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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45853
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR01-17-25361
)	
HOLLEN DAVID FAUGHT,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Faught failed to establish that the district court abused its discretion by imposing a unified sentence of 20 years, with five years fixed, upon his guilty plea to felony DUI, with a persistent violator enhancement?

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

Faught pled guilty to felony DUI (prior felony DUI conviction within 15 years), and admitted to being a persistent violator of the law, and the district court imposed a unified

sentence of 20 years, with five years fixed. (R., pp.69-72.) Faught filed a notice of appeal timely from the judgment of conviction. (R., pp.73-76.)

Faught asserts his sentence is excessive in light of his mental health issues, alcohol abuse, and family support. (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 penalty for felony DUI (prior felony DUI conviction within 15 years) with a persistent violator enhancement is not less than five years, up to life in prison. I.C. §§ 18-8005(6), -8005(9), 19-2514. The district court imposed a unified sentence of 20 years, with five years fixed, which falls well within the statutory guidelines. (R., pp.69-72.) Furthermore, Faught's sentence is appropriate in light of his ongoing criminal behavior, repeated decisions to endanger the community by driving while under the influence of alcohol, failure to rehabilitate or be deterred, and the danger he poses to the community.

Faught's sentence is reasonable considering his criminal record alone. He has a criminal history that dates back to at least 1968 and includes juvenile adjudications for burglary, "petty thefts," malicious mischief, and two separate escapes, as well as criminal convictions for grand theft, auto theft, receiving stolen property, two convictions for escape, ex-con in possession of a firearm, eluding, reckless driving, felony possession of a controlled substance, second degree theft, resisting or obstructing officers, two convictions for battery, criminal trespassing, four convictions for failure to purchase a driver's license, four convictions for DWP, three convictions for open container, operating a vehicle without insurance, leaving the scene of an accident involving damage, and eight prior convictions for DUI. (PSI, pp.4-11, 180-85, 220-26.¹) He has been afforded numerous prior rehabilitative opportunities, but has nevertheless failed to rehabilitate and has instead continued to endanger the community by driving while intoxicated. (PSI, pp.190-91, 214, 229, 232-33, 295.) Faught has likewise failed to be deterred – he reported that he "has gone to prison 'three different times for DUI' for a total of 14 years," yet

¹ PSI page numbers correspond with the page numbers of the electronic file "Faught 45853 psi.pdf."

he continues to drive without driving privileges and while under the influence of alcohol. (PSI, pp.4, 476.)

At sentencing, the state addressed Faught's extremely lengthy history of committing crimes that endanger the community, the risk he presents to society, and his failure to rehabilitate or be deterred. (2/9/18 Tr., p.25, L.8 – p.28, L.17 (Appendix A).) The district court subsequently articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Faught's sentence. (2/9/18 Tr., p.34, L.23 – p.37, L.16 (Appendix B).) The state submits that Faught has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendices A and B.)

Conclusion

The state respectfully requests this Court to affirm Faught's conviction and sentence.

DATED this 27th day of September, 2018.

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

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of September, 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
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/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

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1 MR. WITTEWER: No, Your Honor.
 2 MR. DEANGELO: No, Your Honor.
 3 THE COURT: Either side wish to offer
 4 evidence?
 5 MR. DEANGELO: No evidence.
 6 MR. WITTEWER: No evidence.
 7 THE COURT: Mr. Wittwer.
 8 MR. WITTEWER: Judge, you are aware that the
 9 plea agreement in this case calls for the State to
 10 be able to recommend a sentence of up to 20 years,
 11 which would be a sentence for DUI as enhanced by
 12 the persistent violator -- I guess, the existence
 13 of the persistent violator.
 14 Admittedly the sentence that the State
 15 is recommending, which is the seven plus 13, is a
 16 pretty stiff sentence. And I think that under the
 17 circumstances, Judge, it is fully justified to
 18 impose that sentence and -- primarily for the
 19 protection of the community.
 20 Mr. Faught is before this Court for
 21 having committed the crime of driving under the
 22 influence of alcohol where he had a blood test
 23 done -- a blood draw was done. His BAC was .209.
 24 He was clearly under the influence of alcohol and
 25 impaired when he was driving. And he has a long,

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1 property and escape. He's been violated on
 2 probation.
 3 It's just a lengthy and varied criminal
 4 history and much of it shows that his criminal
 5 conduct either victimizes people or puts people at
 6 risk of great harm and even death.
 7 So, Your Honor, in this case I really
 8 don't think there's much of a question that a
 9 sentence should be imposed. I think really the
 10 issue is what is the underlying sentence -- what
 11 is the appropriate underlying sentence in this
 12 case.
 13 And, as I said, he has admitted the
 14 persistent violator enhancement. And that gives
 15 you a lot of, I guess, sentencing leeway here.
 16 You could sentence him up to life in prison. But
 17 he is a 62-year-old man who has shown that he will
 18 continue to drink alcohol and get behind the wheel
 19 of a car and endanger the community.
 20 And so I think it's fully appropriate
 21 for the Court to impose a sentence that would
 22 essentially put him under supervision for most of
 23 the remainder of his life. And then the sentence
 24 of the determinate portion, the seven years fixed,
 25 I think a significant amount of punishment is

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1 long, history of driving under the influence
 2 repeatedly. This is by -- as far as I can tell,
 3 the ninth or tenth lifetime DUI and the fourth
 4 lifetime felony DUI. He's previously been
 5 imprisoned. He's been sent on some form of a
 6 retained jurisdiction program. He has a history
 7 of criminal activities, of a wide variety of
 8 crimes, relating back into the mid 1970s and then
 9 continuing up to the time that he was arrested.
 10 Granted, it wasn't necessarily a
 11 continuous extreme of criminal conduct, but
 12 nonetheless it was -- it stretches decades. And
 13 we're not talking about insignificant things;
 14 we're talking about things that endanger the
 15 community. Of course, the DUIs, it goes without
 16 saying the risk that that presents to the
 17 community. I don't have to go on and on about the
 18 harm that can come about because of that. But he
 19 has repeatedly endangered the community in that
 20 way.
 21 We see that he has misdemeanor
 22 convictions for battery, for resisting and
 23 obstructing, other alcohol-related offenses,
 24 reckless driving, eluding. He has an old
 25 conviction for grand theft, for receiving stolen

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1 warranted here because certainly he's known that
 2 what he is doing is wrong.
 3 And, you know, he says in the PSI that
 4 -- toward the end when he gives his evaluation of
 5 what he needs, he says he does not feel he needs
 6 an alcohol treatment program at this time. He
 7 just needs to quit drinking. Well, I think he
 8 should have figured that out maybe back in the
 9 1990s when he was getting misdemeanor DUIs and
 10 coming before the Court and getting a felony DUI
 11 and getting sent on a rider and being sent to
 12 prison. He's shown that he won't do it.
 13 And so for the protection of the
 14 community and for punishment, Judge, primarily, I
 15 would ask that you impose the sentence of seven
 16 fixed and 13 indeterminate for the total of 20
 17 years for the enhanced sentence.
 18 Thank you.
 19 THE COURT: Thank you.
 20 Mr. DeAngelo.
 21 MR. WITTEWER: I'm sorry, Judge. I would ask
 22 that you suspend his driver's license for five
 23 years absolute.
 24 THE COURT: Thank you. Go ahead.
 25 MR. DEANGELO: Thank you, Judge.

APPENDIX B

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1 co-occurring treatment and also the support
 2 through Idaho Behavioral Health to be able to do
 3 that.
 4 All in all, Your Honor, this is a very
 5 serious case and my client has repeated his
 6 behavior. But it has been some significant period
 7 of time since his last conviction on a felony DUI.
 8 His mental health is severe. It is treatable. It
 9 has been identified. And I think if we can get a
 10 proper treatment plan, my client can be somebody
 11 who resides out in the community and does not pose
 12 more than a moderate risk. And I think we can
 13 limit the risk that he poses especially through
 14 supervision and that he can be somebody who lives
 15 out in the community under supervision.
 16 So I'd ask the Court to follow my
 17 recommendation. I think the statute on the
 18 driver's license suspension now is five years, but
 19 that he can come back after one year if he's out
 20 of custody. I don't think it's allowable to be
 21 five years absolute anymore. Thank you. That is
 22 to say that it is five years, but the client can
 23 -- the defendant can come back and ask for
 24 modification after the first year of absolute
 25 suspension.

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1 to find that you are guilty. I will impose a
 2 judgment of conviction.
 3 I think you've been sitting here long
 4 enough and you've been sitting in front of
 5 district judges long enough that you've heard us
 6 talk about objectives of sentencing; protection of
 7 society, rehabilitation, deterrence and
 8 punishment. The most important objective is
 9 protection of society.
 10 There are a couple ways we can go about
 11 that. We can either simply lock someone up and
 12 thereby also achieve the deterrence element or we
 13 can focus on rehabilitation by way of minimizing
 14 the risk that that person presents in the future.
 15 You have been at this a long time. You
 16 have clearly had a substance use disorder for
 17 probably 30 years and it appears that it is
 18 focused primarily on alcohol given your history of
 19 offenses.
 20 And the most concerning thing about
 21 your history of offense, aside from the fact this
 22 is your fourth felony, is that the majority of
 23 those appear to be, or certainly a significant
 24 percentage, appear to be offenses that put the
 25 public at risk.

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1 MR. WITTEWER: And, Judge, I think that the
 2 sentencing scheme in place at the time of the
 3 crime would be controlling. So I'd be
 4 recommending that.
 5 THE COURT: What code section are you
 6 referring to, Mr. DeAngelo?
 7 MR. DEANGELO: I'll pull it up, Your Honor.
 8 18-8005(6)(a).
 9 THE COURT: (D). I see the one year
 10 absolute may -- with an additional period of four
 11 years, may request restricted driving privileges.
 12 Mr. Faught, is there anything you want
 13 to tell me before I decide what sentence to
 14 impose?
 15 THE DEFENDANT: No, sir. I think it's all
 16 been stated.
 17 THE COURT: Nothing at all?
 18 THE DEFENDANT: No.
 19 THE COURT: All right. Is there any legal
 20 cause why judgment can't be entered?
 21 MR. DEANGELO: No, Your Honor.
 22 MR. WITTEWER: No, Your Honor.
 23 THE COURT: Mr. Faught, based upon your plea
 24 of guilty to driving under the influence and to
 25 being a persistent violator of the law, I'm going

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1 So that suggests to me that the way you
 2 look at the world doesn't include an appreciation
 3 of how your conduct threatens other people. If I
 4 come to that conclusion that that's how you look
 5 at the world, which it appears to me that you do,
 6 then that makes you kind of a scary guy if you're
 7 willing to undertake behavior and conduct that has
 8 no regard with whether or not that conduct can
 9 injure somebody else.
 10 It may have been seven years since the
 11 last time you've had an offense, but the offense
 12 that you picked up this time is one that could
 13 have easily killed someone. And your response to
 14 that contains none of the empathy that most folks
 15 would appreciate, no recognition of the threat
 16 that you created and you're responsible for. And
 17 that quality is also pretty scary to me.
 18 It appears to me that my obligation is
 19 in an exercise of my discretion to do what I can
 20 to protect society from that kind of thinking and
 21 your behavior. While I think that the State's
 22 recommendation is totally in line, I'm not going
 23 to quite go that far. But I am going to impose a
 24 unified term of 20 years in prison, the first five
 25 years of that will be fixed, determinate, and you

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<p>1 won't be eligible for parole. After that time if 2 the parole commission deems it advisable that you 3 be released, you may be released on parole. It 4 will up to them to make that decision. 5 In any event, you will have a five-year 6 license suspension, the first year of which shall 7 be absolute. And if you can establish a basis for 8 restricted privileges after that first year, you 9 can ask for that from the Court. 10 I'm going to decline the retained 11 jurisdiction program. I don't think at this point 12 given the history that it would achieve anything 13 worthwhile. I think the first objective of 14 sentencing overrides all of the other 15 consideration. That will be the judgment of the 16 Court. 17 Mr. Faught, you have the right to 18 appeal this judgment. You have 42 days in which 19 to take that appeal from the date that judgment is 20 made and entered. You have the right to be 21 represented by an attorney in pursuing that 22 appeal. If you can't afford an attorney, one will 23 be appointed for you at public expense. 24 Also, the payment of costs will be at 25 public expense. I will also impose as part of the</p>	<p>1 obligation you pay the restitution of \$316. 2 Good luck, Mr. Faught. 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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<p>1 <u>REPORTER'S CERTIFICATE</u> 2 3 4 I, KIM I. MADSEN, Official Court 5 Reporter, County of Ada, State of Idaho, hereby 6 certify: 7 That I am the reporter who took the 8 proceedings had in the above-entitled action in 9 machine shorthand and thereafter the same was 10 reduced into typewriting under my direct 11 supervision; and 12 That the foregoing transcript contains 13 a full, true, and accurate record of the 14 proceedings had in the above and foregoing cause, 15 which was heard at Boise, Idaho. 16 IN WITNESS WHEREOF, I have hereunto set 17 my hand this ___ day of _____, 2018. 18 19 20 21 _____ 22 KIM I. MADSEN, Official Court Reporter 23 CSR No. 428 24 25</p>	<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>