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### State v. Pinell Respondent's Brief Dckt. 45344

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45344
Plaintiff-Respondent,	)	
	)	Jerome County Case No.
v.	)	CR-2017-1533
	)	
BRIAN MARSHALL PINELL,	)	
	)	RESPONDENT’S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Pinell failed to establish that the district court abused its discretion by imposing a unified sentence of eight years, with three years fixed, upon his guilty plea to aggravated assault on law enforcement officers?

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

Pinell consumed alcohol while target shooting at “rock chucks” with a friend, became “pretty drunk,” and then went to a bar. (PSI, pp.4, 6.<sup>1</sup>) When his girlfriend declined to join

<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file “#45344 Appeal Conf. Exhibits Brian Pinell.pdf.”

him at the bar, Pinell became “enraged” and left the bar, driving his vehicle at “a high rate of speed” while he was “highly intoxicated.” (PSI, pp.4, 6.) He “crashed into a concrete wall,” but “kept going.” (PSI, pp.4-5.) Officers pursued Pinell after observing him “lose control and spin 360 degrees in an intersection” and then continue “driving recklessly.” (PSI, p.4.) When Pinell saw the police behind him, he was “convinced” that his girlfriend “had called them on [him]” and “decided maybe [he] could get away.” (PSI, p.6.) He attempted to turn onto a dirt road, “missed the road and crashed through some wooden posts, went down a steep barrow pit, and hit a large dirt mound” before getting back on the road and continuing eastbound. (PSI, p.4.)

Pinell eventually “hit some boulders and came to a stop,” at which time he exited the vehicle and retrieved a “long rifle with a scope on it.” (PSI, p.5; R., pp.12-13.) Pinell walked toward the officers’ patrol vehicle with the rifle pointed at the windshield, “brought the rifle to his shoulder and looked through the scope pointing the muzzle towards patrol vehicle,” and “attempt[ed] to manipulate the action on the rifle.” (PSI, p.4; R., p.12.) Fearing for their lives, the officers exited the patrol vehicle and “found cover behind it.” (R., p.12; PSI, p.4.) Pinell then turned and fled, disregarding the officers’ orders to stop. (R., p.12, PSI, p.4.) Upon securing Pinell’s vehicle – which he had left running – the officers observed “three more rifles in between the two front seats,” “several cans of open and unopened beer,” and “at least one open bottle of liquor.” (R., p.14.)

The state charged Pinell with open container, misdemeanor DUI, felony eluding, and two counts of aggravated assault on a law enforcement officer. (R., pp.72-74.) Pursuant to a plea agreement, Pinell pled guilty to one count of aggravated assault on law enforcement officers (amended to reflect both victims/officers) and the state dismissed the remaining charges. (R., pp.83-89.) The district court imposed a unified sentence of eight years, with three years fixed.

(R., pp.95-99.) Pinell filed a notice of appeal timely from the judgment of conviction. (R., pp.102-05.)

Pinell asserts his sentence is excessive in light of his alcohol abuse, willingness to participate in treatment, support from his mother, and purported remorse. (Appellant's brief, pp.3-4.) 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 aggravated assault on law enforcement officers is 10 years. I.C. §§ 18-906, -915(1)(b). The district court imposed a unified sentence of eight years, with three years fixed, which falls well within the statutory guidelines. (R., pp.95-99.) Furthermore, Pinell’s sentence is appropriate in light of the extremely dangerous nature of the offense and Pinell’s ongoing disregard for the law and the safety of others. (Appellant’s brief, pp.3-4.) As a juvenile, Pinell disregarded the rights of others by committing the crime of vandalism. (PSI, p.6.) As an adult, he was convicted of DUI and disturbing the peace (amended from domestic battery in the presence of a child), after which he persisted in violating the law – and disregarded efforts to protect the community – by continuing to drive with a suspended driver’s license; he quickly incurred a conviction for DWP, then a conviction for failure to purchase a driver’s license, followed by a second conviction for DWP, along with a conviction for open container. (PSI, pp.7-8.) Pinell was subsequently convicted of a second DUI and, despite completing substance abuse treatment, he once again chose to endanger the community by driving while intoxicated in the instant offense. (PSI, pp.4, 8, 14.)

Pinell’s conduct in the instant offense was exceedingly dangerous. Not only did he drive while highly intoxicated, he continued to drive recklessly after repeatedly losing control of his vehicle and after his passenger asked him to stop and to be let out of the vehicle, and he deliberately chose to flee from police, simply because he was ““upset”” with his girlfriend and ““decided maybe [he] could get away.”” (PSI, pp.4-6.) After his vehicle was disabled, Pinell added to the peril by exiting his vehicle with a rifle and walking toward the officers’ patrol vehicle with the rifle aimed at their windshield. (PSI, p.4.) One of the officers reported:

At this point I thought the suspect was going to start shooting and I expected to get shot at any moment. I was in absolute fear for my life and in fear of Deputy Wethern[']s life. We both exited the vehicle and found cover behind it. I was able to grab my patrol rifle in case we ended up in a gun fight with the suspect. I made my way over to the passenger side of the truck to find the suspect. My full intention was to engage the suspect with my rifle if he was still threatening us.

(R., p.12.) At sentencing, the state recommended a unified sentence of 10 years, with five years fixed, stating:

The reason why we're asking for that amount of time is due to the fact that this particular defendant but for the fact that -- at least from the video it appears as though but for the fact that his gun didn't fire, he would have been shooting a 7-millimeter rifle, which is the defendant's admission in this particular matter that it was a 7-millimeter, at our law enforcement officers on the day in question.

There was [sic] two law enforcement officers, and but for the fact that the law enforcement officers did not -- were not able to obtain their weapon[s] in time to shoot back, this defendant could most likely be dead. So we have the best case scenario in this particular matter in that nobody was killed.

(7/17/17 Tr., p.20, L.13 – p.21, L.1.) The district court subsequently articulated the correct legal standards applicable to its decision and also set forth in detail its reasons for imposing Pinell's sentence. (7/17/17 Tr., p.34, L.6 – p.37, L.6 (Appendix A).) The state submits that Pinell 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 Pinell's conviction and sentence.

DATED this 27th day of April, 2018.

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

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of April, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JASON C. PINTLER  
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

1 So despite the requests that have been made  
2 here by the State, I would suggest to the Court that  
3 this is a probation case unless that depreciates,  
4 unnecessarily depreciates the severity of this crime.  
5 If it does, then that means the Court has come to the  
6 conclusion that there must be some kind of punishment.  
7 In that instance, I would ask the Court to  
8 retain jurisdiction because it serves two purposes in a  
9 case like Brian's. One, it will serve as punishment  
10 for Brian, incarceration for somewhere between six to  
11 nine months on average. And, number two, it would  
12 mandate and force the necessary treatment that is  
13 necessary. Although it could be completed in the  
14 community, it would certainly be completed while on a  
15 rider.  
16 So those are my two requests to this Court.  
17 You have a three-page letter in front of you, Judge,  
18 from Mr. Pinell he wrote for you on his own and gave to  
19 me on Friday of this week, or last week, which I  
20 provided to the Court. I think that those are the sum  
21 total of the comments; although, I would ask you to  
22 inquire if he has anything else to add.  
23 THE COURT: I will.  
24 Other than this, Mr. Pinell, you have the  
25 right to address the Court. Is there anything else you

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1 under the influence. He's had a prior driving under  
2 the influence offense. He was under the influence of  
3 alcohol at this time. I think that probation at this  
4 point would depreciate the seriousness of the offense.  
5 There's two prior DUI's, I believe, and  
6 then there's this instant offense. Although he did not  
7 plead to the DUI, he does admit that he was driving at  
8 the time and hence the reason why he can't remember what  
9 happened.  
10 But before we even get to the shooting,  
11 driving at a high rate of speed, ultimately ending up  
12 in a crash, and then pointing a gun at the officers,  
13 clearly, in my mind, a threshold has been crossed  
14 regarding the seriousness of the offense.  
15 You can blame it on the alcohol, but you  
16 can't control your drinking, and that's what's, you  
17 know, that's the genesis of it. I mean, the  
18 ramifications from drinking are real serious.  
19 I also comment on the letter that was  
20 submitted by your mother, and we heard her statement,  
21 that says she doesn't feel you are a danger to yourself  
22 or anyone else. Well, clearly, two prior DUI's, third  
23 instant offense where you're driving under the influence  
24 of alcohol, that in and of itself is a danger to  
25 society.

35

1 would like to say?  
2 THE DEFENDANT: No, Your Honor.  
3 THE COURT: Okay. Just give me one minute. I  
4 was just presented with this, and so I'll read it.  
5 (Court reviewed the letter.)  
6 THE COURT: All right, then. For purposes of  
7 sentencing, the Court considers the four goals of  
8 sentencing: protection of society, rehabilitation,  
9 retribution, and deterrence; recognizing, however, that  
10 protection of society is the primary concern.  
11 The Court also considers the factors set  
12 forth in Idaho Code Section 19-2521 to determine whether  
13 probation or some form of incarceration is appropriate.  
14 In that regard, the Court considers the character of  
15 the offender, the nature of the underlying offense, as  
16 well as the defendant's prior record.  
17 The Court has reviewed the presentence  
18 investigation report, along with the attached GAIN  
19 assessment and the letters that were submitted on  
20 behalf of Mr. Pinell, and heard the statements from  
21 Candice Pinell.  
22 I'll start out by saying a few things.  
23 First of all, I'm in disagreement that this is a  
24 probation case. Mr. Pinell, yes, his prior record  
25 consists of misdemeanors, but he had prior driving

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1 Leading the officers on a high speed chase  
2 while you are intoxicated is certainly a high risk and  
3 danger to society. And then pulling a firearm on the  
4 officers, obviously, that speaks for itself. So I  
5 disagree that you're not a danger to society.  
6 Again, I think that based on the nature of  
7 the offense that you crossed a threshold where probation  
8 would depreciate the seriousness of the offense. If I  
9 were just to do what your counsel has suggested and  
10 place you in a retained jurisdiction program, the  
11 implication being that after going through the retained  
12 jurisdiction program, there would be an expectation of  
13 probation.  
14 So in the exercise of discretion and  
15 because I don't feel probation is an appropriate  
16 sentence, I believe the presentence investigation report  
17 also recommends imposition of a term, I will sentence  
18 you as follows to the charge of aggravated assault on  
19 certain law enforcement officers. I will impose court  
20 costs. I will impose a fine of \$2,000. I will impose  
21 penitentiary time of eight years, comprised of three  
22 years fixed and five years indeterminate.  
23 I'll state that the reason -- I understand  
24 what you've -- I read your letter, and I understand the  
25 obligations that you have, and I'm telling you that's

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1 why I'm not going with the full five fixed that the  
2 State has recommended. I'll give you the three fixed,  
3 and then you can make your argument to the Department  
4 of Parole. But I think, like I said, I think the  
5 lesser sentence would depreciate the seriousness of the  
6 crime.

7 I will have the judgment prepared today.  
8 You'll have 42 days from the file stamp within which to  
9 file an appeal. I have to inform you if you cannot  
10 afford the costs of an appeal, you may proceed in forma  
11 pauperis.

12 I will exonerate the bail in this case.  
13 I will order the parties return the  
14 presentence investigation reports, and I'll remand your  
15 custody to the sheriff for delivery to the State  
16 Department of Corrections.

17 For the record, I did sign the motion and  
18 order of dismissal on Counts II through V.

19 MS. SCOTT: Thank you, Your Honor. I'm again  
20 sorry about that mistake.

21 THE COURT: I understand.  
22 (Proceeding concluded.)

23  
24  
25