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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45818
Plaintiff-Respondent,)	
)	Twin Falls County Case No.
v.)	CR42-2017-6118
)	
KEVIN RYAN DURAN,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Duran failed to establish that the district court abused its discretion by imposing a unified sentence of 20 years, with 10 years fixed, for aggravated assault, with a deadly weapon enhancement?

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

Duran pled guilty to aggravated assault, with a deadly weapon enhancement, and the district court imposed a unified sentence of 20 years, with 10 years fixed. (R., pp.136-42.) Duran filed a notice of appeal timely from the judgment of conviction. (R., pp.145-49.)

Duran asserts his sentence is excessive in light of his alcohol problem, desire for treatment, and his acceptance of responsibility. (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 sentence for aggravated assault, with a deadly weapon enhancement, is 20 years. I.C. §§ 18-906, 19-2520. The district court imposed a unified sentence of 20 years, with 10 years fixed, which falls within the statutory guidelines. (R., pp.136-42.) On appeal, Duran contends that his sentence is excessive in light of his alcohol problem, desire for treatment, and acceptance of responsibility. (Appellant's brief, pp.4-5.) Duran's sentence is appropriate in light of the serious nature of the offense, his criminal record, and his failure to be deterred despite prior legal sanctions.

Duran's criminal history includes one juvenile adjudication for possession of a controlled substance, one misdemeanor conviction for failure to give immediate notice of an accident, and three felony convictions for non-sufficient funds, grand theft by false pretenses, and battery with serious bodily injury. (PSI, pp.10-11.¹) Duran has also incurred several charges that were eventually dismissed, including two counts of endangering the health of a child and assault with a deadly weapon. (PSI, pp.10-11.) Duran became a ward of the court at the age of 15, and was placed in a group home, but ran away. (PSI, p.12.) He was then placed in a second group home, but was removed for pushing a staff member. (PSI, p.12.) As an adult, Duran performed poorly while on probation and was incarcerated for approximately two years. (PSI, p.12.) Also, reports received from Siskiyou County Sheriff's Department in California, show that he had two rule violations for fighting with another inmate and flooding cells. (PSI, p.13.) California Correctional Center reports show that Duran received two rule violations for theft of state food and being out of bounds. (PSI, p.13.) Most recently, while in the Twin Falls County Jail, Duran received warnings for not wearing his wristband, disrespecting staff, refusing to obey orders or direction by staff, covering cell doors, bunks or lights, and missing screws on his wrist band.

(PSI, p.13.) Duran also received an official write up for fighting or provoking a fight. (PSI, p.13.)

In this case, Duran became angry when he did not see his children on Father's day, and he sent threatening text messages to his ex-girlfriend and others. (PSI, pp.4-8.) Duran's text messages included the following language: "I'm sorry ur going to hurt," "Death," and "Remember Kevin fuckin Ryan Duran people know my name especially when there eyes close." (PSI, p.5 (verbatim).) Duran's ex-girlfriend called the police to report the threatening text messages and installed a deadbolt on the door that day. (PSI, p.5.) Later that night, Duran went to his ex-girlfriend's house, shot a vehicle parked in the driveway three times, and tried to gain entry into the house. (PSI, p.5.) Duran fled before the police arrived, but he was found at a truck stop a few days later with a loaded .40 caliber semi-automatic pistol located in his Jeep. (PSI, pp.4, 7.) While Duran claims that the entire incident would not have happened if he had not been drinking, and that he now desires treatment for his alcohol problem, it is clear from his violent criminal history and the facts of this case that Duran is a danger to the community.

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Duran's sentence. (5/14/18 Tr., p.27, L.3 – p.36, L.6.) The district court stated:

When you say that you went over there and you weren't trying to scare them and weren't trying to intimidate them, not trying to be violent, I'm not going to read everything into the record on what you texted, but you and I know that's not true.

I'll take judicial notice of the presentence materials that spell out. You were threatening violence in a very real way to the other people. You may not like the way things have gone between you and your ex-wife and your children. I would say to you, Mr. Duran, you are where you are because of you and your

¹ PSI page numbers correspond with the page numbers of the electronic file "Supreme Court No. 45818 Kevin Ryan Duran Confidential Exhibits.pdf"

choices. That includes you are where you are with respect to your children who are now afraid of you. And not because of what people have told them, but because what they saw that night. If you think that your children can't hear guns going off, you're wrong. They can. You better think about how that impacted them.

I read your sister's letter and I read what you claim to be your childhood. You of all people should know the impact that that behavior has on your children.

This is not about custody fighting, this is about protection of community. Although I think alcohol certainly has a role to play in this, it is not what drove it. It is your choice to fight and attack other people that drove this.

(5/14/18 Tr., p.32, L.7 – p.33, L.6.) The state submits that Duran 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 Duran's conviction and sentence.

DATED this 1st day of November, 2018.

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

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of November, 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:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

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

APPENDIX A

1 He'll pay restitution on the vehicle. He got
2 drunk and he shot up the car because he couldn't see his
3 kids on Father's Day. That's the bottom line. That's not
4 right. Nobody will say it's right. He knows it's not
5 right, but it was after a long -- not long, but after a
6 prior back and forth, back and forth, back and forth. Did
7 he handle it right? No.

8 I would ask the court to temper the state's
9 position. I understand the state's position. I
10 understand the victims' positions, but I hope the court
11 will temper that with Mr. Duran's position as elicited in
12 his statement, which the state has no -- the state may
13 surmise that it didn't happen like that. The state may
14 want it to not have happened like that, but there's no
15 evidence that it didn't happen like that. And that is
16 the account that Mr. Duran has given me since day one
17 without any variation or any change.

18 So based on that, Your Honor, I don't think
19 it's inappropriate to sentence Mr. Duran to a number of
20 hard years, heavy years. No objection to that whatsoever.
21 But, Your Honor, as I said, given the way he rehabilitated
22 himself after he was released from custody in California,
23 and had five years, more than five years, of a good and
24 productive life, you can see that this is an individual,
25 other than his inability to handle -- be equipped to

1 that day. Like I said, Your Honor, I let anger get the
2 best of me and I just apologize to the court.

3 THE COURT: Thank you for your comments. First, on
4 the plea of guilty, I do find you guilty of aggravated
5 assault and enhanced with the use of a weapon.

6 In an exercise of discretion at sentencing, I
7 consider the Toohill factors. I do want to spend some
8 time talking about why I'm going to sentence you the way
9 I'm going to.

10 Now, I can assure Mr. Essma, I almost never
11 make up my mind what I'm going to do in a sentencing until
12 I have heard from not just the lawyers, but also from the
13 defendant, because I learn a lot. Oftentimes I come in
14 thinking I'm going to do something more lenient and when
15 the defendant finishes, I know that that is not the right
16 thing to do. I listen very carefully to what a defendant
17 says and what the victims say as well.

18 I also don't let victims dictate to me what it
19 is that is going to happen. I read the materials closely.
20 There are a couple of things that I want to make clear.
21 I'm an old lady. I'll be 71 pretty soon. I'm very
22 familiar with the California system. For what it's worth,
23 I have a relative in the California prison system. I'm
24 more than familiar with that system.

25 I'm also very familiar with the way in which

1 handle the situation that arose, that he's capable of
2 making changes. He's capable of living a law abiding
3 life.

4 A long period of incarceration for an
5 aggravated assault really is -- it might make one side of
6 the equation quite happy and satisfied, but I wonder if
7 it's really in balance over the whole matter.

8 Based upon that, Your Honor, I'm going to ask
9 the court to consider, consider, a retained jurisdiction
10 in this matter. Thank you.

11 THE COURT: Thank you. Mr. Duran, do you wish to
12 make a statement or present any evidence regarding
13 sentencing?

14 THE DEFENDANT: Yes, ma'am. I first would like to
15 apologize to the victims. I had no intention to harm
16 anybody. I'm sorry I instilled fear into them.

17 I'm not here to bash on them. That's not what
18 I'm going to do at all. I'm not innocent by no means. I
19 did what I did. I did shoot a car, leaving the house out
20 of anger. I never shot towards anybody. I knew nobody
21 was in the car. Out of anger I texted horrible things and
22 let the anger get the best of me.

23 All I was trying do was get my kids. When
24 another man says you can't see your kids, I'm sure another
25 man would get mad. I had been intoxicated, was drinking,

1 they, and I'm using air quotes, supervise somebody when
2 placed on parole. I'm sure, Mr. Duran, you are well aware
3 that their supervision is minimal if you want to call it
4 that.

5 I say that because we're talking about doing
6 the same things here. They have kiosks that people,
7 presumably the person on parole, checks into the kiosk or
8 sends in an e-mail. There are very few face to face.
9 There's almost no checking in of how they are doing as far
10 as substance abuse, for instance. So for whatever it's
11 worth, all I will note is that from the time you were
12 placed on parole, until about 2017, you did not incur any
13 new criminal charges. I will not assume that you were
14 living a prosocial life during that time.

15 I want to talk a little bit about the history,
16 as well as what happened here, but I have a couple of
17 preliminary remarks. The custody issue, as far as I'm
18 concerned for the purposes of sentencing, is irrelevant.
19 I will suggest this to you, sir, when you said about
20 another man would have got mad too. Another man who cared
21 about his children as opposed for his own desires wouldn't
22 have put his children through this incident. Another man
23 who cared about his children wouldn't have shown up,
24 regardless of how much he wanted to see his children, with
25 a gun, whether he shot it at the house or not. He

1 wouldn't have been shooting a gun, especially a felon who
2 is not supposed to have a gun. Another man would have
3 gone about it in a civilized way. I'm sorry, sir, but the
4 fact that you couldn't see your children on Father's Day,
5 for whatever reason, is neither justification nor is it an
6 explanation for what happened.

7 Furthermore, while I agree with Mr. Essma,
8 alcohol is always a dangerous combination, whatever is
9 going on with you and your White Power and all of the
10 other stuff that you were spouting, it has nothing to do
11 with alcohol. Your anger issues and fighting and stabbing
12 people has nothing to do with alcohol. The alcohol may
13 exacerbate some of your actions, but as far as I know,
14 unless you were also violating the prison rules and the
15 jail rules, you weren't under the influence of alcohol
16 when you engaged in fighting in the California prison
17 system or in the Twin Falls jail. Alcohol was not
18 involved.

19 The other issues that you had in prison are
20 not related to alcohol or substance abuse. Let's first
21 point out that you first were in prison, or came to the
22 attention of the authorities, in 2004 when you were 15 or
23 16 years of age. You were charged with burglary, force
24 with a deadly weapon, not a firearm, false imprisonment,
25 possession of a controlled substance for sale, possession

1 jail system and it creates a safety issue.

2 Then you were asked to remove combs and paper
3 from an air vent in your cell that you shared with someone
4 else. After the second time of being asked to remove the
5 object and failing to do so, you approached the deputy.
6 And in this case the deputy noted that you were advancing
7 in an aggressive manner with your chest puffed out and
8 hands in a fist as if ready to fight.

9 You weren't drinking then either. You had to
10 have a taser pulled on you. You then began to comply and
11 got back into your cell. The event concluded with you
12 receiving a warning for disrespecting staff and refusal to
13 obey orders.

14 You had another warning due to you missing the
15 screws on your wristband. That's when you had the fight
16 in December. As the prosecutor pointed out, it wasn't
17 even your fight initially, you just jumped in.

18 For whatever it's worth, I do read these and I
19 think very carefully about these. My job isn't about
20 making one side happy. I'm not here to make the victims
21 happy. I'm here to listen to what happened and how it
22 impacted them.

23 You say that you showed up -- and I'm not here
24 to make you happy either. I'm here for one reason and one
25 reason only, protect the community. Your behavior is

1 of marijuana for sale. A misdemeanor, obstructing a
2 public officer. And possession of a controlled substance,
3 a felony. You were given probation.

4 In 2008, four years later, you had a count of
5 nonsufficient funds and then grand theft by false
6 pretenses. In 2009, endangering the health of a child,
7 assault with a deadly weapon by means likely to produce
8 great bodily harm, battery with serious bodily injury, and
9 endangering the health of a child. The same children that
10 you claim you care so much about, that you couldn't wait
11 and handle this differently in a nonviolent way to see
12 them on Father's Day.

13 If you read through the comment section of the
14 presentence report, we find out about you stabbing your
15 brother-in-law. Putting your hand through a hole in the
16 wall, creating a hole. And then you go to prison and you
17 get fighting with another inmate. You got 30 days of lock
18 down for that with ten suspended. Then flooding the jail,
19 twenty days disciplinary segregation. Then at the
20 correctional center theft of state food and being out of
21 bounds.

22 During the current incarceration you received
23 a warning for not wearing your wristband. For those
24 people not familiar with that, it's a fairly significant
25 thing. It means that you are not being tracked in the

1 dangerous. You haven't learned your lesson yet. You're
2 no longer a 15 year old, you're a grown up now. You have
3 to learn to control your behavior. If you can't, then the
4 only way to protect society is to lock you up. That's the
5 only way. It's not going to stop you from fighting, but
6 at least you won't be out in public.

7 When you say that you went over there and you
8 weren't trying to scare them and weren't trying to
9 intimidate them, not trying to be violent, I'm not going
10 to read everything into the record on what you texted, but
11 you and I know that's not true.

12 I'll take judicial notice of the presentence
13 materials that spell out. You were threatening violence
14 in a very real way to the other people. You may not like
15 the way things have gone between you and your ex-wife and
16 your children. I would say to you, Mr. Duran, you are
17 where you are because of you and your choices. That
18 includes you are where you are with respect to your
19 children who are now afraid of you. And not because of
20 what people have told them, but because what they saw that
21 night. If you think that your children can't hear guns
22 going off, you're wrong. They can. You better think
23 about how that impacted them.

24 I read your sister's letter and I read what
25 you claim to be your childhood. You of all people should

1 know the impact that that behavior has on your children.
2 This is not about custody fighting, this is
3 about protection of the community. Although I think
4 alcohol certainly has a role to play in this, it is not
5 what drove it. It is your choice to fight and attack
6 other people that drove this.

7 I actually just want to mention one thing.
8 They had pictures of what happened in the jail. I looked
9 at those pictures. And when I say attack, that's because
10 sometimes there's mutual combat. There are a lot of
11 domestic cases that I see and I wonder why it's brought by
12 the prosecutor the way it's brought when there is a lot of
13 mutual combat going on. This isn't that. Watching you in
14 the jail you attacked people you didn't have to be
15 involved with. So you have some issues.

16 I think that the prosecutor's recommendation
17 makes sense. The primary concern is to protect the
18 community. Clearly you're not appropriate for probation.
19 You have demonstrated that over and over again. It's
20 obvious that you will commit another crime, and most
21 likely a violent crime that puts other people at risk.

22 With respect to the rider, and I know the
23 lawyers have heard me say this before, there's only two
24 reasons to have a rider. One is because I think the
25 programming that is available is going to make the person

1 a viable candidate for probation. Two, because I think I
2 don't know enough to proceed with sentencing so that will
3 give me additional information. I have enough information
4 to make that decision.

5 Furthermore, I do not think the programming
6 that is available there is going to have any impact on you
7 at all. If you succeed on a rider, and if you're able to
8 keep your temper on a rider, I don't think a rider is
9 appropriate at this point. I don't need additional
10 information.

11 I will note that it's extremely unusual
12 recently for the presentence investigators to be
13 recommending prison. When they do and don't recommend a
14 rider, that's significant enough that as a judge you take
15 note of it. The reason for that is they do not recommend
16 imposition lightly. In this case you have an LSI of 40.
17 That's extremely high. That means that they have looked
18 at the protective factors and the -- the factors aren't
19 going to change. The factors that are not going to change
20 are not going to be changed by programming. That's why
21 they recommended prison.

22 This is what I'm going to do. I hereby
23 sentence you to the custody of the Idaho State Board of
24 Corrections with a unified sentence aggregate of ten
25 years. I'm sorry, 20 years. The court specifies a

1 minimum period of confinement of ten fixed followed by a
2 subsequent indeterminate period of custody of 10 years
3 indeterminate. I'll remand you to the custody of the
4 sheriff of this county to be delivered to the proper --
5 cancel that. That's the wrong way to say this.

6 While I'm doing this, the prosecutor needs to
7 make sure that there are the appropriate no contact orders
8 in place.

9 Because this crime was committed with a
10 firearm I have to sentence you this way. It is therefore
11 ordered, adjudged and decreed that the defendant, Mr.
12 Duran, is guilty of the crime of aggravated assault,
13 enhanced by the use of a firearm during the commission of
14 a crime. He is sentenced on count one, aggravated
15 assault, enhanced for the use of a firearm as charged, to
16 the Idaho State Board of Corrections under a unified
17 sentence aggregate of 20 years to be served as follows:
18 A minimum period of confinement of 10 years, followed by a
19 subsequent indeterminate period of custody not to exceed
20 10 years. And he is to receive credit for whatever time
21 he's actually served, which I'm not sure what that amount
22 is at this point.

23 It is further ordered that his bond, his bail,
24 is exonerated. It is further ordered that he shall
25 provide a DNA sample to the Department of Corrections

1 pursuant to Idaho Code 19-5501. I am imposing court
2 costs. I'm not going to impose any kind of public
3 defender reimbursement. I am not going to impose a fine
4 because the restitution is significant. I am imposing
5 restitution in the amount of \$5,364.21 as broken down by
6 the prosecutor.

7 You have the right to appeal. If you can't
8 afford an attorney for the appeal you can request to have
9 one appointed at public expense. Any appeal must be filed
10 within 42 days from the date of the order.

11 Is there anything else I need to do at this
12 time?

13 MR. ESSMA: Not at this time.

14 MR. MISSELDINE: No, Your Honor.

15 THE COURT: Thank you.

16 (Hearing concluded.)

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