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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ANDREW JAMES ESHUN, Defendant-Appellant.	)	NO. 45773 Ada County Case No. CR-FE-2016-5022 RESPONDENT'S BRIEF

Issue

Has Eshun failed to establish that the district court abused its discretion by imposing a unified sentence of 10 years, with two and one-half years fixed, upon his guilty plea to felony domestic battery in the presence of a child, or by relinquishing jurisdiction, or by not further reducing his sentence pursuant to a Rule 35 motion for reduction of sentence?

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

Eshun pled guilty to felony domestic battery in the presence of a child and the district court imposed a unified sentence of 10 years, with three years fixed, and retained jurisdiction. (R., pp.122-26.) Following a period of retained jurisdiction, the district court relinquished

jurisdiction, but reduced the fixed portion of Eshun's sentence to two and one-half years. (R., pp.139-41.) Eshun filed a notice of appeal timely from the district court's order relinquishing jurisdiction and reducing sentence. (R., pp.142-45.)

Eshun asserts his sentence is excessive in light of his mental health, amenability to treatment, and support from family and friends. (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 felony domestic battery in the presence of a child is 20 years. I.C. §§ 18-918(2), -918(4). The district court imposed a reduced unified sentence of 10 years, with two and one-half years fixed, which falls well within the statutory guidelines. (R., pp.122-26, 139-41.) The nature of the offense and Eshun's criminal history demonstrate that the sentence imposed was not an abuse of discretion.

Eshun has a violent criminal record that includes convictions for aggravated assault, forcible confinement, assault with intent to resist, disturbing the peace, two counts of assault with a weapon, three counts for uttering threats, and four counts of assault. (PSI, pp.6-8.[1]) Eshun admitted that, while in custody at the Ada County Jail, he had disciplinary write ups "due to DISCREPANCIES W/CELL PARTNERS – WORDS EXCHANGED NO PHYSICAL CONTACT." (PSI, pp.8-9.) Eshun also had pending misdemeanor charges for violation of a no contact order and attempted violation of a no contact order, stemming from this case. (PSI, p.8.)

In this case, Eshun put "his right hand/fingers inside [his girlfriend's] mouth and down her throat," and used his "forearm to forcefully push against her throat with enough pressure to restrict her breathing." (PSI, p.3.) When the victim tried to use her cell phone to call for help, Eshun used force to get the victim's phone and prevent her from calling the police. (PSI, p.3.) Eshun went to the kitchen to retrieve a "butcher" knife, and the victim fled to the neighbor's house for help. (PSI, p.3.) Eshun chased after the victim, but was unable to gain entry to the neighbor's house and fled the scene before police arrived. (PSI, p.3.) Law enforcement

[1] PSI page numbers correspond with the page numbers of the electronic file "Eshun 45773 psi.pdf."

subsequently located Eshun at a Winco Food Store. (PSI, p.3.) Eshun attempted to elude deputies by running out the fire exit and across the cargo loading area, but he fell into a pond after running through bushes and ultimately surrendered. (PSI, p.3.)

Contrary to his assertions, Eshun's mental health issues, purported "amenability to treatment," and support network do not compel a finding that his sentence is excessive. Eshun was diagnosed with bi-polar disorder in Canada in 2005 and managed that disorder by taking a medication called Celexa and attending counseling. (PSI, p.14.) Eshun admitted, however, that once he moved to Chicago he "slid off," and did not find a doctor to continue treatment of his mental health issues. (PSI, p.14.) Additionally, Eshun claimed that he does not have any substance abuse issues, but the presentence investigator disagreed, noting the criminal reports received from Canada list him as an "Alcoholic." (PSI, p.15.) When Eshun was taken into custody in this case, the arresting officer stated that Eshun was "emitting the odor of alcohol." (PSI, pp.15, 113.) Furthermore, another officer noted that Eshun's eyes were bloodshot and he was slurring his speech, but the officer kept his distance from Eshun due to his "mood swings" and was unable to get close enough to detect any alcoholic odor on Eshun. (PSI, p.111.) While Eshun stated he was willing to get treatment for his anger issues, he also stated, "Well, you know what, I am not going to sit around and say that I am perfect. I didn't sit around and try to beat this woman or punch her in the face, but I look at it this way-what can I glean out of it?" (PSI, p.33.) Eshun's support from family and friends does not outweigh the seriousness of the offense, nor his prior violent criminal history.

At sentencing, the district court set forth its reasons for imposing Eshun's sentence and stated, "By your own admission, sir, you exceeded the outer bounds of appropriate conduct even in the heated situation between two people who may at that time or may not have loved each

other. But you exceeded the appropriate conduct." (5/17/17 Tr., p.57, Ls.7-11.) The state submits that Eshun 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. (5/17/17 Tr., p.54, L.17 – p.60, L.2 (Appendix A).)

Eshun next asserts that the district court abused its discretion by relinquishing jurisdiction in light of his plan for success on probation, performance on his rider, and a recommendation of probation from IDOC. (Appellant's brief, pp.5-7.) Eshun has failed to establish an abuse of discretion.

"Probation is a matter left to the sound discretion of the court." I.C. § 19-2601(4). The decision to place a defendant on probation or whether, instead, to relinquish jurisdiction over the defendant is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. State v. Hansen, 154 Idaho 882, 889, 303 P.3d 241, 248 (Ct. App. 2013) (citing State v. Hood, 102 Idaho 711, 712, 639 P.2d 9, 10 (1981); State v. Lee, 117 Idaho 203, 205–06, 786 P.2d 594, 596–97 (Ct.App.1990)). A court's decision to relinquish jurisdiction will not be deemed an abuse of discretion if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate under I.C. § 19-2521. State v. Brunet, 155 Idaho 724, 729, 316 P.3d 640, 645 (2013); Hansen, 154 Idaho at 889, 303 P.3d at 248 (citing State v. Statton, 136 Idaho 135, 137, 30 P.3d 290, 292 (2001)). "While a recommendation from corrections officials who supervised the defendant [during the period of retained jurisdiction] may influence a court's decision, it is purely advisory and is in no way binding upon the court." State v. Hurst, 151 Idaho 430, 438, 258 P.3d 950, 958 (Ct. App. 2011) (citing State v. Merwin, 131 Idaho 642, 648, 962 P.2d 1026, 1032 (1998); State v. Landreth, 118 Idaho 613, 615, 798 P.2d 458, 460 (Ct.App.1990)). Likewise, an offender's

"[g]ood performance while on retained jurisdiction, though commendable, does not alone establish an abuse of discretion in the district judge's decision not to grant probation." Hurst, 151 Idaho at 438, 258 P.3d at 958 (citing State v. Statton, 136 Idaho 135, 137, 30 P.3d 290, 292 (2001)).

Although Eshun was recommended for probation and preformed reasonably well while in the retained jurisdiction program, these factors alone do not qualify one for probation. Eshun had one verbal waring for being tardy to math class and four written warnings for being late to pill call, not being inspection ready, and talking during count (x2). (PSI, p.447.) Additionally, staff at NICI noted that, while Eshun is well spoken, he used it to distract from his issues, that continued to minimize his crime, and that his risk level for committing acts of domestic violence had not been reduced during his time at NICI. (PSI, pp.447-48.)

The district court's decision to relinquish jurisdiction was appropriate in light of the serious nature of Eshun's underlying crime and his prior violent criminal behavior. The district court concluded:

> Because this isn't a one-time situation with you; it is a pattern of conduct. And until you are ready to break the cycle regarding how you react to relationship disputes, whether you are bipolar or not bipolar, you need to conduct yourself in a manner that is acceptable to society and does not harm or create fear in others that you appear to actually care about.

(1/17/18 Tr., p.81, Ls.3-10.) Given any reasonable view of the facts, Eshun has failed to establish that the district court abused its discretion by relinquishing jurisdiction.

Eshun finally asserts that the district court abused its discretion by declining to further reduce his sentence, in light of his performance on his rider. Eshun has failed to establish an abuse of discretion.

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, Eshun 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. Eshun has failed to satisfy his burden.

Contrary to Eshun's assertion that the district court did not give his performance while on his rider adequate weight, the district court actually reduced his sentence because of the "good things" Eshun did on his rider. (1/17/18 Tr., p.80, Ls.15-21.) Moreover, Eshun's performance while in the retained jurisdiction program, while commendable, does not outweigh the seriousness of the offense, nor Eshun's pattern of violent behavior towards women with whom he is in a relationship. Eshun has failed to establish any basis for reversal of the district court's decision to not further reduce his sentence.

Conclusion

The state respectfully requests this Court to affirm Eshun's conviction and sentence and the district court's order relinquishing jurisdiction.

DATED this 16th 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 16th 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:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

__/s/_ Lori A. Fleming _____
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

12:37PM to the amended no-contact order is that visitation must be approved by the family law judge for the defendant to have contact with AE. I think that allows both parties to make the argument.

Anything further on the no-contact order?

MS. BUTTRAM: I just notified Mr. Smith of who her attorney was on that case if he wanted to contact him to get a copy of the custody decree.

12:38PM THE COURT: The no-contact remains in effect without exceptions except it is noted on here to meet with attorneys or during legal proceedings, and to respond to emergencies involving the parties' natural or adopted children. The Court finds there is no evidence that Ms. Ladegaard's son was adopted by the defendant. Therefore, the no contact as to Ms. Ladegaard's son remains without exception.

The Court is going to sign this no-contact order. The Court is going to have it

12:39PM expire -- is there a statutory limit on the term of no-contact orders, counsel?

MS. BUTTRAM: My understanding that it can only last as long as the criminal case can last, and in this case since it could last up to

12:39PM 20 years, I think the no-contact order can last 20 years but not beyond that.

THE COURT: It would be the Court's intent to have the no-contact order, and it can always be reopened if necessary or sought if there are conditions that would allow the same for a new no-contact order. But at this time this no-contact order is going to expire or is going to remain in effect for ten years being that it would

12:40PM expire on 5-17 of 2027.

In issuing this no-contact order, the Court finds that the no-contact order is in the interest of both the defendant and the victim in this case in that it protects both parties from contact and further disagreements and/or physical altercations between the two.

The Court finds the defendant is guilty of domestic violence in the presence of a child, Count I. And in an exercise of my discretion in sentencing, I have considered the *Toohill* factors and the nature of the offense, the character of the offender, any mitigating or aggravating

12:41PM factors, fulfilling the objectives of protecting society, achieving deterrence, rehabilitation, and retribution.

12:41PM This is a very difficult case for the Court. Relationships between human beings are difficult for everyone. You are no exception nor is Ms. Ladegaard an exception. Everyone has difficulties in relationships. It is hard work and it takes hard work to maintain relationships. But society has outer bounds of what is appropriate and what is not appropriate in dealing

12:42PM with altercations that arise between two individuals.

It appears to this court that it is a situation of Dr. Jekyll and Mr. Hyde. And by that I mean, I don't doubt at all, sir, that you may have been very good with the children. And it may also be true that Ms. Ladegaard's son is very scared of you. I don't know that. I don't have the ability to interview that young man to determine what is the actual truth.

But I also know it is possible for people to act in two different ways depending on life's stressors. And as everyone admits, there was a significant life stressor in the relationship due to the alleged embezzlement by a

12:43PM co-business partner of Ms. Ladegaard's. I agree that would be a very stressful situation for any

12:43PM relationship.

However, as the Court indicated, there are outer boundaries of what is appropriate. And when I look at your physical size and I look at the physical size of Ms. Ladegaard, I know that if things got heated it is not unreasonable that a person could be scared who has less physical presence than you. And I think that is common. It is not uncommon for a man to be stronger than a

12:43PM woman.

In this particular case I think the Court cannot ignore, while you may not agree with the fear that the victim had, the victim is the only one who knows how real that fear was. And two people can see the exact same situation and think the outcome might be completely different.

The Court finds that the record is very unclear as to the knife. I do not think it is unreasonable, knowing that there were knives in the kitchen, that the victim may have believed you were going for a knife. That is not out of the realm of possibility.

The Court also finds that it may have been possible that based on the fact that she bit your finger and you were bleeding that you might

12:44PM 1 have just been going for napkins. I don't know.
12:44PM 2 I wasn't there and there is no eyewitness.
12:44PM 3 Nor does the victim know exactly what
12:44PM 4 was going through your mind, but the victim is
12:44PM 5 free to testify to this court as to what was going
12:45PM 6 through her mind as the events were occurring.
12:45PM 7 By your own admission, sir, you
12:45PM 8 exceeded the outer bounds of appropriate conduct
12:45PM 9 even in the heated situation between two people
12:45PM 10 who may at that time or may not have loved each
12:45PM 11 other. But you exceeded the appropriate conduct.
12:45PM 12 So now it is up to this court to
12:45PM 13 determine what is more likely to have occurred on
12:45PM 14 this particular situation based on your admission
12:45PM 15 and the victim's statement and in consideration of
12:45PM 16 your nature and criminal history -- the character
12:45PM 17 of the offender, the nature of the offense, and
12:45PM 18 considering your criminal history.
12:45PM 19 So if you are a court and you look at
12:46PM 20 your criminal history, you see there have been six
12:46PM 21 assaults prior to this one, and one of those prior
12:46PM 22 assaults was very serious with a prior girlfriend,
12:46PM 23 that when you see a pattern of victims, then it is
12:46PM 24 up to the Court to decide, not having been at the
12:46PM 25 incident at issue in this case, what is most

12:46PM 1 likely to have occurred, I don't want to speculate
12:46PM 2 but your record speaks for itself. And it says
12:46PM 3 you have a history of assaults or aggravated
12:46PM 4 assaults. And it is true that you were on
12:46PM 5 probation, misdemeanor probation, at the time of
12:46PM 6 the events.
12:46PM 7 Those are the aggravating factors along
12:46PM 8 with alcohol and perhaps when your counsel talks
12:47PM 9 medication seeming to -- the medication you are on
12:47PM 10 has been adjusted such that your counsel finds, I
12:47PM 11 think that you are ready and steady was the term
12:47PM 12 he used. And based on your history of mental
12:47PM 13 health challenges, bipolar and depression, as well
12:47PM 14 as an admitted alcohol problem, which is noted not
12:47PM 15 only in the Canadian records but also from other
12:47PM 16 statements included in the record, would seem to
12:47PM 17 corroborate that alcohol problem.
12:47PM 18 So I don't know if this case was the
12:47PM 19 perfect storm. The perfect storm of a business
12:48PM 20 transaction gone bad, creating stress in a
12:48PM 21 relationship, combined with other stressors in
12:48PM 22 your relationship due to mental health issues, use
12:48PM 23 of alcohol. I am not in a position to know what
12:48PM 24 happened in the past. So I have to look at the
12:48PM 25 record and determine what is best in this

12:48PM 1 particular case.
12:48PM 2 I will note that you love your
12:48PM 3 daughter. I intend for you to have a relationship
12:48PM 4 with your daughter. I don't know what that
12:48PM 5 relationship will look like, but you have a right
12:48PM 6 to have a relationship with your daughter. And
12:48PM 7 you, sir, have some significant talents that you
12:48PM 8 have been blessed with that you can share with her
12:48PM 9 and you can share with others. You are musically
12:48PM 10 talented. You have an education. You are well
12:49PM 11 traveled. You are very articulate. You want to
12:49PM 12 help people, I don't disagree with that. But I
12:49PM 13 think it combines with these other factors in your
12:49PM 14 life which maybe prevent you from being that
12:49PM 15 person that you want to be.
12:49PM 16 But I want you to have the opportunity
12:49PM 17 to have an impact on your daughter's life because
12:49PM 18 I think you have qualities that hopefully she will
12:49PM 19 have inherited as well and that you will be able
12:49PM 20 to share that with her.
12:49PM 21 So this is what the Court finds is an
12:49PM 22 appropriate sentence: The Court is, based on your
12:50PM 23 history of prior assaults, along with the serious
12:50PM 24 nature of this assault, going to sentence you to
12:50PM 25 three years fixed plus seven years indeterminate,

12:50PM 1 for a total sentence of ten years. However, the
12:50PM 2 Court is going to retain jurisdiction.
12:50PM 3 Now, this means different things to
12:50PM 4 different people. And I am going to tell you what
12:50PM 5 it means to this court. You have credit for time
12:50PM 6 served of 394 days. That means if the Court just
12:50PM 7 imposed your sentence you would have at least two
12:50PM 8 years to serve, approximately two years to serve
12:50PM 9 in the penitentiary. It is this court's
12:50PM 10 understanding that while the penitentiary would
12:50PM 11 like for you to start treatment immediately, that
12:50PM 12 is not always possible and you may have to get on
12:50PM 13 the waiting list to become part of the treatment.
12:51PM 14 The Court feels like it is your -- in
12:51PM 15 your best interest for rehabilitation purposes,
12:51PM 16 which the prosecutor admitted is a concern of her
12:51PM 17 office as well as society in general, that we try
12:51PM 18 to do some front-end programming for
12:51PM 19 rehabilitation in your case. That is what I think
12:51PM 20 is possible if the Court sends you on this rider.
12:51PM 21 But the Court is not in any way
12:51PM 22 committing today that after the rider, even if you
12:51PM 23 successfully complete the rider and have not even
12:51PM 24 a single incident, that the Court will not come
12:51PM 25 back at a rider review and still impose the