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ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

ANDREA W. REYNOLDS
Deputy State Appellate Public Defender
I.S.B. #9525
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 45315
)	
v.)	BANNOCK COUNTY NO. CR 2016-6216
)	
DEREK JON SANDERS,)	REVISED
)	APPELLANT'S BRIEF
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Derek Jon Sanders was convicted of criminal possession of a financial transaction card and grand theft following a jury trial, and was sentenced as a persistent violator to an aggregate unified term of 12 years, with four years fixed. He appeals from his judgment of conviction, arguing the district court abused its discretion when it imposed this sentence upon him considering the mitigating factors that exist in this case.

Statement of Facts and Course of Proceedings

Mr. Sanders was charged by Information with two counts of criminal possession of a financial transaction card and one count of grand theft. (R., pp.54-56.) The State dismissed Count II without prejudice at the preliminary hearing, and Mr. Sanders proceeded to trial on Counts I and III. (R., pp.61-64.) In Count I, the State alleged Mr. Sanders used Katie Denny's Visa debit card without her permission on January 24, 2016, at Fred Meyer. (R., p.55.) In Count III, the State alleged Mr. Sanders "did wrongfully take, obtain or withhold, with the intent to deprive another of their property, or to the appropriate the same to self or a third person, a Financial Transaction Card, the property of Katie Denny." (R., p.55.)

At trial, Ms. Denny testified she realized she had lost her wallet on Sunday, January 24, and on Monday, January 25, she reviewed her bank account records, and saw transactions on her Visa debit card she "had not done [herself]." (Tr., p.217, Ls.1-18, p.218, Ls.1-12.) Ms. Denny went to her credit union and reviewed a printout of the transactions made on her debit card on Sunday, January 24. (Tr., p.218, L.15 – p.219, L.10.) The State introduced at trial an exhibit listing 14 transactions that were attempted on Ms. Denny's debit card on Sunday, January 24. (State's Ex. 1.) Ms. Denney testified she did not make or authorize any of these transactions. (Tr., p.224, Ls.1-3.)

The State introduced two video recordings at trial, one showing a man in a white jacket using Ms. Denney's debit card to make a purchase at Fred Meyer, and the other showing the same man entering and exiting the Fred Meyer store. (State's Exs. 7, 8.) A police officer testified that she searched Mr. Sanders' vehicle on January 25, and found an identification card, Costco card, and bank card all belonging to Ms. Denney inside the vehicle. (Tr., p.298, L.23 – p.300, L.22.) Mr. Sanders testified he received a debit card from a person who introduced

herself as Ms. Denny, and whom he believed to be Ms. Denny. (Tr., p.14, L.12 – p.15, L.1.) He testified he purchased certain items from Fred Meyer using Ms. Denny’s card. (Tr., p.18, Ls.17-23.) He testified he believed he had permission to use the card. (Tr., p.20, Ls.14-18.)

The jury found Mr. Sanders guilty on both counts, and then found him guilty of being a persistent violator. (Tr., p.84, L.22 – p.85, L.3, p.114, Ls.3-6.) For criminal possession of a financial transaction card, the district court sentenced Mr. Sanders to a unified term of five years, with three years fixed. (R., p.313.) For grand theft, the district court sentenced Mr. Sanders to a unified term of 12 years, with four years fixed, to be served concurrently. (R., p.313.) The judgment of conviction was entered on July 20, 2017, and Mr. Sanders filed a timely Notice of Appeal on August 4, 2017. (R., pp.314-18, 320-25.)

ISSUE

Did the district court abuse its discretion when it sentenced Mr. Sanders to an aggregate unified term of 12 years, with four years fixed, considering the mitigating factors that exist in this case?

ARGUMENT

Considering The Mitigating Factors That Exist In This Case, The District Court Abused Its Discretion When It Sentenced Mr. Sanders To An Aggregate Unified Term Of 12 Years, With Four Years Fixed

Mr. Sanders asserts that, given any view of the facts, his aggregate unified sentence of 12 years, with four years fixed, was excessive. Where, as here, the sentence imposed by the district court is within statutory limits, “the appellant bears the burden of demonstrating that it is a clear abuse of discretion.” *State v. Miller*, 151 Idaho 828, 834 (2011) (quoting *State v. Windom*, 150 Idaho 873, 875 (2011)). “When a trial court exercises its discretion in sentencing, ‘the most fundamental requirement is reasonableness.’” *Id.* (quoting *State v. Hooper*, 119 Idaho 606, 608 (1991)). “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.* (citation omitted). “When reviewing the reasonableness of a sentence this Court will make an independent examination of the record, ‘having regard to the nature of the offense, the character of the offender and the protection of the public interest.’” *Id.* (quoting *State v. Shideler*, 103 Idaho 593, 594 (1982)).

The aggregate sentence the district court imposed upon Mr. Sanders was not reasonable considering the nature of his offenses, his character, and the protection of the public interest. While under the influence of marijuana and methamphetamine, Mr. Sanders used a debit card that had been stolen from Ms. Denney to purchase items from Fred Meyer totaling \$420.81. (Conf. Exs., p.24; State’s Ex. 1.) Mr. Sanders testified he thought he had permission to use the debit card, though he understood the person who had given him permission was not Ms. Denney. (Tr., p.14, L.12 – p.20, L.18.) While Mr. Sanders’ actions were certainly criminal, they do not warrant a term of incarceration of 17 years, with seven years fixed. These were not crimes of violence, and Ms. Denney was compensated by her credit union, so she suffered no out-of-pocket loss. (Conf. Exs., p.7.)

The aggregate sentence imposed upon Mr. Sanders was also not reasonable considering his character. Mr. Sanders is addicted to drugs—that much is true. But there is hope that, absent his substance abuse, Mr. Sanders could be a productive and law-abiding member of society. The presentence investigation materials include a letter from Mr. Sanders’ father, recognizing in his son a “greater maturity and a greater desire to eschew criminal behavior and become an upstanding citizen.” (Conf. Exs., p.27.) In addition, there is a letter from a licensed professional counselor stating, “I believe with the strong family support network Derek has in place, he has the potential to be a success when he puts the work into his recovery.” (Conf. Exs., p.82.) These

letters make clear that the underlying problem here is substance abuse, not some failure of character. Mr. Sanders obtained his GED in 2000 and has the ability to work, hampered only by his problems with substance abuse. (Conf. Exs., pp.18-19.) Mr. Sanders told the presentence investigator that dealing with his drug addiction is his first priority, and the district court should have fashioned a sentence with this as the primary goal. (Conf. Exs., p.22.)

Finally, there is simply no indication that Mr. Sanders provided such a risk to the public that he needs to be incarcerated for a term of 12 years, with four years fixed. On the contrary, there is every indication that if he can refrain from using illegal drugs, he can function well in society. Considering the mitigating factors that exist in this case, and notwithstanding the aggravating factors, the district court abused its discretion when it sentenced Mr. Sanders to an aggregate unified term of 12 years, with four years fixed, for the crimes of criminal possession of a financial transaction card and grand theft.

CONCLUSION

Mr. Sanders respectfully requests that the Court reduce his aggregate sentence as it deems appropriate. Alternatively, he requests that the Court remand this case to the district court for a new sentencing hearing.

DATED this 11th day of July, 2018.

 /s/ Andrea W. Reynolds
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of July, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, electronically as follows:

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
Delivered via e-mail to: ecf@ag.idaho.gov

/s/ Magali Ceja
MAGALI CEJA
Administrative Assistant

AWR/mc