  
 9 long-term public interest. I think giving people  
 10 some insight to pull their conduct in life in line  
 11 and start dealing with the problems they have is  
 12 better for everybody in the long run, including  
 13 the people in the institution and for you.  
 14 Because you need to approach things  
 15 differently. You have been approaching things  
 16 badly for a long time. From what you write, it  
 17 sounds like you kind of have some of the correct  
 18 ideas, but you need to start putting them into  
 19 practice.  
 20 I am not going to award any court  
 21 costs. There is no restitution due.  
 22 You need to make some changes. And you  
 23 need to do what you need to do to make that go  
 24 deeper. Any questions?  
 25 MR. MARX: No, Your Honor.

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1 MR. WHITE: Not from the State. State is  
 2 returning its copy of the PSI.  
 3 MR. MARX: Aa is Defense.  
 4 THE COURT: You do have 42 days in which to  
 5 appeal.  
 6 (Proceedings concluded 3:20 p.m.)  
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1 CERTIFICATE OF REPORTER  
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 3 STATE OF IDAHO )  
 4 ) ss.  
 5 COUNTY OF ADA )  
 6  
 7 I, NICOLE L. JULSON, Official Court  
 8 Reporter of the County of Ada, hereby certify:  
 9  
 10 That I attended the hearing in the  
 11 above-entitled matter and reported in stenograph  
 12 the proceedings had thereat; That I thereafter,  
 13 from the shorthand record made by me at said  
 14 proceedings; that the foregoing 195 pages  
 15 constitutes said transcript and that said  
 16 transcript contains a full, true, complete and  
 17 correct transcript of said proceedings.  
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 19 IN WITNESS WHEREOF, I have hereunto set  
 20 my hand this 3rd day of March, 2015.  
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