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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45407
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-16-41233
v.)	
)	
ELLEN JULIA BROOKE,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Ms. Brooke was convicted after guilty pleas to the crimes of felony leaving the scene of an injury accident (Count I), and misdemeanor operating a motor vehicle while under the influence of alcohol with an excessive blood alcohol concentration (“BAC”) (Count II). (R., pp.87-96). She was sentenced to a unified five year term, with one year fixed, on Count I, and three hundred and sixty-five days concurrent on Count II. (R., pp.104-107.) She thereafter filed a Motion for Reconsideration pursuant to Idaho Criminal Rule 35 (“Rule 35”), which was

denied.¹ (R., p.111.) She now appeals, asserting the trial court abused its discretion by imposing an excessive sentence and failing to reduce her sentence. (R., pp.108-110.)

Statement of Facts and Course of Proceedings

On December 5, 2016, while driving her vehicle, Ms. Brooke veered out of her lane and ran into a parked vehicle. (Presentence Investigation (“PSI”), pp.4-5, 87.)² The parked vehicle owner, Ms. Victoria Lucich, was standing outside of her car, attempting to put her child into a car seat. After Ms. Brooke struck the Lucich vehicle, she continued driving until a passerby pursued her to get her to pull over. The police arrived at the scene and determined Ms. Brooke was driving with an excessive BAC and arrested her. (PSI, pp.3-4, 87-89.) When the vehicle impact occurred, Ms. Lucich fell backwards and her head struck her vehicle, causing her to suffer a laceration and swelling to her right eye area. Later, Ms. Lucich saw a chiropractor for “all over pain.” (PSI, pp.4, 46, 53, 87.) Ms. Brooke was arrested and charged with Leaving the Scene of an Injury Accident, in violation of I.C. § 18-8007, and Operating a Motor Vehicle While Under the Influence of Alcohol with an Excessive Blood Concentration, in violation of I.C. § 18-8004C. (R., p.65.) In exchange for her guilty pleas to both counts, the State agreed to cap its sentencing recommendation to a unified five year term, with three years imposed, and abandon its efforts to file an Information Part II alleging Ms. Brooke to be a persistent violator under I.C. § 19-2514. (Tr., p.5, Ls.16-25, p.6, Ls.1-10.)³

¹ Ms. Brooke has simultaneously filed hereto a Motion to Augment the record with the December 6, 2017, Order Denying Motion for Reconsideration of Sentence.

² The PSI referenced in this brief refers to the July 21, 2017, Presentence Investigation.

³ The reporter’s transcript is set forth in two continuous volumes; volume 1 contains pages 1-20 representing the plea hearing, and volume 2 contains pages 21-39, representing the sentencing hearing. For purposes of this appeal, Ms. Brooke will refer solely to the page number.

At the June 12, 2017, sentencing hearing, the State sought a five year term with three years fixed. (Tr., p.23, Ls.8-16.) Ms. Brooke, through counsel, requested that the court impose a grant of probation. (Tr., p.31, Ls.9-16.) Yet, despite the numerous mitigating factors and the presentence investigator's recommendation for probation, the district court declined to place Ms. Brooke on probation or retain jurisdiction; rather, it imposed a unified sentence of five years, with one year fixed. (PSI, p.18; R., pp.104-107.) Ms. Brooke filed a timely notice of appeal, as well as a Motion to Reconsider under Rule 35, asserting the district court abused its discretion in imposing a five term. (R., pp.65, 72.)

ISSUE

Did the district court abuse its discretion by failing to fully consider the mitigating factors and imposing a unified sentence of five years, with one year fixed, following Ms. Brooke's guilty pleas?

ARGUMENT

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Five Years, With One Year Fixed, Upon Ms. Brooke's Pleas Of Guilty To Felony Leaving The Scene Of An Injury Accident And Driving A Vehicle While Under the Influence Of An Excessive BAC

Since Ms. Brooke does not allege her sentence exceeds the statutory maximum, in order to show an abuse of discretion, she must demonstrate that in light of the governing criteria, the sentence was excessive under any view of the facts. *State v. Charboneau*, 124 Idaho 497, 499, 861 P.2d 67, 69 (1993); *State v. Small*, 107 Idaho 504, 505, 690 P.2d 1336, 1337 (1984). Where a defendant contends 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 reviewing court considers the length of the

appellant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). "Reasonableness is a fundamental requirement in the exercise of sentencing discretion." *State v. Kingsley*, 99 Idaho 868, 869, 590 P.2d 1014, 1015 (1979). Yet, 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).

There are several factors that a court should consider to determine whether the objectives are served by a particular disposition and whether probation is appropriate. *See State v. Knighton*, 143 Idaho 318, 320 (2006); I.C. § 19-2521. These factors include, but are not limited to: "the defendant's good character, status as a first-time offender, sincere expressions of remorse and amenability to treatment, and support of family." *Knighton*, 143 Idaho at 320. Insufficient consideration of these factors can warrant a more lenient sentence. *See, e.g., Cook v. State*, 145 Idaho 482, 489-90 (Ct. App. 2008); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991). In Ms. Brooke's case, several mitigation factors were present – her early acceptance of responsibility, personal life circumstances, amenability to treatment, community support, and employment capacity. All told, these factors compelled a lesser sentence.

To begin with, Ms. Brooke willingly entered guilty pleas within four months from the time the Information was filed, rather than protest the alleged facts. (R., pp.65, 87-88.) During her colloquy with the court, Ms. Brooke expressed remorse and acknowledged her criminal conduct:

On the date of the accident I made a number of very poor decisions. I am sorry someone was hurt as a result & grateful that it wasn't worse. Since the incident I have been 100% compliant with all pre-trial conditions. I have no positive UA's and once I learned that dilute UA's were an ongoing problem I followed all recommendations suggested by Officer Young including no coffee on testing days & changing my diet to include more protein. These dietary changes worked and

regular dilutes stopped as of Jan 4; 3 ½ weeks before the Scram Cam was added to my conditions. I know this was a serious incident but it is not a pattern of behavior and I don't believe I am a danger to society.

(PSI, p.15.) This early acceptance of responsibility is mitigating. *See State v. Shideler*, 103 Idaho 593, 594 (1982). Moreover, acknowledgment of guilt and acceptance of responsibility by the defendant are critical first steps toward rehabilitation. *See State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010). Ms. Brooke should be afforded credit for resolving her case prior to trial, and accepting culpability for her actions. Ms. Brooke's personal circumstances were also significant.

Like many individuals before the criminal court, Ms. Brooke has been severely affected by her family of origin. This can be mitigating evidence. *See State v. Gonzales*, 123 Idaho 92, 93-94 (Ct. App. 1993) (mitigating facts included defendant's young age, lack of high school completion, abusive childhood having lived in "numerous broken homes," and "was introduced to drugs and alcohol at a very young age and admit[ted] to being chemically dependent."). Ms. Brooke was born and raised in New York, but her childhood was "extremely dysfunctional and traumatic." (PSI, p.9.) She recalls that her mother divorced by the time she was five, was addicted to drugs and had several breakdowns. At times, Ms. Brooke and her siblings lived with her grandmother and her mother was in jail. (PSI, pp.9-10.) Ms. Brooke was sexually abused by two of her step-uncles before the age of thirteen, and after age thirteen or fourteen, she was raped. (PSI, p.10.) As such, she has faced significant trauma. It is appropriate for the district court to consider a defendant's mental health issues when making sentencing decisions. I.C. § 19-2523; *Hollon v. State*, 132 Idaho 573, 581 (1999). In dealing with her life circumstances, Ms. Brooke has admittedly turned to alcohol and drugs.

Courts have recognized that substance abuse can be a mitigating factor in sentencing. *State v. Nice*, 103 Idaho 89, 645 P.2d 323 (1982). Alcoholism and addiction are recognized by

the American Medical Association and the Surgeon General as disease, and are not merely a result of one's lack of willpower or compunction. Andrew W. Gurman, M.D., President of the American Medical Association, released a statement last year to this effect:

The AMA applauds Surgeon General Murthy for tackling the crisis of drug and alcohol addiction – an issue of vital importance to our patients and communities. The report's detailed findings and research provide important guidance for the nation to see that addiction is a chronic disease and must be treated as such. This is a crucial starting point.

The AMA supports the report's emphasis on early detection and evidence-based interventions rather than providing treatment only after a crisis. The report clearly explains how alcohol and certain other drugs affect people's brains and can develop into substance use disorders. . . .

<https://www.ama-assn.org/ama-applauds-surgeon-general-report-substance-use-disorders> (last accessed December 21, 2017.) Despite that Ms. Brooke has suffered from substance abuse in the form of addiction to stimulants and an alcohol-related disorder, she has made a great deal of progress. (PSI, p.27.) During the PSI interview process, Ms. Brooke completed a Global Appraisal of Individual Needs ("GAIN") with a licensed social worker. (PSI, p.20.) The GAIN evaluator diagnosed Ms. Brooke with a mild alcohol use disorder in early remission and severe stimulant use disorder which was in sustained remission. (PSI, p.27.) The evaluator's recommendation was that Ms. Brooke complete a treatment plan called ".5 Pre-treatment/Early Intervention." (PSI, p.27.) The fact that Ms. Brooke's substance abuse disorders were in remission was corroborated by Ms. Brooke's account, where she acknowledged having a more significant drug and alcohol problem in the past, which ended in approximately 2001. (PSI, p.14.) Her progress in dealing with her disease bodes well for her rehabilitation.

While under supervision, outside of challenges in the first several weeks on account of dilute tests, Ms. Brooke's performance was great. She "maintained excellent communication with the Pretrial Services Unit," and complied with random urinalysis ("UA"), weekly phone

calls and scheduled face-to-face visits. (PSI, pp.9-10; R., pp.100-101.) In fact, she completed forty-one UA's which were negative. (R., p.100.) Ms. Brooke also has a lack of recent significant criminal history outside of the current offense. Although Ms. Brooke has felony drug-related convictions in her record, she did excellent in the community for almost a decade. (PSI, p.8.) Her assessed risk, or LSI, was 16, placing her in the "moderate" range; yet since the moderate range includes an LSI between 16 and 30, her potential for recidivism is closer to low. (PSI, pp.15-16.) And after compiling a lengthy background and analyzing the same, the presentence investigator assessed Ms. Brooke as a candidate for probation supervision. (PSI, p.18.) Ms. Brooke also has the support of his family and friends.

Ms. Brooke's strong community support system is comprised of her immediate family, her church family, and work associates. (PSI, pp.11, 398-400.) These people also attest to Ms. Brooke's character, motivation and remorse. She has been with her husband, Steve Brooke, since 2003. Mr. Brooke attests to the fact that Ms. Brooke has not had substance abuse issues for several years, outside of the present offense, and she has been sober since her December 2016 arrest on this case. (PSI, p.11.) Ms. Brooke had one son named Wolfgang, but tragically, he passed away in 2013 from an asymptomatic heart condition. (PSI, p.11.) She regularly attends the Holy Transfiguration Orthodox Church and has hobbies such as knitting, reading, and exercise. (PSI, p.10.) Charles Hoffman wrote a letter to the court, expressing support for Ms. Brooke, whom he knew through his work as a floral designer. (PSI, p.398.) He described Ms. Brooke as dedicated, motivated, honest, and a great communicator. He attested to her feelings of remorse for the damage she caused. (PSI, p.398.) Her brother, George Bagley, a former sergeant in the U.S. Army, explained that Ms. Brooke recently suffered from the loss of

her son and mother, and he vouched to do whatever he could to help her get back on track. (PSI, p.400.) Ms. Brooke also has viable employment skills.

At the time of Ms. Brooke's sentencing, she was gainfully employed at Home Depot. (PSI, pp.12-13.) She has worked various jobs throughout the years, had earned an AA degree, and recently contemplated pursuing further education. (PSI, pp.12-13, 399.) A defendant's reliability and dedication as a working member of society is a factor which a district court should consider as part of the defendant's character. *State v. Baiz*, 120 Idaho 292, 293 (Ct. App. 1991); *see also State v. Hagerdorn*, 129 Idaho 155, 161 (Ct. App. 1996). Judy Rose-Smith, from Ms. Brooke's church, described Ms. Brooke as a "go-getter," and "completely trustworthy" with money, and "one of many who has had a hard life [] [who has] chosen to struggle against her passions to lead a good Christian life." (PSI, p.399.)

In sum, the evidence of mitigation reveals a woman who has been severely affected by her childhood and the disease of addiction, but who has community support, and is fully willing, eager, and capable of paying her debt to society while on probation. The district court did acknowledge Ms. Brooke's need for alcohol treatment, and the fact that she had done well on pretrial release, yet failed to fully "balance the goals of retribution, protection of society and deterrence against the defendant's potential for rehabilitation." *State v. Douglas*, 118 Idaho 622, 624, 798 P.2d 467, 469 (Ct. App. 1990). It stated:

I don't know, but is all a very concerning incident that is suggestive of a significant alcohol problem. Now, the defendant, after some initial trouble on pretrial release with a number of dilute samples that couldn't be tested, and one initial early-on tamper reading with her SCRAM device has done well. She has been on pretrial release for a substantial period of time. Some of these factors I suppose contributed to the PSI riders'⁴ suggestion that the defendant was an

⁴ Ms. Brooke quotes verbatim from the transcript, however, in reviewing the district court's comments at sentencing in context, Ms. Brooke posits there may be uncorrected error(s) in the transcript where the word "rider" should actually be "writer."

appropriate candidate for probation, although the PSI rider⁵ indicated that the incident itself was serious enough that the PSI rider⁶ expressed, I suppose, what amounts to understanding that some outcome other than probation may not be in the offing here. It is a very serious incident. It warrants a significant punishment. The defendant would seem to benefit from or to be in a position to benefit from substance abuse treatment that, of course, could be available in the community but would also be something to be provided in custody here.

(Tr., p.35, Ls.5-25, p.36, Ls.1-4.) While the court's statements indicate the imposed sentence was fashioned to address rehabilitation (to an extent), and punishment, the court failed to give appropriate weight to Ms. Brooke's overall ability to comply with supervision based upon her acceptance of responsibility and expression of remorse, her family background and progress with her disease, her community support, and her employment reliability and dedication, all of which placed her at low risk to the community. *See Cook v. State*, 145 Idaho 482, 489–90, 180 P.3d 521, 528–29 (Ct. App. 2008) (district court's imposition of eight counts consecutive was excessive, and "the court did not give sufficient consideration to the defendant's status as a first time offender, his expressions of remorse, the likelihood of rehabilitation and deterrence possible with a lesser cumulative sentence, and his amenability to make at least some restitution."). A probation sentence, imposed after Ms. Brooke had already spent time in jail and been so successful on home monitoring, would have been sufficiently tailored to address all sentencing goals. 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). Here, the district court abused its discretion in imposing an excessive sentence because confinement was not necessary to achieve the goals of sentencing.

⁵ *Id.*

⁶ *Id.*

CONCLUSION

Ms. Brooke respectfully requests that this Court reduce her sentence such that she can pay her debt to society on community supervision.

DATED this 24th day of January, 2018.

_____/s/_____
LARA E. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of January, 2018, 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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JASON D SCOTT
DISTRICT COURT JUDGE
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D DAVID LORELLO
ADA COUNTY PUBLIC DEFENDER
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_____/s/_____
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LEA/eas