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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45907
Plaintiff-Respondent,)	
)	Madison County Case No.
v.)	CR-2017-2018
)	
PENNY GAY DAVIES,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Davies failed to establish that the district court abused its discretion by imposing a four-year fixed sentence for prescription fraud and a concurrent unified sentence of seven years, with four years fixed, for possession of Adderall without a valid prescription, both with an enhanced penalty for being a second or subsequent drug offense?

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

Davies pled guilty to prescription fraud and possession of Adderall without a valid prescription, with an enhancement on both counts for being a second or subsequent drug offense, and the district court imposed a sentence of four years fixed for the prescription fraud conviction

and a unified sentence of seven years, with four years fixed, for the possession of Adderall without a valid prescription conviction. (R., pp.48-52, 68-69.) Davies filed a notice of appeal timely from the judgment of conviction. (R., pp.77-79.)

Davies asserts her sentence is excessive in light of her substance abuse issues, desire for treatment, mental health issues, support of family and friends, and purported remorse. (Appellant's brief, pp.3-7.) 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 prescription fraud is four years and for possession of Adderall without a valid prescription is seven years, and the enhancement for a second or subsequent drug offense can double each sentence. I.C. §§ 37-2734(a)(3), -2732(c)(1)(A), -2739. The district court imposed a sentence of four years fixed for the prescription fraud conviction and a concurrent unified sentence of seven years, with four years fixed, for the possession of Adderall conviction, both of which fall well within the statutory guidelines. (R., pp.68-69.) Furthermore, Davies’ sentences are appropriate in light of her ongoing criminal behavior and failure to rehabilitate or be deterred despite numerous opportunities both while in the community and while incarcerated.

Davies’ sentences are reasonable considering her criminal record alone. She has a criminal history that dates back to 1988 and includes misdemeanor convictions for insufficient funds checks, obtaining property by false pretenses, unlawful possession of a controlled substance, DUI, possession of a controlled substance, two counts of petit theft, and two counts of pharmacy-unlawful to obtain legend drug by fraud. (PSI, pp.4-8.¹) Davies also has felony convictions for obtaining a controlled substance by fraud or forgery, three counts of attempting to obtain a controlled substance by fraud or forgery, and three counts of forgery. (PSI, pp.5-7.) In this case, Davies used a fraudulent identity to obtain a prescription for 30 mg of Adderall from Rexburg Community Care, and then filled that prescription at Walgreens. (PSI, p.3.) Walgreens then provided additional information regarding a second prescription for the same fraudulent

¹ PSI page numbers correspond with the page numbers of the electronic file “DAVIES SEALED PSI.pdf.”

identity that was prescribed by Dr. Richard Jones at Teton Medical Group. (PSI, p.3.) Dr. Jones was able to positively identify Davies “as the individual who came into his office pretending to be Sidney Waters.” (PSI, p.3.) Davies was originally charged with two counts of prescription fraud and two counts of possession of a controlled substance, each with a sentencing enhancement for being a second or subsequent drug offense. (R., pp.48-52; PSI, pp.4, 8.) Davies has been afforded numerous prior rehabilitative opportunities both in the community and while incarcerated, but has nevertheless failed to rehabilitate and has instead continued to obtain prescription drugs through fraud. (PSI, pp.8-9.)

Davies reported to the presentence investigator that she suffers from bipolar disorder, depression, anxiety, and PTSD, and was taking medication for bipolar disorder and depression. (PSI, pp.14-15.) The mental health evaluator recommended that Davies continue to participate in mental health services at a similar level of care, and if not already doing so, participate in therapy. (PSI, p.138.) While it is clear that Davies does have mental health issues, she continues to exacerbate these issues by continuing her illegal drug use. The state acknowledges that there are factors that could be deemed mitigating in this case; however, they do not outweigh the seriousness of the offense or Davies’ ongoing criminal behavior.

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Davies’ sentence. (1/24/18 Tr., p.39, L.22 – p.43, L.8.) Although the court stated it was not “able to find any mitigating factors in [Davies’] case, it did specifically consider the severity of Davies’ addiction, as well as her stated remorse and desire for treatment. (1/24/18 Tr., p.40, L.21 – p.41, L.14.) That the court was unwilling to find those factors mitigated against a prison sentence, when Davies has repeatedly demonstrated an inability or unwillingness to be rehabilitated, does not show an abuse of discretion. The state

submits that Davies 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 Davies' conviction and sentences.

DATED this 15th 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 15th 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:

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

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

APPENDIX A

1 Today's the day of my mother's passing,
2 and I was incarcerated and didn't get to say
3 good-bye. My father's 80 years old, and I left him
4 all alone. I don't want to go through that again.
5 I've lost so much in my life.

6 And I'm ready to do whatever it takes to
7 live in society. I don't care if it's an ankle
8 monitor, monitor wherever I go, constant UAs,
9 classes, meetings, and definitely a lot of service
10 work to pay back the community and to my family. I
11 know I can do this, Your Honor. I will succeed in
12 this. Thank you.

13 THE COURT: Thank you, Ms. Davies.
14 Ms. Davies, are you fully satisfied with the
15 representation that you've received from your
16 attorney in this case?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Mr. Archibald, is there any
19 legal reason for me not to sentence your client
20 today?

21 MR. ARCHIBALD: No.

22 THE COURT: Okay. Well, Ms. Davies, as I
23 mentioned, I've carefully reviewed the Presentence
24 Report. It does indicate that you've -- if I
25 counted everything correctly, you had eight adult

1 misdemeanors and seven adult felonies, as well as at
2 least three probation or parole violations. You
3 served time in Drug Court. You've been -- you've
4 done Riders, and you've been to prison.

5 The presentence investigator, as you
6 mentioned, does recommend incarceration. And the
7 substance abuse evaluation recommends 3.1 intensive
8 inpatient treatment.

9 I have reviewed the objectives of criminal
10 sentencing adopted by the Idaho Supreme Court, which
11 include protection of society, deterrence of the
12 individual and the public, and the possibility of
13 rehabilitation, and punishment or retribution. I
14 don't think punishment is an issue in this case, but
15 all the other items are.

16 I note -- or I've also considered the
17 criteria in Idaho Code 19-2521 relative to the
18 question as to whether I should consider probation
19 for you. I note that you are 55 and that your LSI
20 is 33, which is high.

21 I've not been able to find any mitigating
22 factors in your case. But I do have to consider
23 that one of the aggravating factors is the number of
24 crimes that you've been convicted of.

25 I have to admit, Ms. Davies, my heart goes

1 out to you. I just can't -- and I'm a Drug Court
2 judge, so I deal with people regularly who have
3 severe addictions. But frankly, I haven't seen an
4 addiction as bad as yours. You've been given
5 opportunity after opportunity. And I know what you
6 learn in Drug Court and what you learn on Riders.

7 All the things that you've been telling me
8 today are things that you've been taught and that
9 you probably said to judges before. And while I
10 wish that I could believe that you would be able to
11 be rehabilitated if I put you back into a Drug Court
12 or on a Rider, I would be -- I think people would
13 question my sanity, as they read your history, if I
14 did that. So I'm not going to be able to do that.
15 I'm going to have to sentence you to incarceration.
16 I don't have any joy in doing this.

17 But this will be the sentence: In Count I
18 I'm sentencing you to four years fixed, no
19 indeterminate. Count IV, I'm sentencing you to four
20 years fixed with three years indeterminate for a
21 total of seven. Those two sentences will run
22 concurrent with each other, but they will not run
23 concurrent with your probation violation.

24 I'm going to fine you \$500 on each count.
25 There's standard court costs on each count. You'll

1 be required to reimburse the County for public
2 defender services in the amount of \$500.

3 I wish I could have done something
4 different. I really do.

5 I need to make sure you understand your
6 appellate rights, Ms. Davies. You are advised that
7 you have a right to appeal to the Idaho Supreme
8 Court from this judgment of conviction. And you do
9 have a right to be represented by an attorney if you
10 appeal. If you cannot afford an attorney, then an
11 attorney will be appointed for you at the public
12 expense, but you only have 42 days from today to
13 file an appeal.

14 You also have a right to seek relief from
15 this judgment under Idaho Criminal Rule 35. This
16 rule gives you 120 days to seek a correction or
17 reduction of this sentence if you feel it was too
18 harsh or illegal.

19 And you may also have a right to seek
20 relief under the Idaho Uniform Post-Conviction
21 Relief Act. That's an action that must be filed
22 within one year from the date your right to appeal
23 expires. Do you have any questions about your
24 appellate rights?

25 THE DEFENDANT: No.

1 THE COURT: Okay. Well, Ms. Davies, I
2 don't have any joy whatsoever in this sentence. I
3 just wish it could be different, but I believe I've
4 done everything that I can do. So I'm going to
5 remand you to the custody of the Madison County
6 sheriff to be delivered to the proper authorities
7 with the Department of Corrections for execution of
8 this sentence.

9 MR. ARCHIBALD: Credit for time served,
10 Your Honor?

11 THE COURT: Yes.

12 You will get credit for time served.

13 Do you know what that is, when she was
14 incarcerated?

15 MR. ARCHIBALD: July 9th of 2017.

16 THE COURT: Does that sound right?

17 MR. BROWN: Yeah, I assume, yeah.

18 THE COURT: She'll get credit for time
19 served since July 9th of 2017.

20 MR. BROWN: Well --

21 MR. ARCHIBALD: Oh, I'm sorry. July 24.

22 THE COURT: July 24.

23 MR. ARCHIBALD: That's just the date --

24 MR. BROWN: I'm not sure that -- we'll
25 have to double-check that, Your Honor. The warrants