

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
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. 45861
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR01-17-28119
)	
DONALD EUGENE DAVIS, JR.,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Davis failed to establish that the district court abused its discretion by imposing a unified sentence of 10 years, with three years fixed, upon his guilty plea to trafficking in methamphetamine?

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

On August 22, 2017, a grand jury indicted Davis on two counts of trafficking in methamphetamine (28 grams or more, but less than 200 grams), one count of delivery of methamphetamine, one count of possession and/or manufacturing of drug paraphernalia with the

intent to deliver, and one count of possession of drug paraphernalia. (R., pp.19-21.) Pursuant to a plea agreement, Davis pled guilty to one count of trafficking in methamphetamine (28 grams or more, but less than 200 grams) and the state dismissed the remaining charges, agreed to not file a persistent violator enhancement, and also agreed to limit its sentencing recommendation to a unified sentence of 10 years, with the mandatory minimum of three years fixed. (R., pp.76-88.) The district court imposed a unified sentence of 10 years, with three years fixed. (R., pp.91-94.) Davis filed a notice of appeal timely from the judgment of conviction. (R., pp.99-102.)

Davis asserts his sentence is excessive in light of his substance abuse and desire for treatment, abusive childhood, belief that his health is poor, purported remorse, and mental health diagnosis of “Rule Out Major Depressive Disorder, Recurrent, Moderate.” (Appellant’s brief, pp.2-5 (citing PSI, pp.24, 36¹.) 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

¹ PSI page numbers correspond with the page numbers of the electronic file “Davis 45861 psi.pdf.”

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 trafficking in methamphetamine (28 grams or more, but less than 200 grams) is a mandatory minimum of three years, up to life in prison. I.C. §§ 37-2732B(a)(4)(A), -2732B(a)(4)(D). The district court imposed a unified sentence of 10 years, with the mandatory minimum of three years fixed, which falls well within the statutory guidelines. (R., pp.91-94.) Because the district court imposed only the mandatory minimum of three years for the fixed portion of Davis’ sentence, Davis may challenge only the indeterminate portion of his sentence on appeal. Davis’ indeterminate sentence is appropriate in light of his incessant substance abuse and criminal offending, disregard for court orders and the terms of community supervision, and failure to rehabilitate or be deterred despite numerous prior legal sanctions and treatment opportunities.

Davis has a long criminal history that dates back to at least 1987 and includes convictions for unauthorized use of a motor vehicle, two prior convictions for felony possession of a controlled substance, possession of a controlled substance with intent to deliver, two convictions

for sale of dangerous drugs, misdemeanor possession of a controlled substance, possession of drug paraphernalia, battery, destruction of telecommunication line/instrument, two convictions for violation of a no contact order, disturbing the peace, false information to police, and two convictions for malicious injury to property. (PSI, pp.5-10, 172-73, 214-15.) He also has a history of repeatedly violating the terms of community supervision – his record contains at least eight probation violations for conduct including “routinely” changing residences without permission, failing to appear for UA testing, testing positive for controlled substances, failing to attend treatment, and absconding supervision. (PSI, pp.7-11, 210, 215, 628, 632, 636.) Davis’ probation officer reported, ““Overall I don’t feel his community supervision went well at all, as there was never any behavior change taking place for him, as evident with his behaviors leading up to his arrest”” for the instant offense. (PSI, p.11.)

Indeed, Davis’ conduct in the instant offense was remarkably similar to his conduct during his prior felony drug offense (the 2014 conviction for possession of a controlled substance with intent to deliver), for which he was on parole when he committed the instant offense. (PSI, pp.3, 10, 604, 621, 636.) When he committed the 2014 offense, Davis had absconded supervision in a prior case and was dating Amanda Fisher; the couple were “regularly” moving between local motels and “giving people meth for rides in their vehicles,” and they were ultimately discovered by police in a motel room with multiple baggies of methamphetamine, a digital scale, and other drug paraphernalia. (PSI, pp.13, 604-05.) After serving time in prison for the 2014 offense, Davis was granted parole in December 2016, and he almost immediately resumed his use of methamphetamine, failed to attend treatment, and – by May 2017 – he had again absconded supervision. (PSI, pp.621, 625-32, 634-36.) While on absconder status, Davis and Fisher (who was also on parole) sold large amounts of methamphetamine to a confidential

informant on several separate occasions, leading to Davis' arrest for the instant offense, at which time he and Fisher were once again found in a hotel room with multiple packages of methamphetamine, a drug ledger, the "necessary components and materials for manufacturing methamphetamine," scales, packaging, and other drug paraphernalia. (PSI, pp.3-4, 636.)

During his presentence interview for the instant offense, Davis admitted that he is a long-time "drug addict"; he stated, "[It]'s all I know." (PSI, p.18.) Davis – who is now 49 years old – reported that he began using methamphetamine at age 11 and that he has been "an IV user for almost 40 years and 'used 2-3 grams a day.'" (PSI, pp.1, 16, 143.) He also reported a history of abusing alcohol, marijuana, cocaine, and opioids. (PSI, p.124.) Davis claimed that he went "back into the drug trade" in the instant offense as "a way to start making money," and that "once [he] got started doing drugs it was all about how [he] was going to get more, so [he] started saling [sic] drugs." (PSI, p.5.) He acknowledged that his "drug use has caused legal issues his whole life" and that merely "a 'few classes in prison won't help [him], the classes are too short [t]o deal with the length of [his] addiction.'" (PSI, pp.18, 21.) Indeed, Davis has previously been afforded treatment via the retained jurisdiction program, the Pine Creek Wellness Center, Ascent Behavioral Health, the Friendship Clinic through St. Vincent DePauls, Community Services Counseling, Celebrate Recovery, River of Life, New Hope, Rising Sun Sober Living, the New Life Recovery Program, intensive outpatient treatment at Recovery4Life, intensive outpatient treatment at Ascent Counseling, Domestic Violence Treatment at Pathways, Anger Management, Moral Reconation Therapy, MRT Aftercare, SAMSHA MATRIX Relapse Prevention, the SAMSHA Anger Management for Substance Abuse and Mental Health group, Cognitive Self-Change, and Vocational Rehabilitation, and he reported that he attends AA and NA meetings approximately three to four times per week. (PSI, pp.11-12, 16-17, 25, 124, 131,

135-38, 144, 175, 178, 192, 544, 554, 562, 566, 574, 577, 591-92, 597-98, 610, 622, 627-28.) Yet, despite the extensive treatment he has been provided, Davis has failed to rehabilitate and has instead continued to abuse substances and commit crimes. The presentence investigator determined that Davis presents a high risk to reoffend, and concluded, “I believe it would be extremely difficult for Mr. Davis to successfully complete community supervision at this time and do not believe h[e] is a viable candidate for probation.” (PSI, pp.18, 21.)

At sentencing, the state addressed Davis’ ongoing disregard for the law and the terms of community supervision, his repeated decisions to place society at risk by distributing illegal substances, and his abject failure to rehabilitate or be deterred. (2/9/18 Tr., p.7, L.6 – p.9, L.9.) The district court subsequently articulated its reasons for imposing Davis’ sentence. (2/9/18 Tr., p.10, L.20 – p.13, L.10.) The state submits that Davis 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. (Appendix A)

Conclusion

The state respectfully requests this Court to affirm Davis’ conviction and sentence.

DATED this 4th day of September, 2018.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th 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:

ELIZABETH ANN ALLRED
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

APPENDIX A

5

1 BOISE, IDAHO

2 Friday, February 9, 2018, 1:48 p.m.

3

4 THE COURT: State vs. Donald Davis, Case No.

5 CR01-17-28119. Mr. Davis is present in custody, he's

6 represented by Mr. Barnum; the State is represented by

7 Ms. Reilly. We are here today for sentencing.

8 On December 15th, the defendant pleaded

9 guilty to one count of trafficking in methamphetamine.

10 He entered that plea under a plea agreement that called

11 for the State to cap its recommendation at a ten-year

12 prison sentence, consisting of three years fixed,

13 followed by seven years indeterminate. All right.

14 Of course, that is the mandatory minimum

15 fixed amount of prison time. There's also a mandatory

16 minimum \$10,000 fine in the case.

17 Counsel, is there any legal cause why

18 judgment should not be pronounced today?

19 MR. BARNUM: Not that I'm aware of,

20 Your Honor.

21 MS. REILLY: None known, Your Honor.

22 THE COURT: All right.

23 Have Counsel had a full opportunity to review

24 the presentence investigation?

25 MR. BARNUM: Yes.

6

1 MS. REILLY: The State has, Your Honor.

2 THE COURT: Mr. Davis, have you read it?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Are there any deficiencies or

5 errors in it that either side would like to bring to my

6 attention?

7 MS. REILLY: Not from the State, Your Honor.

8 MR. BARNUM: No, Your Honor.

9 THE COURT: Okay. And does either side

10 contend there should be any additional investigation or

11 any additional evaluation of the defendant before

12 sentencing?

13 MR. BARNUM: No.

14 MS. REILLY: Not from the State, Judge.

15 THE COURT: Okay.

16 Ms. Reilly, is the State pursuing a

17 restitution claim in the case?

18 MS. REILLY: Your Honor, you -- I know you

19 may recall the State sought restitution in the

20 co-defendant's case, and Your Honor declined to order

21 restitution. I presume that your analysis will be the

22 same in this case, so I will leave it at that.

23 THE COURT: Okay. You're right. It would

24 likely be the same, and -- and -- and so that's fine.

25 All right.

7

1 Any evidence as to sentence or just

2 arguments?

3 MS. REILLY: Just argument.

4 MR. BARNUM: Just argument.

5 THE COURT: Okay. Go ahead.

6 MS. REILLY: Thank you, Judge.

7 Your Honor, I know you're familiar with the

8 facts of the case, since you presided over both this case

9 and the co-defendant's case.

10 This defendant obviously comes before the

11 Court with a little more extensive criminal history than

12 his co-defendant Ms. Fisher did. He is 48 years of age,

13 and he now is before the Court, as I understand it, on

14 his fifth felony conviction. Two of those are out of

15 state; one in Oregon, one in Arizona all related to

16 controlled substances.

17 Specifically, the 1995 Arizona case,

18 according to the records we reviewed, it was a sale of

19 dangerous drug. It looks like it's written down as a

20 possession with intent in 1996 out of Arizona. And then,

21 here in Ada County, 2010, possession of controlled

22 substance. And in 2014, another felony possession of

23 controlled substance case, for which the defendant was on

24 parole when the conduct in the case before Your Honor

25 occurred.

8

1 I did pull the 2014 case, just to review it,

2 and -- and I noted that in that case, similarly, in

3 June of 2014, probation and parole was looking for the

4 defendant. He had absconded. And they found him at a

5 hotel, West River Inn at that time, with a female, and I

6 believe it might have been Ms. Fisher. I'm not for sure

7 on that. And, ultimately, controlled substances were

8 located.

9 The defendant has, during the time he's been

10 adjudicated here or convicted here in Ada County, has

11 been sent on a rider, he's been given opportunities at

12 probation, he's been incarcerated, and been on parole.

13 And yet, he continues to revert back, I guess, to what he

14 knows. And I -- it appeared to me, in the PSI, that the

15 defendant was forthright in that he indicated that

16 essentially he was down on his luck, he couldn't get a

17 job or couldn't find a job. It was in the winter; he was

18 cold, he was hungry. And so, he met up with some old

19 friends and got back into meth, and then got into

20 distributing methamphetamine.

21 And so, in terms of the defendant

22 acknowledging that -- I think he said he could have found

23 a different way to make a living. Really, he was

24 obligated to find another way to make a living. It's not

25 uncommon for people to have issues related to employment,

1 housing, and the bare necessities, but returning to drug ⁹
 2 distribution is never acceptable as an alternative.
 3 I would ask the Court to consider the
 4 Judgment of Conviction, three years fixed, followed by
 5 seven years indeterminate, as recommended or agreed to.
 6 I am not asking for more than the \$10,000 fine that is
 7 required. I did pull the defendant's IDOC information,
 8 and it looks like he is on parole -- or that sentence
 9 satisfaction isn't until 2021, in any event.
 10 THE COURT: All right.
 11 MS. REILLY: Thank you, Judge.
 12 THE COURT: Thank you, Ms. Reilly.
 13 Mr. Barnum?
 14 MR. BARNUM: Your Honor, we would ask that
 15 you impose a sentence that's concurrent, in this
 16 particular case, to Mr. Davis' present hold. In looking
 17 at the -- the co-defendant received a sentence of three
 18 years fixed, seven years indeterminate.
 19 As I had gone through the discovery materials
 20 and prepared this case previously, it certainly appeared
 21 that the co-defendant, Ms. Fisher, had a greater deal of
 22 culpability and a greater deal of involvement in regard
 23 to the trafficking. The Court may disagree with my
 24 analysis with respect to that.
 25 But that being the case, on balance ask the

1 Court to consider a shorter tail with regard to ¹⁰
 2 Mr. Davis, something in the neighborhood of a three-year
 3 fixed, five-year indeterminate sentence. I know round
 4 numbers make sense, and they sound right, and three plus
 5 seven equals ten, as opposed to three plus five equals
 6 eight.
 7 But when you take into consideration the
 8 differ -- different aspects and the involvement of the
 9 two defendants, and ultimately lay the accountability
 10 upon those two defendants, I think the Court would --
 11 could reasonably find, certainly, that a lesser sentence
 12 is appropriate for Mr. Davis, and I ask the Court to
 13 impose the same.
 14 THE COURT: Okay. Thank you, Mr. Barnum.
 15 Mr. Davis, would you like to make a
 16 statement?
 17 THE DEFENDANT: No, sir, Your Honor.
 18 THE COURT: Okay, that's fine. You're not
 19 obligated to do so.
 20 I have read the presentence investigation in
 21 your case, I'm well aware of the four objectives of
 22 criminal sentencing that Idaho law directs me to consider
 23 in every case. And it's important to note here, of
 24 course, that the legislature has -- has made one of the
 25 decisions that would otherwise have to be made here

1 today, which is that three years, minimum, of prison time ¹¹
 2 must be ordered, along with a \$10,000 minimum fine.
 3 Counsel have noted the sentence in Mr. Davis'
 4 co-defendant's case that was recently handed down. It
 5 was a three-point -- a three plus seven sentence, the
 6 same kind of sentence the State requested here today, as
 7 it had the right to do under the plea agreement in this
 8 case.
 9 Mr. Barnum's argued that there's a
 10 culpability difference in connection with the behavior in
 11 this case. And if I were to assume that as true, of
 12 course one might argue that it's offset by what
 13 Ms. Reilly noted, which is that Mr. Davis' criminal
 14 history is -- is worse than his co-defendant's criminal
 15 history. So, that would kind of seem to come out in the
 16 wash, for the most part, along those lines.
 17 Mr. Davis committed this offense while on
 18 parole, had only been out, if I have the -- if I have the
 19 time right, around six or seven months before committing
 20 this offense. So -- and I -- I understand the rationale
 21 he -- he gave for doing that, which is essentially I
 22 couldn't figure out anything else to do in order to be --
 23 be -- be fed and kept out of the cold but to sell drugs.
 24 And I -- you know, I -- I -- I don't know of any way to
 25 assess the reality of whether that was truly Mr. Davis'

1 only way of getting by. But -- but in the end, that ¹²
 2 is -- that's not something I can sort of hold up as -- as
 3 a basis not punish Mr. Davis for his fifth drug felony.
 4 In the end, the legislature has prescribed a
 5 lengthy fixed prison sentence, and it would seem to me
 6 that there continues to be some societal interest in
 7 moderating -- monitoring Mr. Davis after that fixed portion
 8 of any sentence has been served, so that we can try to
 9 help him reintegrate into the community successfully and
 10 try to -- try to -- try to make sure he avoids going back
 11 to this kind of stuff when he's paroled the next time.
 12 So, it seems to me that the sentencing
 13 recommendation made by the State, under the plea
 14 agreement, is a reasonable resolution of the case.
 15 So, Mr. Davis, on your plea of guilty of to
 16 the crime of trafficking in methamphetamine, I find you
 17 guilty. I'll sentence you to the custody of the Idaho
 18 State Board of Correction, under the Unified Sentence Law
 19 of the State of Idaho, for an aggregate term of ten
 20 years. I'll specify a minimum period of confinement of
 21 three years, and a subsequent indeterminate period of
 22 confinement of seven years.
 23 You'll be remanded to the custody of the
 24 sheriff of this county to be delivered to the proper
 25 agent of the State Board of Correction in execution of

13
1 this sentence. You have 207 days of credit toward it, at
2 this point.
3 I'll impose the mandatory minimum fine of
4 \$10,000; I'll assess court costs as well.
5 The State, as already noted, did not seek
6 restitution in the case.
7 You have the right to appeal, Mr. Davis. If
8 you can't afford to hire an attorney for the appeal, one
9 will be provided at public expense. Any appeal must be
10 filed within 42 days.
11 Good luck.
12 MS. REILLY: State's returning the PSI and
13 will delete the electronic copy.
14 THE COURT: Thank you, Ms. Reilly.
15 MR. BARNUM: I'm returning the PSI materials
16 as well, Your Honor.
17 THE COURT: Thank you, Mr. Bamum.
18
19 (The proceedings concluded at 1:59 p.m.)
20
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24
25

REPORTER'S CERTIFICATE

I, Susan M. Heronemus, Registered
Professional Reporter and Certified Shorthand Reporter
in and for the State of Idaho, do hereby certify:
That the foregoing proceedings were taken
down by me in machine shorthand at the time and place
therein named, and thereafter the same was reduced to
typewriting under my direct supervision; and
That the foregoing transcript contains a
full, true, and verbatim record of the said proceedings.
WITNESS my hand this 6th day of April, 2018.

Susan M. Heronemus, CSR No. 728