

6-5-2017

## State v. Percoco Respondent's Brief Dckt. 44748

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/not\\_reported](https://digitalcommons.law.uidaho.edu/not_reported)

---

### Recommended Citation

"State v. Percoco Respondent's Brief Dckt. 44748" (2017). *Not Reported*. 3805.  
[https://digitalcommons.law.uidaho.edu/not\\_reported/3805](https://digitalcommons.law.uidaho.edu/not_reported/3805)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

PAUL R. PANTHER  
Deputy Attorney General  
Chief, Criminal Law Division

LORI A. FLEMING  
Deputy Attorney General

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44748
Plaintiff-Respondent,	)	
	)	Ada County Case No.
v.	)	CR-2015-16207
	)	
JESSICA VIRGINIA PERCOCO,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Percoco failed to establish that the district court abused its discretion by imposing a combined, unified sentence of 12 years, with five years fixed, upon her guilty pleas to burglary, grand theft, and trafficking in heroin?

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

Percoco pled guilty to burglary, grand theft, and trafficking in heroin, and the district court imposed a combined unified sentence of 12 years, with five years fixed.

(R., pp.85-89.) Percoco filed a notice of appeal timely from the judgment of conviction.  
(R., pp.91-93.)

Percoco asserts her sentence is excessive in light of her drug addiction, difficult childhood, and purported remorse and acceptance of responsibility. (Appellant's brief, pp.4-5.) The record supports the sentence imposed.

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)).

The maximum prison sentence for the crimes of burglary and grand theft are 10 years and 14 years, respectively. I.C. §§ 18-1403, -2408(2)(a) The penalty for trafficking in heroin has a mandatory minimum of three years, and a maximum prison sentence of life. I.C. § 37-2732B(a)(6)(A)(D). The district court imposed a unified sentence of four years, with two years fixed for burglary; four years, with two years fixed for grand theft, to run concurrently with the burglary sentence; and eight years, with three years fixed for trafficking in heroin, to run consecutively to the burglary and grand theft sentences, all of which fall well within the statutory guidelines. (R., pp.85-89.)

That Percoco has failed to overcome her drug addiction and had a difficult childhood does not show that the district court abused its sentencing discretion. Percoco has a long criminal history that includes convictions for manufacturing/possessing a dangerous weapon, theft (amended from burglary), possession of a controlled substance (multiple convictions), trespass, bringing a controlled substance into prison, and possession of a narcotic substance. (PSI, pp.6-10.) Percoco has been given multiple opportunities for rehabilitation, but neither treatment nor prior legal sanctions have deterred her from committing new crimes. (See PSI, pp.10-11, 15-16.) At sentencing, the district court found it significant that Percoco has not changed her behavior, despite the legal consequences, and also found that, because of her long history of drug abuse and difficult childhood, it would take a long-term project to get Percoco back on track. (12/9/16 Tr., p.31, L.15 – p.35, L.9.) The

state submits that Percoco 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 Percoco's conviction and sentence.

DATED this 5th day of June, 2017.

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

ALICIA HYMAS  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of June, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

KIMBERLY A. COSTER  
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

Page 30

1 That being said, she has a significant  
 2 sentence coming to her by virtue of the  
 3 trafficking. I don't think the court needs to  
 4 send her to prison for 15 years, five years fixed,  
 5 in order to accomplish the Tuhill objectives. I  
 6 think the court can accomplish those with a three  
 7 plus five.  
 8 That gets her, as near as I could tell,  
 9 about 26 or 27 more months in custody before she  
 10 is eligible for parole, and then it will be up to  
 11 her to convince the parole commission with her  
 12 record and her behavior that she deserves the  
 13 opportunity for parole. The five years' worth of  
 14 indeterminate time is enough of an incentive to  
 15 get her to behave in custody and it gives her --  
 16 the Department of Corrections some tools to deal  
 17 with her when she gets out of parole.  
 18 Because I don't think she is going to  
 19 be able to fix this quickly. It's going to take  
 20 some time, and my hope for Jessica is that once  
 21 she gets out to the institution, that she can get  
 22 a job. She can go to the work center and conform  
 23 her behavior and try to make something of herself.  
 24 Because right now she is really kind of -- she  
 25 doesn't have anything.

Page 32

1 history of drug-related offenses in California  
 2 from before she came to Idaho. The defendant, by  
 3 her own admission after coming to Idaho in 2014,  
 4 engaged in a theft related scheme or life-style in  
 5 which she traveled around to places using stolen  
 6 credit cards and things of that nature in order to  
 7 fund her life and fund her drug habit.  
 8 The theft element of this case is  
 9 significant. This is a somewhat more  
 10 sophisticated theft type scheme than going into  
 11 stores and shoplifting in that it involved the  
 12 purchase of a machine that enabled the defendant  
 13 to place stolen credit card numbers on the  
 14 magnetic strips on different cards and then use  
 15 those cards in order to purchase things.  
 16 So the defendant was using these stolen  
 17 credit cards or stolen credit card numbers to buy  
 18 gift cards, re-encoding the magnetic strips on  
 19 cards with stolen credit card numbers. Certainly  
 20 there's a lot of criminal thinking inherent in  
 21 that plan in living the defendant's life that way.  
 22 The defendant I think does get some  
 23 credit marks for honesty with the PSI writer as to  
 24 how she had been living her life. She does  
 25 indicate that this was sort of the beginning of

Page 31

1 I think the one thing that I found sort  
 2 of hopeful is that she has got some plans for the  
 3 future, and she understands that those plans have  
 4 to be put on hold. But somebody who doesn't have  
 5 plans for the future doesn't have any hope for  
 6 today. So I think that she is starting to turn  
 7 the corner, and the court will have plenty of time  
 8 by virtue of the mandatory minimum to allow her to  
 9 do that on her own. Those are the comments I  
 10 have, Judge. Thank you.  
 11 THE COURT: Thank you, Mr. Lorello.  
 12 Ms. Percoco, would you like to make a  
 13 statement?  
 14 THE DEFENDANT: No, thank you.  
 15 THE COURT: That's fine. You're not  
 16 obligated to do that. I, of course, have read the  
 17 presentence investigation materials in this case.  
 18 I'm also well aware of the four objectives of  
 19 criminal sentencing that Idaho law directs me to  
 20 consider in every case. As I have already noted,  
 21 a three-year minimum prison sentence is required  
 22 by law here in connection with the trafficking in  
 23 heroin charge, so that's the base line from which  
 24 we're operating here today.  
 25 Now, the defendant has a significant

Page 33

1 her career as a their, these incidents here in  
 2 Idaho.  
 3 Now, I don't know whether that's true  
 4 or not. The defendant's explanation in the PSI  
 5 seemed to be along the lines of she had a serious  
 6 drug habit and drugs cost a lot more here in Idaho  
 7 than they cost in California. And it required her  
 8 to go to these kind of measures in order to fund  
 9 her habit.  
 10 As I said, the defendant has five prior  
 11 drug felony offenses in California that are at  
 12 least eligible for reduction to misdemeanor under  
 13 California law, whether these have been reduced or  
 14 not. I think it's not -- doesn't matter terribly  
 15 to the sentence that would be imposed or  
 16 appropriate here in this case. It's really, the  
 17 significance is that all these run-ins with the  
 18 legal system has not caused the defendant to  
 19 modify her behavior and live less of a crime  
 20 oriented life-style.  
 21 The defendant indicated to her credit  
 22 in the PSI that while on probation and parole in  
 23 California, she was passing tests, passing drug  
 24 tests, by faking them, presumably providing urine  
 25 samples that weren't hers or something along those

Page 34

1 lines in order to test clean when she in fact  
 2 wasn't clean.  
 3 The defendant has had a difficult life,  
 4 difficult life circumstances. Both parents went  
 5 to prison when she was eight years old. The  
 6 defendant is a long-term, very serious drug user  
 7 including daily I.V. heroin and methamphetamine  
 8 use and has been using all on a regular basis  
 9 since she was 14 years old.  
 10 On the whole, I think the PSI suggests  
 11 that the defendant is a fairly bright person, who  
 12 lost her way very young and has had a heck of a  
 13 time being 32 years old now getting back on track  
 14 and making the most of her skills and abilities  
 15 and faculties as a human being.  
 16 The extent of the defendant's drug  
 17 problem is very significant, and her criminal  
 18 thinking errors are so apparent that it does seem  
 19 to be a long-term project to get the defendant  
 20 back on track and to be someone who could be  
 21 trusted and live in the community again and  
 22 conduct herself in an appropriate and crime free  
 23 way.  
 24 Now, in my mind, absent evidence that  
 25 the defendant was engaged in actually selling

Page 36

1 Idaho for an aggregate term of eight years. I'll  
 2 specify a minimum period of confinement of three  
 3 years and a subsequent indeterminate period of  
 4 confinement of five years.  
 5 Additionally, on your plea of guilty to  
 6 Count 4, the crime of grand theft by deception, on  
 7 your plea of guilty to that crime, I find you  
 8 guilty, and I will sentence you to the custody of  
 9 the Idaho State Board of Correction under the  
 10 unified sentence law of the State of Idaho for an  
 11 aggregate term of four years, I'll specify a  
 12 minimum period of confinement of two years and a  
 13 subsequent indeterminate period of confinement of  
 14 two years.  
 15 And I will run that sentence  
 16 consecutive to the sentence on Count 5. On  
 17 Count 1, the crime of burglary on your plea of  
 18 guilty, I find you guilty. I will sentence you to  
 19 the custody of the Idaho State Board of Correction  
 20 under the unified sentence law of the State of  
 21 Idaho for an aggregate term of four years,  
 22 specifying a minimum period of confinement of two  
 23 years, and a subsequent indeterminate period of  
 24 confinement of two years to run concurrent with  
 25 the sentence imposed on Count 4.

Page 35

1 heroin in the community, the theft aspect of this  
 2 case, given the nature of the theft scheme, is  
 3 perhaps the more serious side of the case than the  
 4 heroin possession charges.  
 5 That said, the legislature has dictated  
 6 three years in prison at a minimum on heroin  
 7 charge, whereas there is no mandatory minimum  
 8 sentence on the theft related crimes at issue  
 9 here.  
 10 This is -- of course, it's a prison  
 11 case, and it's a matter of determining the  
 12 appropriate time that is appropriate.  
 13 I'll go through the charges one by one  
 14 here and meat out sentences. The overall effect  
 15 of it won't be apparent, I would say, until all of  
 16 them have been read. I'm going to go in reverse  
 17 order of the order in which the counts are  
 18 charged. Count 5 is the one that requires the  
 19 mandatory minimum prison time, so I'm going to  
 20 start with that one.  
 21 All right. So, Ms. Percoco, on your  
 22 plea of guilty to Count 5, trafficking in heroin,  
 23 I find you guilty. I will sentence you to the  
 24 custody of the Idaho State Board of Correction  
 25 under the unified sentence law of the State of

Page 37

1 So as I count things and what I had  
 2 intended to do is to impose what nets out to a  
 3 12-year sentence with five years fixed count  
 4 considering all of these counts together.  
 5 On the trafficking in  
 6 methamphetamine -- or excuse me, heroin charge, I  
 7 will impose a fine of \$10,000, as already noted  
 8 that fine is required by law.  
 9 On each count, I will assess court  
 10 costs. I won't impose fines on the other counts.  
 11 It doesn't appear that that would be constructive.  
 12 There are restitution matters to address later on,  
 13 and we've scheduled further proceedings to address  
 14 those matters.  
 15 Now, you are, of course, entitled to  
 16 credit for the time you have spent in custody.  
 17 During the course of this case so far, by our  
 18 count that is 310 days in custody. So you will  
 19 have credit for that period of time toward the  
 20 prison sentence I have ordered today.  
 21 All right. You have the right to  
 22 appeal, Ms. Percoco. If you can't afford an  
 23 attorney for the appeal, one will be provided at  
 24 public expense. Any appeal must be filed within  
 25 42 days.