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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|-------------------------|---|----------------------------|
| STATE OF IDAHO, |) | |
| |) | NO. 46049, 46050 |
| Plaintiff-Respondent, |) | |
| |) | IDAHO COUNTY NOS. |
| v. |) | CR-2016-62912, CR 2018-245 |
| |) | |
| TONNA LAREE FUNDERBURG, |) | APPELLANT’S BRIEF |
| |) | |
| Defendant-Appellant. |) | |
| _____ |) | |

STATEMENT OF THE CASE

Nature of the Case

After Tonna L. Funderburg pled guilty to unlawful possession of a firearm and driving under the influence, the district court imposed an aggregate sentence of three years, with one and one-half years fixed. The district court also revoked her probation and imposed the underlying sentence of four years, with two and one-half years fixed. The district court retained jurisdiction (“a rider”) in both cases. Ms. Funderburg timely appealed. Mindful that Ms. Funderburg received a lesser sentence than requested and was placed on probation after the rider, she maintains the district court abused its discretion by imposing an excessive sentence and by revoking her probation.

Statement of Facts and Course of Proceedings

In February 2016, the State filed a Criminal Complaint alleging Ms. Funderburg committed the crimes of possession of a controlled substance, driving under the influence, and possession of drug paraphernalia (CR-2016-62912) (R. Vol. I,¹ pp.12–13.) Ms. Funderburg waived a preliminary hearing, and the magistrate bound her over to district court. (R. Vol. I, pp.27, 31–32.) The State filed an Information charging her with these three offenses. (R. Vol. I, pp.28–29.) Ms. Funderburg pled guilty as charged. (R. Vol. I, pp.46–47.) In November 2016, the district court sentenced her to four years, with two and one-half years fixed, suspended the sentence, and placed her on probation. (R. Vol. I, pp.57–58.)

In February 2018, the State alleged Ms. Funderburg committed four new offenses: unlawful possession of a firearm, driving under the influence, possession of marijuana, and possession of drug paraphernalia (CR 2018-245). (R. Vol. II, pp.10–12.) Ms. Funderburg waived a preliminary hearing, and the magistrate bound her over to district court. (R. Vol. II, p.23.) The State charged her by Information with these four offenses. (R. Vol. II, pp.29–31.) Consequently, also in February 2018, the State filed a petition for probation violation. (R. Vol. I, pp.67–69, 78–82.)

At a joint hearing, Ms. Funderburg admitted to some of the probation violations and pled guilty to unlawful possession of a firearm and driving under the influence. (Tr., p.38, L.1–p.39, L.21, p.40, L.14–p.44, L.15) As part of the plea agreement, the State and defense counsel would jointly recommend a sentence of five years, with two and one-half years fixed, for the two new

¹ The clerk’s record on appeal is divided into four parts. Only two parts are cited herein. Citations to “R. Vol. I” will refer to the 141-page electronic record pertaining to CR-16-62912, titled “Clerk’s Record Appeal 9-6-2018 10.25.57 13673624 0B114043-86F4-4C39-9395-28588FDEA1C8.pdf.” Citations to “R. Vol. II” will refer to the sixty-nine-page electronic record pertaining to CR 2018-245, titled “Clerks Record Appeal.pdf.”

offenses, to be served concurrently. (Tr., p.20, L.22–p.21, L.2.) Neither party would argue for a different sentence, but the defense was free to argue for probation, and the State was free to argue for a rider. (Tr., p.21, Ls.1–4.) On the State’s motion, the district court dismissed the other charges. (R., pp.38–40.)

In March 2018, the district court held a joint sentencing and disposition hearing. In accordance with the plea agreement, the State recommended concurrent sentences of five years, with two and one-half years fixed, and a rider, for the two new offenses. (Tr., p.59, Ls.16–24.) Ms. Funderburg agreed with the underlying sentence, but requested that the district court place her on probation. (Tr., p.57, L.14–p.58, L.4.) For the new offenses, the district court sentenced Ms. Funderburg to three years, with one and one-half years fixed, for each offense, to be served concurrently, and retained jurisdiction. (Tr., p.70, L.15–p.71, L.19; R. Vol. II, pp.35–37 (judgment of conviction).) For the probation violations, the district court revoked Ms. Funderburg’s probation, imposed the four-year sentence, and retained jurisdiction. (Tr., p.69, L.15–p.70, L.3; R. Vol. I, pp.94–95 (order revoking probation).) Ms. Funderburg timely appealed from the district court’s judgment of conviction and order revoking probation. (R. Vol. I, pp.130–34; R. Vol II, pp.63–67.²) This Court consolidated the cases. (R. Vol. I, p.118; R. Vol. II, p.55.)

In August 2018, the district court held a rider review hearing. (R. Vol. I, p.123; R. Vol. II, p.56.) The district court suspended Ms. Funderburg’s sentences and placed her on probation. (R. Vol. I, pp.125–26; R. Vol. II, pp.58–59.)

² Ms. Funderburg submitted a pro se Notice of Appeal. It was filed in the district court on April 20, 2018, but dated April 16, 2018. (R. Vol. I, pp.130, 133–34; R. Vol. II, pp.63, 66–67.) *Munson v. State*, 128 Idaho 639, 642 (1996) (“Under the ‘mailbox rule,’ a pro se inmate’s documents are deemed filed as of the date they are submitted to prison authorities for the purpose of mailing them to the court for filing.”)

ISSUES

- I. Mindful that Ms. Funderburg received a lesser sentence than requested, did the district court abuse its discretion when it imposed an excessive sentence?
- II. Mindful that Ms. Funderburg was placed on probation after the rider, did the district court abuse its discretion by revoking her probation?

ARGUMENT

I.

Mindful That Ms. Funderburg Received A Lesser Sentence Than Requested, The District Court Abused Its Discretion When It Imposed An Excessive Sentence

“It is well-established that ‘[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.’” *State v. Pierce*, 150 Idaho 1, 5 (2010) (quoting *State v. Jackson*, 130 Idaho 293, 294 (1997) (alteration in original)). Here, Ms. Funderburg’s sentences do not exceed the statutory maximum. *See* I.C. § 18-3316 (maximum of five years for unlawful possession of a firearm); I.C. § 18-8005(6) (maximum of ten years for driving under the influence). Accordingly, to show that the sentence imposed was unreasonable, Ms. Funderburg “must show that the sentence, in light of the governing criteria, is excessive under any reasonable view of the facts.” *State v. Strand*, 137 Idaho 457, 460 (2002).

“‘Reasonableness’ of a sentence implies that a term of confinement should be tailored to the purpose for which the sentence is imposed.” *State v. Adamcik*, 152 Idaho 445, 483 (2012) (quoting *State v. Stevens*, 146 Idaho 139, 148 (2008)).

In examining the reasonableness of a sentence, the Court conducts an independent review of the entire record available to the trial court at sentencing, focusing on the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public; (3) possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

Stevens, 146 Idaho at 148. “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.” *State v. Delling*, 152 Idaho 122, 132 (2011).

Here, Ms. Funderburg received a more lenient sentence than requested. At sentencing, she requested that the district court impose an aggregate sentence of five years, with two and one-half years fixed. (*See Tr.*, p.57, L.14–p.58, L.4.) The district court imposed a lesser sentence of three years, with one and one-half years fixed. (*R. Vol. II*, pp.35–37.) “It has long been the law in Idaho that one may not successfully complain of errors one has acquiesced in or invited. Errors consented to, acquiesced in, or invited are not reversible.” *See State v. Abdullah*, 158 Idaho 386, 420–21 (2015). Mindful of the invited error doctrine, and that Ms. Funderburg received a lesser sentence than requested, she nonetheless maintains that the district court abused its discretion by imposing an excessive sentence. As argued at sentencing, Ms. Funderburg is the mother of six children. (Presentence Investigation Report (“PSI”),³ p.12.) She hoped to be there for her children and her husband. (PSI, p.15.) In addition, she accepted responsibility for her actions. (*Tr.*, p.58, Ls.10–11.) Further, pending sentencing, Ms. Funderburg made “significant process in vocational rehab” and worked for Goodwill Industries. (*Tr.*, p.58, Ls.17–20, p.64, Ls.10–11.) She also recognized that she had a substance abuse problem and wanted inpatient treatment so she could “go back to work” and be with her children. (*Tr.*, p.65, Ls.3–6.) To this end, her goals were to attend substance abuse and mental health treatment. (PSI, p.15.) In light of these mitigating factors, but mindful of the sentence received, Ms. Funderburg maintains the district court abused its discretion by imposing an excessive sentence.

³ Citations to the PSI refer to the 102-page electronic document with the confidential exhibits.

II.

Mindful That Ms. Funderburg Was Placed On Probation After The Rider, The District Court Abused Its Discretion By Revoking Her Probation

The district court is empowered by statute to revoke a defendant's probation under certain circumstances. I.C. §§ 19-2602, -2603, 20-222. The Court uses a two-step analysis to review a probation revocation proceeding. *State v. Sanchez*, 149 Idaho 102, 105 (2009). First, the Court determines "whether the defendant violated the terms of his probation." *Id.* Second, "[i]f it is determined that the defendant has in fact violated the terms of his probation," the Court examines "what should be the consequences of that violation." *Id.* The determination of a probation violation and the determination of the consequences, if any, are separate analyses. *Id.*

Here, Ms. Funderburg does not challenge her admissions to violating her probation. "When a probationer admits to a direct violation of her probation agreement, no further inquiry into the question is required." *State v. Peterson*, 123 Idaho 49, 50 (Ct. App. 1992). Rather, mindful of the mootness doctrine, Ms. Funderburg submits the district court abused its discretion by revoking her probation.

"After a probation violation has been proven, the decision to revoke probation and pronounce sentence lies within the sound discretion of the trial court." *State v. Roy*, 113 Idaho 388, 392 (Ct. App. 1987). "A judge cannot revoke probation arbitrarily," however. *State v. Lee*, 116 Idaho 38, 40 (Ct. App. 1989). "The purpose of probation is to give the defendant an opportunity to be rehabilitated under proper control and supervision." *State v. Mummert*, 98 Idaho 452, 454 (1977). "In determining whether to revoke probation a court must consider whether probation is meeting the objective of rehabilitation while also providing adequate protection for society." *State v. Upton*, 127 Idaho 274, 275 (Ct. App. 1995). The court may consider the defendant's conduct before and during probation. *Roy*, 113 Idaho at 392.

“A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. A case is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome.” *State v. Manzanares*, 152 Idaho 410, 419 (2012) (citation omitted). Here, the district court retained jurisdiction after revoking Ms. Funderburg’s probation. (R. Vol. I, pp.94–95.) Ms. Funderburg was placed on probation after the rider. (R. Vol. I, pp.125–26.) Mindful of the mootness doctrine, and that Ms. Funderburg was placed on probation after the rider, she maintains the district court erred by revoking her probation.

CONCLUSION

Ms. Funderburg respectfully requests that this Court reduce her sentence in CR 2018-245 as it deems appropriate. Alternatively, she respectfully requests that this Court vacate her judgment of conviction in CR 2018-245 and remand that case for a new sentencing hearing. In addition, she respectfully requests that this Court vacate the district court’s order revoking her probation in CR-2016-62912 and remand that case for a new disposition hearing.

DATED this 7th day of November, 2018.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November, 2018, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

JCS/eas