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### State v. Abbott Appellant's Brief Dckt. 45730

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45730
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR01-17-24403
v.	)	
	)	
CHRISTOPHER E. ABBOTT,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, fifty-six-year-old Christopher E. Abbott pleaded guilty to felony aggravated driving under the influence of alcohol. The district court imposed a unified sentence of fifteen years, with seven years fixed. On appeal, Mr. Abbott asserts the district court abused its discretion when it imposed his sentence.

## Statement of the Facts & Course of Proceedings

Garden City Police Department and Boise City Police Department officers responded to the scene of an injury crash involving two vehicles at Chinden Boulevard and East 44<sup>th</sup> Street. (See Presentence Report (*hereinafter*, PSI), pp.3, 78.)<sup>1</sup> The force of the accident ejected Mr. Abbott, the driver of one of the vehicles, from his vehicle onto the roadway. (See PSI, pp.3, 78.) He was unconscious and bleeding from the head. (PSI, p.57.) The male passenger in Mr. Abbott's vehicle, Laurel McKenzie, had facial lacerations, and reported chest pain and a dislocated right hip. (See PSI, pp.3, 67-68.) According to the presentence report, the driver of the other vehicle was not injured. (PSI, p.3.)

In or near Mr. Abbott's vehicle, officers found a baggie containing a brown tar-like substance, a pill bottle with a prescription in Mr. Abbott's name for methadone and several white round pills inside, and a syringe. (See PSI, pp.3, 63.) The pills fit the methadone prescription on the bottle, and the brown substance tested presumptively positive for heroin. (PSI, p.3.)

After Mr. Abbott was taken to a hospital, officers had a paramedic supervisor administer a blood draw on him, pursuant to an aggravated driving under the influence investigation related to Mr. McKenzie's injuries. (PSI, p.3.) Mr. Abbott was unconscious the entire time. (See PSI, p.66.) The blood test gave a blood alcohol content result of 0.16. (PSI, p.3.)

The State charged Mr. Abbott by Information with one count of aggravated driving under the influence of alcohol, felony, I.C. § 18-8006, and one count of possession of a controlled substance, felony, I.C. § 37-2732(c). (R., pp.33-34.) Pursuant to a plea agreement, Mr. Abbott agreed to plead guilty to aggravated driving under the influence of alcohol, and the State agreed to dismiss the possession of a controlled substance charge. (See Tr., p.6, L.4 – p.7, L.12.) The

sentencing recommendations would be open. (Tr., p.6, Ls.12-14.) The district court accepted Mr. Abbott's guilty plea. (Tr., p.20, Ls.12-17.)

Mr. Abbott's presentence investigator recommended Mr. Abbott "complete the retained jurisdiction program." (See PSI, p.18.) At the sentencing hearing, the State recommended the district court impose a unified sentence of fifteen years, with seven years fixed. (Tr., p.30, L.25 – p.31, L.2.) Mr. Abbott's counsel informed the district court Mr. Abbott "understands that there's got to be a measure of punishment for what happened," asked the district court "to fashion a sentence which addresses rehabilitation as well," and asserted, in light of Mr. Abbott's "poor health," that "[a] 7 plus 8, for 15, is essentially a life sentence for Christopher." (Tr., p.32, L.11 – p.33, L.24.) Defense counsel requested the district court "fashion a sentence that gives him some hope, some incentive to change, some opportunity to engage in treatment." (Tr., p.33, Ls.15-17.) The district court imposed a unified sentence of fifteen years, with seven years fixed. (R., pp.56-59.)

Mr. Abbott filed a Notice of Appeal timely from the district court's Judgment of Conviction and Commitment.<sup>2</sup> (R., pp.62-64.)

### ISSUE

Did the district court abuse its discretion when it imposed a unified sentence of fifteen years, with seven years fixed, upon Mr. Abbott following his plea of guilty to aggravated driving under the influence of alcohol?

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<sup>1</sup> All citations to the PSI refer to the 290-page PDF version of the Presentence Report and its attachments.

<sup>2</sup> Mr. Abbott also filed an Idaho Criminal Rule 35 motion for a reduction of sentence. (R., p.60.) The district court then issued an Order Denying Motion for Reconsideration of Sentence. (R., pp.75-78.) In the order, the district court stated, "Defendant has failed to provide any new information, argument, or legal authority in support of his motion, despite being granted leave to supplement the motion." (R., p.77.) In light of the applicable legal standards, Mr. Abbott does not challenge the district court's denial of his Idaho Criminal Rule 35 motion.

## ARGUMENT

### The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Fifteen Years, With Seven Years Fixed, Upon Mr. Abbott Following His Plea Of Guilty To Aggravated Driving Under The Influence Of Alcohol

Mr. Abbott asserts the district court abused its discretion when it imposed his unified sentence of fifteen years, with seven years fixed, because his sentence is excessive considering any view of the facts. The district court should have followed Mr. Abbott's recommendation by imposing a lesser sentence that would address rehabilitation, or, alternatively, the presentence investigator's recommendation by retaining jurisdiction.

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving "due regard to the nature of the offense, the character of the offender, and the protection of the public interest." *State v. Strand*, 137 Idaho 457, 460 (2002).

The Idaho Supreme Court has held that, "[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence." *State v. Jackson*, 130 Idaho 293, 294 (1997) (internal quotation marks omitted). Mr. Abbott does not assert that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Abbott must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* An appellate court, "[w]hen reviewing the length of a sentence . . . consider[s] the defendant's entire sentence." *State v. Oliver*, 144 Idaho 722, 726

(2007). The reviewing court will “presume that the fixed portion of the sentence will be the defendant’s probable term of confinement.” *Id.*

Mr. Abbott asserts his sentence is excessive considering any view of the facts, because the district court did not adequately consider mitigating factors. Specifically, the district court did not adequately consider Mr. Abbott’s poor physical health. Mr. Abbott has been diagnosed with chronic obstructive pulmonary disease, asphyxiation, chronic pain, and drug addiction. (PSI, pp.13-14.) During the sentencing hearing, Mr. Abbott’s counsel informed the district court that “Christopher is in poor health. He doesn’t have an excellent quality of life now and probably doesn’t really hope to—to really improve much in the future.” (Tr., p.32, Ls.16-19.) Defense counsel asserted, “[a] 7 plus 8, for 15, is essentially a life sentence for Christopher.” (Tr., p.33, Ls.23-24.)

The district court also did not adequately consider Mr. Abbott’s desire to get treatment for his substance abuse problems. Mr. Abbott reported that his drug of choice was heroin, but he had been sober from 1997 to 2017. (*See* PSI, p.15.) He reported he had been prescribed methadone through a clinic. (*See* PSI, p.15.) However, Mr. Abbott relapsed on heroin on the day of the instant offense, because of “my medical problems.” (PSI, p.15.) Mr. Abbott had also been consuming alcohol on a regular basis. (*See* PSI, pp.14-15.) After the accident, he was in a methadone program for about four months until his arrest for the instant offense. (*See* PSI, p.15.)

Mr. Abbott’s GAIN assessment recommended Level 2.1 Intensive Outpatient Treatment for him. (*See* PSI, p.18.) The presentence investigator wrote, “[d]ue to the defendant’s continued pattern of behavior involving his controlled substance use, the lack of accountability for his drug use, and lack of follow through on his treatment case plan, it is recommended that the defendant complete the retained jurisdiction program.” (PSI, p.18.) That would provide

Mr. Abbott “a period of sobriety, further evaluation of his mental health, and treatment in a controlled environment.” (PSI, p.18.)

During the sentencing hearing, Mr. Abbott’s counsel stated Mr. Abbott “hasn’t availed himself of the modern treatment methods that are available today that could be successful.” (Tr., p.33, Ls.18-20.) Mr. Abbott told the district court, “I’m an addict and an alcoholic, Your Honor. I need treatment. I’ve asked for it in the past; no one has ever offered me help. I’m asking now to the Court, if you can, please, see fit to give me something where I can get treatment and help.” (Tr., p.35, Ls.4-10.)

Additionally, the district court did not adequately consider Mr. Abbott’s remorse and acceptance of responsibility. In the presentence investigation questionnaire, Mr. Abbott wrote, “I’m sorry for any and all problems I caused, that day and take full responsibility even when I still don’t remember much after the accident that day, gives me no excuse, drunk driving is drunk driving, and as bad as things are because of it I’m [grateful] to God that it wasn’t worse.” (PSI, p.4.) In his written comments to the district court, Mr. Abbott stated, “Your Honor, for the First time in my life I cannot [think] of one single excuse, my actions are a[n] absolute act of selfishness.” (PSI, p.16.) During the sentencing hearing, Mr. Abbott told the district court, “I’ve been very sorry. I took responsibility from the beginning. I know that my impacts and my actions have hurt them and other people.” (Tr., p.34, Ls.22-24.)

Because the district court did not adequately consider the above mitigating factors, the sentence imposed by the district court is excessive considering any view of the facts. Thus, Mr. Abbott asserts the district court abused its discretion when it imposed his sentence.

CONCLUSION

For the above reasons, Mr. Abbott respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 25<sup>th</sup> day of May, 2018.

\_\_\_\_\_/s/\_\_\_\_\_  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25<sup>th</sup> day of May, 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:

CHRISTOPHER E ABBOTT  
INMATE #126041  
ISCI  
PO BOX 14  
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JONATHAN MEDEMA  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

D DAVID LORELLO  
ADA COUNTY PUBLIC DEFENDER  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BPM/eas