

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. 45719
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR01-2017-33377
)	
JOE BLANE CALHOUN,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Calhoun failed to establish that the district court abused its discretion by imposing a unified sentence of 10 years, with two years fixed, upon his guilty plea to grand theft?

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

Pursuant to a plea agreement, Calhoun pled guilty to one count of grand theft and the district court imposed a unified sentence of 10 years, with two years fixed. (R., pp.48-51.) Calhoun filed a notice of appeal timely from the judgment of conviction. (R., pp.56-58.)

Calhoun asserts his sentence is excessive in light of his substance abuse issues and desire for treatment, ADHD, dyslexia, difficult childhood, remorse, and acceptance of responsibility. (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 grand theft is 14 years. I.C. § 18-2408(2)(a). The district court imposed a unified sentence of 10 years, with two years fixed, which falls well within the statutory guidelines. (R., pp.48-51.) Furthermore, Calhoun's sentence is reasonable in light of his ongoing criminal offending, his failure to rehabilitate or be deterred, and the risk he presents to the community.

Calhoun – who was 33 years old at the time of sentencing – has been committing theft offenses since he was a juvenile and was adjudicated for receiving known stolen property, petty theft, and vehicle theft. (PSI, p.5.¹) Calhoun has a long history of disregarding the law, with a criminal record that includes six juvenile adjudications, six misdemeanor convictions, and one prior felony conviction. (PSI, pp.5-8.) Calhoun's record also contains multiple prior misdemeanor charges that were ultimately dismissed, including charges for under the influence of a controlled substance, disorderly conduct, possession of drug paraphernalia, possess or receive stolen property, and DUI. (PSI, pp.5-8.) Calhoun admitted that juvenile probation was “very trying,” and he violated his probation by absconding and producing positive urinalysis tests. (PSI, p.8.) Additionally, the Fresno County Adult Probation office reported that Calhoun was a “poor probationer,” as he had been out of contact for over a year and failed to enroll in a court-ordered substance abuse program. (PSI, pp.8-9.)

In the instant offense, Calhoun and his girlfriend walked into a Dollar Tree store, went behind the register, took the victim's car keys, and stole her vehicle. (PSI, p.3.) Calhoun and his girlfriend then cashed a check that they had stolen from the victim's vehicle before they were

¹ PSI page numbers correspond with the page numbers of the electronic file “Calhoun 45719 psi.pdf.”

arrested. (PSI, p.3.) The victim, a 70-year-old woman, is now fearful of retribution from Calhoun. (PSI, p.4.)

Calhoun asserts that he has substance abuse issues, and “is highly motivated to engage in treatment.” (Appellant’s brief, pp.4-5.) However, while Calhoun has previously participated in a withdrawal management program, he has, most recently, failed to even enroll in a court-ordered substance abuse program. (PSI, pp.9, 18.) Furthermore, Calhoun’s purported desire to get clean so that he can see his five-year-old daughter has not deterred him from his continued drug use. (PSI, pp.7-8, 12.) Calhoun’s ADHD, dyslexia, remorse, and acceptance of responsibility do not outweigh the seriousness of the offense or Calhoun’s continued criminal thinking.

At sentencing, the district court considered all of the relevant information and imposed a reasonable sentence. (Tr., p.28, L.8 – p.32, L.21.) The district court also made a specific recommendation that Calhoun receive trauma counseling in regards to his past childhood abuse. (Tr., p.30, Ls.8-14.) Calhoun’s sentence is appropriate in light of his ongoing criminal offending, his failure to be deterred by prior legal sanctions, and his failure to rehabilitate within the community. The state submits that Calhoun 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 Calhoun'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:

REED P. ANDERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

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

APPENDIX A

<p style="text-align: center;">25</p> <p>03:41PM 1 is he has a daughter, ██████ and it is important</p> <p>03:41PM 2 that he is part of her life. But he knows that,</p> <p>03:41PM 3 and you can see this in the PSI, that he is not</p> <p>03:41PM 4 going to be able to be a part of her life until he</p> <p>03:41PM 5 cleans himself up. ██████ mom has made that</p> <p>03:41PM 6 clear. He has had video visits and such like that</p> <p>03:41PM 7 throughout his time in custody. But again, her</p> <p>03:41PM 8 mom has made it clear that until he cleans up his</p> <p>03:41PM 9 act and cleans up his life, he is not going to be</p> <p>03:41PM 10 a part of ██████. And that is something he</p> <p>03:41PM 11 takes very seriously.</p> <p>03:41PM 12 But there is a lack of some job history</p> <p>03:41PM 13 here, for sure. I think some of that lack of</p> <p>03:41PM 14 stability has been some of the probably driving</p> <p>03:41PM 15 forces behind some of the conduct that Joe has</p> <p>03:41PM 16 done. It looks like he suffers from dyslexia,</p> <p>03:41PM 17 which has obviously made school and things like</p> <p>03:41PM 18 that difficult. He talks about as a career goal</p> <p>03:41PM 19 getting his GED. Again, under the rider would be</p> <p>03:41PM 20 a great place to start that, if not finish it</p> <p>03:42PM 21 completely, at least get a lot of that started and</p> <p>03:42PM 22 something he can complete on the outside should he</p> <p>03:42PM 23 be given that opportunity. Again, I think he sees</p> <p>03:42PM 24 the GED as a way for more opportunities in the</p> <p>03:42PM 25 future.</p>	<p style="text-align: center;">26</p> <p>03:42PM 1 The treatment recommendation is a 2.1.</p> <p>03:42PM 2 Obviously that could be done on the rider as well.</p> <p>03:42PM 3 I think the biggest thing when you talk</p> <p>03:42PM 4 with Joe is he has a ton of remorse, and he does.</p> <p>03:42PM 5 He is very concerned for the victim in this case,</p> <p>03:42PM 6 that she had those feelings of fear, that they</p> <p>03:42PM 7 continue to this day, and that she would think</p> <p>03:42PM 8 these things about him. And he is very adamant</p> <p>03:42PM 9 that is not who he is, not something he has ever</p> <p>03:42PM 10 even thought about.</p> <p>03:42PM 11 Obviously he didn't know this person.</p> <p>03:42PM 12 Clearly a crime of opportunity. Saw these keys</p> <p>03:42PM 13 and took them. Did not associate those keys with</p> <p>03:42PM 14 any individual. But he can understand how that</p> <p>03:42PM 15 could be concerning, and the disruption that he</p> <p>03:42PM 16 caused to that life.</p> <p>03:42PM 17 And again, that was something that we</p> <p>03:43PM 18 talked about at length and something that was a</p> <p>03:43PM 19 big concern of his. So again, he did ask for an</p> <p>03:43PM 20 opportunity to apologize. And I didn't -- we are</p> <p>03:43PM 21 not sure if that will be appropriate or not,</p> <p>03:43PM 22 depending on what the court does with the</p> <p>03:43PM 23 no-contact order in this case.</p> <p>03:43PM 24 Again, someone who knows he needs to</p> <p>03:43PM 25 change his life. He's asking for an opportunity</p>
<p style="text-align: center;">27</p> <p>03:43PM 1 to do that. He thinks the rider would be a great</p> <p>03:43PM 2 step. He has never had any sort of program and</p> <p>03:43PM 3 things like that before. Again, he is looking for</p> <p>03:43PM 4 an opportunity here, some clean and sober time,</p> <p>03:43PM 5 some tools to maybe change how he is thinking,</p> <p>03:43PM 6 maybe get his GED under his belt, provide some</p> <p>03:43PM 7 more job and financial opportunities out in the</p> <p>03:43PM 8 community, and perhaps transition to the Boise</p> <p>03:43PM 9 Rescue Mission, the River of Life, should he be</p> <p>03:43PM 10 released out on probation some time in the future.</p> <p>03:43PM 11 Thank you.</p> <p>03:43PM 12 THE COURT: Thank you.</p> <p>03:44PM 13 Mr. Calhoun, do you have a statement</p> <p>03:44PM 14 you would like to make?</p> <p>03:44PM 15 THE DEFENDANT: Yes, Your Honor.</p> <p>03:44PM 16 Again, just like he said, I never</p> <p>03:44PM 17 intended to inflict fear into anyone. That is not</p> <p>03:44PM 18 something that -- obviously I know the difference</p> <p>03:44PM 19 between right and wrong. When I made a choice,</p> <p>03:44PM 20 whether I was on drugs or not, I just didn't -- I</p> <p>03:44PM 21 guess it was more of a selfish type thing, and I</p> <p>03:44PM 22 didn't realize the impact that it makes on</p> <p>03:44PM 23 people's lives. I have never been in a situation</p> <p>03:44PM 24 where I had a victim like that. My crime has</p> <p>03:44PM 25 always been drugs or possession of drugs mainly.</p>	<p style="text-align: center;">28</p> <p>03:44PM 1 So I didn't realize exactly what the circumstances</p> <p>03:44PM 2 were before I went into it to do it. But either</p> <p>03:44PM 3 way, I made the choice and the decision. And I'd</p> <p>03:44PM 4 just like the victim to know that there is never,</p> <p>03:44PM 5 not a chance of me doing anything because I have</p> <p>03:44PM 6 been punished for something that I have done.</p> <p>03:44PM 7 THE COURT: Thank you, sir.</p> <p>03:44PM 8 Based on your plea of guilty to Count</p> <p>03:44PM 9 One, grand theft, and in exercise of my discretion</p> <p>03:45PM 10 in sentencing, I have considered the <i>Toohill</i></p> <p>03:45PM 11 factors, the nature of the offense, the character</p> <p>03:45PM 12 of the offender, any mitigating or aggravating</p> <p>03:45PM 13 factors, fulfilling the objectives of protecting</p> <p>03:45PM 14 society, achieving deterrence, rehabilitation or</p> <p>03:45PM 15 retribution.</p> <p>03:46PM 16 I think your criminal history is</p> <p>03:46PM 17 significantly different than the codefendant's</p> <p>03:46PM 18 criminal history presented to the court at her</p> <p>03:47PM 19 sentencing. I think you clearly have a substance</p> <p>03:47PM 20 abuse problem. I think you have indicated that</p> <p>03:47PM 21 you do not do well on probation, you have</p> <p>03:47PM 22 absconded from prior probation. That while you</p> <p>03:47PM 23 feel remorseful for the impact that this crime had</p> <p>03:47PM 24 on the victim, you simply do not think before you</p> <p>03:47PM 25 act on how your actions affect others. You would</p>

<p style="text-align: center;">29</p> <p>03:47PM 1 rather -- it appears you would rather take the 03:47PM 2 easy way out and try to steal something than 03:47PM 3 actually get a job and earn a living and not have 03:47PM 4 to steal. 03:47PM 5 I question whether or not a rider 03:47PM 6 should even be considered by the court. In 03:48PM 7 reviewing this case, I think putting you on a 03:48PM 8 rider would be misleading because I would not 03:48PM 9 intend to place you on probation if you completed 03:48PM 10 a rider; it would simply be allowing you to do a 03:48PM 11 front-end rider for purposes of programming. So 03:48PM 12 is that the best way to get you the programming 03:48PM 13 that I think you need? I don't think that is 03:48PM 14 required. 03:48PM 15 I think based on your criminal record 03:48PM 16 and LSI score of 37, the nature of the crime 03:48PM 17 committed in this particular case, with complete 03:48PM 18 disregard for the victim and the impact of your 03:48PM 19 crime on the victim, the court finds that an 03:48PM 20 imposed sentence is the appropriate sentence to be 03:48PM 21 entered in this case. 03:49PM 22 In making that recommendation, I do not 03:49PM 23 want you to think that I don't want you to get 03:49PM 24 programming. But the programming is the same at 03:49PM 25 the facilities throughout the state; the substance</p>	<p style="text-align: center;">30</p> <p>03:49PM 1 abuse program is the same, the critical thinking 03:49PM 2 errors program is the same, whether you take it on 03:49PM 3 a rider or whether you take it as part of being 03:49PM 4 incarcerated on an imposed sentence. So I feel 03:49PM 5 like the imposition of the sentence is appropriate 03:49PM 6 and still will allow you to get the programming 03:49PM 7 you need. 03:49PM 8 I want to encourage you to also address 03:49PM 9 the mental health issues and to seek out, and I 03:49PM 10 will make a specific recommendation, that if in 03:49PM 11 any way possible you receive trauma counseling 03:49PM 12 related to childhood abuse that occurred in your 03:50PM 13 life. I think you need to acknowledge what has 03:50PM 14 happened in your life in order to move forward. 03:50PM 15 I also would recommend that you 03:50PM 16 complete your GED while you are incarcerated. And 03:50PM 17 you can do that whether you are on a rider or 03:50PM 18 whether you are in IDOC custody. I think all the 03:50PM 19 same programming is the same, and I would be 03:50PM 20 misleading you in thinking that I felt your 03:50PM 21 conduct warranted potential probation. 03:50PM 22 So the court is going to sentence you 03:50PM 23 to two years fixed plus eight years indeterminate 03:50PM 24 for a total sentence of ten years imposed. I am 03:50PM 25 going to give you credit for 104 days served. I</p>
<p style="text-align: center;">31</p> <p>03:50PM 1 am going to dismiss Counts Two through Four. I am 03:50PM 2 going to order the restitution stipulated to by 03:51PM 3 the defendant, \$4,306.25 joint and several with 03:51PM 4 the codefendant, Ms. Thompson, in CR 01-17-33379. 03:51PM 5 I am going to order the DNA 03:51PM 6 requirement, the right thumbprint, standard court 03:51PM 7 costs. I am not going to impose a fine. With the 03:51PM 8 significant amount of restitution, I want to make 03:51PM 9 sure that the victim is paid in this case. And 03:51PM 10 that is going to be the priority for the court. 03:51PM 11 Additionally you are going to have, I am confident 03:51PM 12 when you are released on parole, substance abuse 03:51PM 13 treatment costs, mental health counseling costs, 03:51PM 14 and I don't want a fine to stand in the way of 03:51PM 15 your success. 03:52PM 16 The court is going to sign the 03:52PM 17 no-contact order. The no-contact order is going 03:52PM 18 to with the term of the sentence, therefore it 03:52PM 19 will expire in ten years. There are no 03:52PM 20 exceptions. And Ms. Roxas, you will not have any 03:52PM 21 contact with her or her employer or wherever she 03:52PM 22 is working, if she is working. Simply no contact, 03:52PM 23 no exceptions, for a term of ten years. 03:53PM 24 If you disagree with the Court's 03:53PM 25 judgment, sir, you have the right to appeal. Any</p>	<p style="text-align: center;">32</p> <p>1 appeal must be filed within 42 days. You have a 2 right to an attorney for purposes of appeal. One 3 can be appointed at public expense if you cannot 4 afford an attorney. 03:53PM 5 You know, you are 32 years old, and you 03:53PM 6 need to decide what the final, the second half of 03:53PM 7 your life is going to look like. Only you can 03:53PM 8 decide what it is going to look like. If you are 03:53PM 9 going to decide to stop using drugs, to get the 03:53PM 10 treatment you need, to stop taking advantage of 03:54PM 11 others, to abide by the conditions that society 03:54PM 12 sets on you as conditions of parole or whether or 03:54PM 13 not you want to commit additional crimes and be 03:54PM 14 back in prison. I hope it is the first option and 03:54PM 15 not the second option. 03:54PM 16 I firmly believe it is not too late. 03:54PM 17 In my opinion, you are a young man. You may not 03:54PM 18 feel as young as you used to, but you can turn 03:54PM 19 your life around. So figure out what you want to 03:54PM 20 do, come out with goals and a plan to achieve 03:54PM 21 those goals. And I wish you all the success. 03:54PM 22 THE DEFENDANT: Thank you, Your Honor. 03:54PM 23 THE COURT: Good luck, sir. 03:55PM 24 03:55PM 25 (Hearing concluded.)</p>