

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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

LORI A. FLEMING
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45521
Plaintiff-Respondent,)	
)	Lemhi County Case No.
v.)	CR-2017-318
)	
WESLEY ALLEN BOWEN,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Bowen failed to establish that the district court abused its discretion by imposing a unified sentence of 15 years, with five years fixed, upon his guilty plea to aggravated battery?

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

Bowen pled guilty to aggravated battery, and the district court imposed a unified sentence of 15 years, with five years fixed. (R., pp.42-44.) Bowen filed a notice of appeal timely for the judgment of conviction. (R., pp.51-54.)

Bowen asserts his sentence is excessive in light of his difficult childhood, remorse, acceptance of responsibility, substance abuse issues, mental health issues, and his potential to overcome his addiction to alcohol. (Appellant’s brief, pp.2-5.) 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 aggravated battery is 15 years. I.C. § 18-908. The district court imposed a unified sentence of 15 years, with five years fixed, which falls within the statutory guidelines. (R., pp.42-44.) Furthermore, Bowen's sentence is reasonable in light of his history of violent conduct, willingness to victimize others, and disregard for the law and the terms of community supervision.

Bowen has a long criminal history that includes multiple misdemeanor and felony convictions for crimes of violence. (PSI, pp.3-8.¹) His misdemeanor record includes convictions for domestic violence, failing to purchase driver's license, assault-domestic violence, DUI, hit and run of unattended vehicle, theft, driving without a license, reckless driving, two counts of domestic violence court violation, two counts of violation of protection order, two counts of a no contact order violation, two counts of assault, and three counts of reckless endangerment. (PSI, pp.4-7.) Bowen has also incurred seven felony convictions for domestic violence, harass or threaten to kill, robbery, two counts of domestic violence court violation, and two counts of burglary. (PSI, pp.5-8.) Bowen has been "on probation, which he violated numerous times, and [has] served several years in prison." (PSI, p.8.) Bowen absconded parole supervision in Washington and was in Idaho for only 35 days before he was arrested for the aggravated battery of which he was convicted in this case. (PSI, pp.8-9.)

In this case, Bowen was at a family gathering when he punched the victim in the face, breaking the victim's tooth and both sides of his jaw. (PSI, p.3.) Bowen admitted that he was intoxicated and had not been taking his medication for his mental health issues when he punched the victim. (PSI, p.3.) Bowen claims to be remorseful and to have accepted responsibility

¹ PSI page numbers correspond with the page numbers of the electronic file "BOWEN-PSI CONFIDENTIAL EXHIBIT.pdf."

(Appellant's brief, p.4), but these claims ring hollow considering that, when confronted by police soon after the altercation, Bowen attempted to shift the blame to the victim and refused to cooperate with the investigation. (PSI, pp.3, 14.)

Bowen's continual use of alcohol and failure to maintain his mental health medication have contributed to his criminal behavior, and prior programming has not deterred him from continuing to drink and failing to treat his mental health issues. (PSI, pp.11-12.) Although Bowen now claims he "is willing to make ... needed changes" to overcome his addiction and address his mental health issues (Appellant's brief, pp.4-5), the psychological evaluator observed that Bowen displayed neither a "recognition of his need to change nor ... a willingness to follow recommendations" (PSI, p.19). The evaluator opined that, "without significant treatment efforts," Bowen poses a "high" risk to reoffend. (PSI, p.19.) He also specifically recommended that Bowen's "[t]reatment should begin while incarcerated, as well as vocational rehabilitation, so that when he is returned to the community he will have made some initial strides towards recovery and the ability to be independent and prosocial in his lifestyle." (PSI, p.19.) The district court agreed with the evaluator and concluded that, for protection of society, treatment must start in prison. (9/21/17 Tr., p.13, Ls.9-12.)

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Bowen's sentence. (9/21/17 Tr., p.11, L.17 – p.14, L.6.) The district court concluded, "I don't know that there's anything else I can do in your case, Mr. Bowen. I feel badly for you. But your history is just so glaring that I think I would be really gullible to think that anything else would be appropriate." (9/21/17 Tr., p.14, Ls.2-6.) The state submits that Bowen 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 Bowen's conviction and sentence.

DATED this 24th day of July, 2018.

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

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of July, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

KIMBERLY A. COSTER
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

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

APPENDIX A

1 that you think that I should know before I pronounce
2 sentence. You don't have to speak to me because
3 your attorney has. But if there's anything that you
4 want to say, this would be your opportunity.

5 THE DEFENDANT: Your Honor, I take full
6 responsibility for the crime. That's why I pled
7 guilty at arraignment. And I'm sorry to
8 Mr. Williams and the family.

9 THE COURT: Okay. Thank you.

10 Well, Mr. Bowen, are you fully satisfied
11 with the representation that you've received from
12 your attorney in this case?

13 THE DEFENDANT: Yes.

14 THE COURT: Counsel, is there any legal
15 reason not to sentence today?

16 MR. GILES: No, Your Honor.

17 THE COURT: Okay. Mr. Bowen, as I've
18 said, I've reviewed carefully the Presentence
19 Investigation Report. I've carefully looked at your
20 record. As part of that, it indicates that you had
21 at least -- you had one juvenile offense. But then
22 as an adult you've had at least 17 misdemeanors and
23 at least seven felonies. And many of those felonies
24 and misdemeanors have been assaults, domestic
25 violence, harassment, threaten to kill, so they're

1 all -- a lot of them are similar to the crime that
2 you pled guilty to here.

3 I've reviewed the recommendations of the
4 PSI, which basically is incarceration. I've also
5 reviewed carefully the mental health -- or the
6 psychological evaluation that the court ordered, and
7 the substance abuse evaluation. The substance abuse
8 evaluation is a 3.5 residential, meaning that you
9 need treatment while you're incarcerated. I read
10 the psychological evaluation as indicating that you
11 definitely need treatment for psychological issues
12 that you suffer from, mental health issues. But as
13 I read that -- the recommendation really is that you
14 need to get a lot of that treatment while you're
15 incarcerated.

16 I've also reviewed the objectives of
17 criminal sentencing required by the Idaho Supreme
18 Court. And the number one objective I have to
19 consider is protection of society. I also have to
20 consider how the sentence I give you will either
21 deter you or others. And then I need to consider
22 the possibility of rehabilitation for you. And
23 that's why -- one of the reasons I ordered the
24 psychological evaluation. Sometimes the courts also
25 consider some need for punishment or retribution for

1 wrongdoing. But I think in this case protection of
2 society is probably the most important thing I have
3 to consider.

4 I note that you're 37 years old, that your
5 LSI is 33, which indicates that you would have a
6 high likelihood to re-offend. I see as an
7 aggravating factor your substantial history of
8 similar criminal activity.

9 I agree with the psychological evaluation,
10 that you really need some help. The problem is I
11 believe that you're a danger to society if I try to
12 get you that help outside of incarceration. And I
13 think while a Rider would be -- I mean, technically,
14 you can get psychological treatment incarcerated. I
15 don't think that a Rider is appropriate in this case
16 because there's no way that I can bring you back
17 from a Rider and place you on probation, so . . .

18 This will be the sentence of the court:
19 I'm going to sentence you to a fixed minimum term of
20 five years, with an indeterminate term of ten years,
21 for a total unified sentence of 15 years. So 15 --
22 there's a \$500 fine, standard court costs, victims
23 relief fund. There's a restitution that will remain
24 open. Presently it's at \$26,718.31. You're going
25 to be required to reimburse the County for the

1 public defender at \$500.

2 I don't know that there's anything else I
3 can do in your case, Mr. Bowen. I feel badly for
4 you. But your history is just so glaring that I
5 think I would be really gullible to think that
6 anything else would be appropriate.

7 I do want to make sure you understand your
8 appellate rights. You are advised that you do have
9 a right to appeal to the Idaho Supreme Court from
10 this judgment of conviction and that you have a
11 right to be represented by an attorney if you
12 appeal. I also advise you that if you cannot afford
13 an attorney, then an attorney will be appointed for
14 you at the public expense. But you only have 42
15 days from today to file an appeal.

16 You also have a right to seek relief from
17 this judgment under Idaho Criminal Rule 35. This is
18 a rule that grants you 120 days to seek a correction
19 or reduction of this sentence if you feel it was
20 either illegal or too harsh.

21 And you could have a right to seek relief
22 under the Idaho Uniform Post-Conviction Relief Act.
23 That's a civil action that has to be filed within
24 one year from the day your right to appeal expires.

25 Do you have any questions about your