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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45612
Plaintiff-Respondent,	)	
	)	Twin Falls County Case No.
v.	)	CR42-2016-11042
	)	
MICHAEL PAUL FRIEL,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Friel failed to establish that the district court abused its discretion, either by imposing a unified sentence of 14 years, with six years fixed, upon a jury's verdict finding him guilty of grand theft, or by denying his Rule 35 motion for a reduction of sentence?

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

A jury found Friel guilty of grand theft, and the district court imposed a unified sentence of 14 years, with six years fixed. (R., pp.210-14.) Friel filed a timely Rule 35 motion for

reconsideration of sentence, which the district court denied. (R., pp.215-22.) Friel filed a notice of appeal, timely from the judgment of conviction. (R., pp.223-26.)

Friel asserts his sentence is excessive in light of the nature of the offense, his substance abuse issues, his character, and his claim that that the sentence “was not necessary to protect the public interest.” (Appellant’s brief, pp.3-5.) 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 grand theft is 14 years. I.C. § 18-2408 (2)(a). The district court imposed a unified sentence of 14 years, with six years fixed, which falls within the statutory guidelines. (R., pp.210-14.) On appeal, Friel contends that his sentence was not reasonable because of the nature of the offense, his character, and his claim that the sentence “was not necessary to protect the public interest.” (Appellant’s brief, p.3.) Friel’s criminal history and his continued criminal thinking demonstrate the reasonableness of his sentence.

Friel has an extensive criminal history that includes four prior felony convictions for theft by receiving/possessing stolen property, battery on a correctional officer, and two counts of burglary. (PSI, pp.15-16.<sup>1</sup>) His record also includes two additional felony charges, 14 misdemeanor charges, and 27 misdemeanor convictions for assault, loitering, minor in possession, negligent driving, disturbing the peace (amended from battery), no contact order violation, two counts of theft by receiving, two counts of battery, three counts of resisting, three counts of use/possess drug paraphernalia, three counts of false information, and eight counts of petit theft. (PSI, pp.12-20.) Additionally, at the time of sentencing, Friel had three pending felony charges for burglary and two counts of receiving, possessing, or disposing of stolen property. (PSI, pp.19-20.) Friel has been placed on probation, has had the benefit of retained jurisdiction programming, and has served prison time for his crimes. (PSI, pp.12-20.) None of these prior legal sanctions and rehabilitative opportunities has had any deterrent or rehabilitative effect, however, as demonstrated by Friel’s conduct in this case: Friel entered a Wal-Mart store,

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<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file “Supreme Court No. 45612 Michael Paul Friel – Confidential Exhibits.pdf.”

put a total of \$1,243.70 worth of merchandise a cart, and then left the store without paying for the items. (PSI, p.11.)

Friel claims that his character and substance abuse issues warrant a lesser term of incarceration. (Appellant's brief, pp.3-5.) Friel, however, has repeatedly demonstrated that his character is that of someone either unwilling or unable to comply with the law, even in the confines of a correctional facility. While in IDOC custody, Friel amassed 38 disciplinary actions that included possession of homemade alcohol, flooding his cell on numerous occasions, refusing to return to his cell, fondling his penis in front of staff, making disrespectful comments to staff, throwing urine on an officer, verbally threatening officers, and destroying state property. (PSI, pp.20-21.) Additionally, while on a retained jurisdiction program, Friel threatened to stab and hang another inmate. (PSI, p.21.) Friel's violent actions continued when, while incarcerated in the Jerome County jail, he attempted to steal another inmate's property and, in the ensuing altercation, punched the other inmate and broke his nose. (PSI, p.21.) Friel's character supports, not militates against, the sentence imposed.

Friel's substance abuse issues are also not particularly mitigating. Although Friel self-reported a long history of untreated alcohol and illegal substance abuse, it appears he has taken no steps to seek treatment for his addictions. (PSI, pp.25-26.) He reported that he had been using methamphetamine daily and heroin weekly, and mixing the two together. (PSI, p.33.) He also reported that he overdosed on October 31, 2016, but continued to use methamphetamine after his overdose. (PSI, p.33.) Friel admitted to continuing to use methamphetamine even while acknowledging that it has interfered with every aspect of his life, and that his use has put him in dangerous situations. (PSI, p.35.) While Friel is clearly in need of substance abuse treatment, the district court did not abuse its discretion in concluding, in light of Friel's extensive

criminal history, that any such treatment would be best provided in a correctional, as opposed to a drug-court and/or probation-type, setting.

At sentencing, the district court addressed Friel's extensive criminal record, his abysmal performance while previously incarcerated, his failure to rehabilitate or be deterred despite multiple prior legal sanctions, and the need to protect the community from his criminal behavior. (10/26/17 Tr., p.21, L.21 – p.26, L.16.) The district court articulated the correct legal standards applicable to its decision and concluded:

I read your account of what happened in the PSI. There's a definite lack of accountability. I was out helping a couple of other friends. I consider the inconsistencies in the representations that were made to the psychological evaluator as well as the PSI evaluator. I listened to the statements that you made regarding while you were incarcerated to your wife or your significant other, as well as to a relative and it's just making light of it.

So I hear what you're saying to me, but your actions don't – they're not consistent with what you're saying to me. I don't think that you really are willing to change.

(10/26/17 Tr., p.25, Ls.4-16.) The state submits that Friel 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.

Friel next asserts the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence in light of a letter a former prisoner submitted on his behalf. (Appellant's brief, pp.5-6.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Friel must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id. Friel has failed to satisfy his burden.

Friel provided no new information in support of his Rule 35 motion that showed his sentence was excessive. Information with respect to Friel's prior criminal history, his willingness to change, and that the monetary amount he was convicted of shoplifting was just "a few hundred dollars above the misdemeanor cut off level of \$1000" was before the district court at the time of sentencing; as such, none of this was "new" information. (R., p.216; PSI, pp.11-20, 26.) The letter of support in which a former prisoner/parolee offered to assist Friel and stated he would "kn[e]w for a fact that [Friel] will make it" was likewise not "new" information that supported a reduction of sentence. (See R., pp.218-19.) The district court agreed and concluded, "Without new information or further reasoning as to why the sentence should be reduced, the defendant has not carried his burden to show that his sentence was excessive, unduly severe, and/or unreasonable." (R., p.221.) Because Friel presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentence was excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion for a reduction of sentence.

#### Conclusion

The state respectfully requests this Court to affirm Friel's conviction and sentence and the district court's order denying Friel's Rule 35 motion for a reduction of sentence.

DATED this 10th day of August, 2018.

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

ALICIA HYMAS  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of August, 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:

ANDREA W. REYNOLDS  
DEPUTY STATE APPELLATE PUBLIC DEFENDER  
[documents@sapd.state.id.us](mailto:documents@sapd.state.id.us).

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

# APPENDIX A

1 on probation.  
 2 We have the additional argument in this  
 3 case that the Court would have very close control over  
 4 Mr. Friel and be able to see very quickly if he was  
 5 relapsing and if he was going to be a danger to the  
 6 community and to inventory loss at stores in the area.  
 7 Most people aren't going to say, look, all  
 8 he got was 11-plus months and so I'm going to try to  
 9 push some stuff out of Walmart too. There's still a  
 10 deterrent factor there because he's done a lot of jail.  
 11 One of the biggest deterrent factors will be a  
 12 substantial sentence hanging over his head that the  
 13 Court can impose if he doesn't do what he's saying here  
 14 today, which would be to follow through.  
 15 He's done. You know, he's 40 years old now  
 16 he tells me. He doesn't want to be the way he's been  
 17 in the past. He looks at himself and says this is not  
 18 good.  
 19 He wouldn't object, if the Court says this  
 20 record is too much, I can't do this, he would ask the  
 21 Court to consider retaining jurisdiction if the Court  
 22 comes to that conclusion and then order drug court upon  
 23 his return.  
 24 But, first and foremost, I think with this  
 25 window open now for drug court and the halfway house

19

1 help me better myself. By bettering myself, I'll become  
 2 a better part of the community. I'm tired of living  
 3 this. I'm tired. I'm just tired of it. I'm tired of  
 4 all the trouble that comes with it. I'm tired of all  
 5 the heartache, everything.  
 6 When I came in and I did my drug -- for drug  
 7 court, my interview for drug court, I was asked why do  
 8 you want to do drug court? Because I want to be done.  
 9 I want to be done with it all. I got an opportunity to  
 10 do that.  
 11 I got a little girl out there now that I  
 12 didn't find out about until two weeks before I came in.  
 13 I grew up without my dad and I don't want that to happen  
 14 with her. I don't want, you know, I just don't want it  
 15 no more.  
 16 All I ask is that you give me or let me  
 17 have the opportunity to do the program. Let me have  
 18 the opportunity to prove not only to you and to society  
 19 that I can do better but to myself.  
 20 That's all I've got.  
 21 THE COURT: Okay. Thank you.  
 22 All right, then. For purposes of sentencing  
 23 the Court considers the four goals of sentencing:  
 24 protection of society, rehabilitation, retribution, and  
 25 deterrence; recognizing, however, that protection of

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1 open and the other things he has in place with work and  
 2 things he's asking the Court to consider drug court  
 3 today.  
 4 I'm just making sure I covered everything I  
 5 wanted to cover, Your Honor.  
 6 So he has filled out the conditions of  
 7 probation if the Court does choose his recommendation  
 8 today, Your Honor, and that would be his request.  
 9 Thank you.  
 10 THE COURT: Thank you.  
 11 Mr. Friel, you have the right to address  
 12 the Court. Anything you would like to say?  
 13 THE DEFENDANT: I have been, you know, Your Honor  
 14 I've got a long past, a long history, and I understand  
 15 that. I mean, I've been a screw-up most of my life.  
 16 Like Ben said, I have been in and out of jail; I've had  
 17 my ups and downs with drugs. My prison sentence was  
 18 the same way.  
 19 I do feel for everything that I've took  
 20 from the community and the people that took their time  
 21 out to handle my case, the lady at Walmart taking her  
 22 time away from what she could be doing, the community  
 23 and the tax payers for me being in here.  
 24 There's a -- I got an opportunity to get  
 25 help. I got an opportunity to do a program that will

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1 society is the primary concern.  
 2 The Court also considers the factors set  
 3 forth in Idaho Code Section 19-2521 to determine whether  
 4 probation or some form of incarceration is appropriate.  
 5 In that regard, the Court considers the character of the  
 6 offender, the nature of the underlying offense, as well  
 7 as the defendant's prior record.  
 8 The Court has reviewed the presentence  
 9 investigation report, along with the psychological  
 10 evaluation and the materials submitted by the defense,  
 11 particularly the letter from Ken at New Hope and the  
 12 letter regarding defendant's employment. The Court  
 13 also understands that Mr. Friel was found to be eligible  
 14 for drug court.  
 15 However, with that being said and in the  
 16 Court's discretion, the Court does not feel, or finds  
 17 that based on Mr. Friel's criminal background -- and  
 18 I'll get into that in more detail -- that you're not a  
 19 suitable candidate for probation. Probation would not  
 20 achieve its intended purpose, and also I think it would  
 21 depreciate the seriousness of the offense, particularly  
 22 based on your extensive criminal history.  
 23 Of note to me is a couple of things. You've  
 24 spent two terms with Idaho State Corrections. You  
 25 topped out because you violated parole. Also,

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1 jurisdiction was relinquished while you were doing a  
 2 rider. You would think after 2013 when you got released  
 3 that maybe the criminal justice system would have got  
 4 your attention, but you look at your criminal history  
 5 and there's extensive criminal history that occurred  
 6 after you were released. Clearly, you didn't get the  
 7 message. Clearly, whatever programming that IDOC  
 8 attempted to give you didn't stick.

9 Then you look at the disciplinary reports  
 10 that you received while you were incarcerated. That's  
 11 significant to me with respect to the fact that I think  
 12 your conduct is not just attributable to substance  
 13 abuse, and I'm getting that in terms of drug court,  
 14 it's your lack of respect for authority, your lack of  
 15 respect for the criminal justice system.

16 Part of the problem, when you're in the  
 17 drug court environment, you've got to follow a lot of  
 18 rules. You've got to respect the drug court team. And  
 19 somebody that has a history of unwillingness to follow  
 20 the rules, and I look at your horrible behavior while  
 21 you were in prison over those disciplinary reports, I  
 22 could see what would happen in drug court. I preside  
 23 over the drug court.

24 When we make a determination, when the team  
 25 makes a determination as to eligibility, you know, the

23

1 accountability and whether or not somebody is willing  
 2 to take responsibility for their actions and then  
 3 expresses a willingness to change.

4 I read your account of what happened in the  
 5 PSI. There's a definite lack of accountability. I was  
 6 out helping a couple of other friends. I consider the  
 7 inconsistencies in the representations that were made  
 8 to the psychological evaluator as well as the PSI  
 9 evaluator. I listened to the statements that you made  
 10 regarding while you were incarcerated to your wife or  
 11 your significant other, as well as to a relative and  
 12 it's just making light of it.

13 So I hear what you're saying to me, but  
 14 your actions don't -- they're not consistent with what  
 15 you're saying to me. I don't think that you really are  
 16 willing to change. I think you've been through the  
 17 system long enough. You got out. Again, you have this  
 18 extensive criminal history since you got out. So you're  
 19 not -- I find you're not an acceptable candidate for  
 20 probation, even drug court.

21 So that leaves me with what are the Court's  
 22 other options? Well, you've been through -- you've  
 23 been twice before with IDOC. You've had the rider. You  
 24 didn't do well on the rider.

25 So I think under the facts and circumstances

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1 threshold requirements are the GAIN and the LSI, and  
 2 you did qualify. The team did not have the benefit of  
 3 your full criminal background and criminal history. And  
 4 had the team had that information, even though you did  
 5 qualify, they probably would have not agreed to accept  
 6 you. I would not have agreed to accept you.

7 Once we accept somebody like that, you're  
 8 working in close quarters with other participants, and  
 9 somebody that's not willing to follow the rules or that  
 10 has a lack of accountability tends to have an adverse  
 11 effect on the rest of the participants. And that's one  
 12 thing that we definitely try to avoid.

13 Again, based on your conduct while you were  
 14 incarcerated, had I known that, I would not have signed  
 15 that order stating that you were eligible for drug  
 16 court.

17 Also, another thing that we look at when  
 18 we're determining whether or not to allow somebody into  
 19 drug court is accountability. It's the exception, not  
 20 the rule, that somebody that goes to trial gets into  
 21 drug court. Typical circumstance is somebody that has  
 22 accepted responsibility for their actions.

23 Now I'm not saying going to trial gives you  
 24 a worse sentence than had you plead. That's not what  
 25 I'm saying. What I'm saying though is looking at

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1 of your case, here is what I'm going to do. In the  
 2 exercise of discretion and for the reasons that I've  
 3 just stated, to the charge of grand theft, I'll impose  
 4 a sentence of court costs. I will impose a \$1,500 fine.  
 5 I will impose penitentiary time, a unified sentence of  
 6 14 years, comprised of six years fixed, eight years  
 7 indeterminate. I will give you credit for time served.  
 8 I will have this sentence run concurrently with the  
 9 sentence imposed in Minidoka Case 2016-2555.

10 I will have the judgment prepared today.  
 11 You'll have 42 days from the file stamp within which to  
 12 appeal. I have to advise you if you cannot afford the  
 13 cost of an appeal, you may proceed in forma pauperis.

14 There's no bail to be exonerated in this  
 15 case. So I will remand your custody to the sheriff to  
 16 serve your sentence.

17 MR. WILLMORE: Your Honor, briefly, and I  
 18 apologize, and that's because I mixed up my notes with  
 19 what we discussed with Judge Brody because that hearing  
 20 actually went on halfway through the hearing until  
 21 Judge Brody recused himself, but we had discussed  
 22 restitution in that hearing. We have prepared an order  
 23 of \$1,243.70. I think that's been filed.

24 THE COURT: And I should have brought up  
 25 restitution. Have you seen the order?

26