

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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

LORI A. FLEMING
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. 45874
Plaintiff-Respondent,)	
)	Latah County Case No.
v.)	CR-2017-184
)	
JOSEPH LEE FENNER,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Fenner failed to establish that the district court abused its discretion by imposing an underlying, unified sentence of 10 years, with two years fixed, upon the jury's verdict finding him guilty of grand theft?

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

A jury found Fenner guilty of grand theft for stealing from his employer, and the district court imposed a unified sentence of 10 years, with two years fixed, and retained jurisdiction.

(R., pp.18-25, 170-72, 277-78, 287-91.) Fenner filed a notice of appeal timely from the judgment of conviction. (R., pp.292-294.)

Fenner asserts his underlying sentence is excessive because he has previously completed a period of probation and because he accepted responsibility, had a “promising job prospect,” apologized to the victim, and claimed that “being sent to prison would cause a lot of strain on his family.” (Appellant’s brief, pp.2-4.) 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 grand theft is 14 years. I.C. §§ 18-2407(1)(b)(8), -2408(2)(a). The district court imposed an underlying, unified sentence of 10 years, with two years fixed, which falls well within the statutory guidelines. (R., pp.287-91.) On Appeal, Fenner argues that the district court abused its sentencing discretion in light of his claim that he had “finished his probationary term and was making progress” and because he accepted responsibility, apologized to the victim, had a “promising job prospect,” and claimed that “being sent to prison would cause a lot of strain on his family.” (Appellant’s brief, pp.3-4.) However, these factors do not outweigh the seriousness of the offense, Fenner’s poor performance during his previous probationary period, or his failure to rehabilitate or be deterred despite prior legal sanctions and treatment opportunities.

In 2008, Fenner pled guilty to rape and lewd conduct. (Conf. Exh., pp.1, 9; Tr., p.1137, Ls.1-2.) At sentencing in this case, the prosecutor summarized the events that followed Fenner’s guilty plea in the 2008 case, noting that the district court in that case retained jurisdiction so that Fenner would have the “needed building blocks in place” to eventually “be successful on probation.” (1/23/18 Tr., p.1137, Ls.1-11.) Fenner performed poorly on his first rider; “he did not engage in his sex offender treatment” and the district court stated at that time that Fenner did not “seem to get it.” (1/23/18 Tr., p.1137, Ls.12-15.) After concluding Fenner did not “seem to be on the proper medication for his ADD/ADHD, ... the [c]ourt gave him an opportunity to go back and do [a second] rider ... to see how he would do on the proper medication.” (1/23/18 Tr., p.1137, Ls.16-22.) Fenner did not “fare much better” on his second rider; he failed “to complete any part of his case plan,” had “lower than average participation,” and did not “make use of

treatment,” leading rider staff to conclude “his success on probation would be unlikely.” (1/23/18 Tr., p.1137, L.23 – p.1138, L.4.) Despite his poor performance on both riders, the district court “reluctantly” placed Fenner on probation for seven years. (1/23/18 Tr., p.1138, Ls.5-10.)

Fenner’s performance while on probation was abysmal. He failed to obtain employment within the first year of his period of supervision and, as a result, was required to serve five days of administrative jail time in December 2010. (1/23/18 Tr., p.1138, Ls.11-19.) That same month, Fenner’s probation officer filed a report of violation alleging that Fenner failed to complete community service, failed to attend a financial workshop, failed to maintain employment, had only made one payment toward his financial obligations, and failed to report to his probation officer. (1/23/18 Tr., p.1138, L.20 – p.1139, L.2.) Fenner was then given a polygraph, and “during the prepolygraph questions he admitted to [having] four sexual partners,” only one of whom he had disclosed to his probation officer. (1/23/18 Tr., p.1139, Ls.3-6.) In August of 2011, Fenner’s probation officer filed another report of violation alleging Fenner had frequented a place his probation officer had specifically instructed him not to go and had failed to maintain employment. (1/23/18 Tr., p.1139, Ls.9-21.) Several months later, Fenner twice admitted to having used marijuana on multiple occasions over the several previous months and, as a result, was again required to serve administrative jail time. (1/23/18 Tr., p.1139, L.22 – p.1140, L.2.) Fenner’s probation officer thereafter filed a third report of violation alleging Fenner missed appointments with his probation officer, consumed alcohol, tested positive for and admitted to having smoked marijuana, missed individual and group treatment, and was unsuccessfully discharged from treatment. (1/23/18 Tr., p.1140, Ls.3-12.) His probation officer noted at the time that Fenner had “done the bare minimum to get by” and, when he was

employed, he “seem[ed] to have a lot of problems with his employers.” (1/23/18 Tr., p.1140, Ls.13-18.)

In January 2016, Fenner’s probation officer received information that Fenner was “sending videos of himself masturbating, via text messages, to a female, in addition to having several sexual conversations with her.” (1/23/18 Tr., p.1140, Ls.19-25.) Fenner “failed to disclose his sex offender treatment to this person and had a functioning camera on his cell phone, in addition to video taping pornographic images, all a violation of his sex offender probationary terms.” (1/23/18 Tr., p.1141, Ls.1-5.) Fenner’s probation expired in September 2016, before the state was aware of some of Fenner’s conduct that would have formed the basis for another probation violation. (1/23/18 Tr., p.1141, Ls.6-12.)

In July 2016, while Fenner was still on probation in the 2008 rape/lewd conduct case, Fenner’s employer reported to law enforcement that Fenner had been stealing from his company. (R., pp.18-25.) Fenner made multiple purchases on his employer’s account at Moscow Building Supply without authorization over a period of six months. (R., p.18.) Fenner claimed that it was his understanding that he did not need permission to purchase anything, and that any personal purchase made on the account would be deducted from his paycheck; however, no other employee had that understanding, and Fenner also admitted that nothing was ever deducted from his paycheck. (R., pp.21-22.) Fenner was charged with grand theft (R., pp.170-72, and a jury found him guilty beyond a reasonable doubt (R., pp.277-78).

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Fenner’s sentence. (1/23/18 Tr., p.1150, L.17 – p.1153, L.7.) Although Fenner technically completed his prior period of probation—a probation that, as noted above, was riddled with violations and illegal behavior—apologized to

the victim, and had a couple of job prospects that Fenner himself characterized as “not great” and “nothing fancy and nothing extravagant” (1/23/18 Tr., p.1150, Ls.5-10), none of these factors outweigh Fenner’s continued criminal conduct or his failure to rehabilitate or be deterred despite prior treatment opportunities and legal sanctions. The state submits that Fenner 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 Fenner’s conviction and sentence.

DATED this 7th day of February, 2019.

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

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of February, 2019, 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 willing to do what needs to be done to make it right,
2 um, I guess, whatever Your Honor sees fit.

3 I would prefer probation so that I can
4 support my family and pay my restitution, um, and get
5 all my other bills caught up. Um, like we stated, I've
6 got a possible job. Um, it's not great, but I do have
7 a friend in St. Mary's who is trying to help me find a
8 job up there, too. Um, so I do have a couple
9 possibilities. Um, they're nothing fancy and nothing
10 extravagant, but it's income. And if I have to go to a
11 fast food joint to pay Mr. Daigle back, I will. I -- I
12 wronged him and I want to make it right.

13 THE COURT: Thank you, Mr. Fenner. Does the
14 defendant have any lawful cause to show why judgment
15 should not be pronounced against him at this time?

16 MS. HUNTER: No, Your Honor.

17 THE COURT: Well, it's true, Mr. Fenner, you
18 and I go back a long ways. Um, to say that it's
19 disheartening to see you commit new felonies -- or a
20 new felony while you were on probation would be an
21 understatement. I thought you had come a lot farther
22 than that. You had a good job. Had you just followed
23 the rules and not abused your responsibility, we
24 wouldn't be having this conversation. Um, but that is
25 what you did and that is what we're here for.

SHERYL ENGLER, RPR, CSR - LATAH COUNTY DISTRICT COURT
(208)883-2255 - email: sherylengler@gmail.com

1110

1 So on the grand theft charge, I'm imposing a
2 sentence of not less than two and not more than ten
3 years in the State penitentiary. If this were the only
4 charge that had brought you before me, this wouldn't be
5 the sentence, but because I do have the history with
6 you and do want to see you succeed and change, most
7 importantly, I'm imposing that sentence.

8 I am going to retain jurisdiction. I do it
9 somewhat reluctantly, but I do so for a couple of
10 reasons, one of which, I think you have the capability
11 of changing. Another reason I'm retaining jurisdiction
12 is that I think that there are new programs available
13 to you at Cottonwood that weren't available to you
14 before. So I'm specifically recommending that you
15 undertake and complete cognitive behavioral
16 intervention substance abuse and cognitive behavioral
17 intervention sex offense.

18 I'm not yet persuaded that you are not at
19 risk of reoffending with a sex crime, given the
20 behavior you engaged in while on probation and being
21 watched by your probation officer.

22 I'm also ordering -- or recommending to the
23 Department of Correction that you participate in
24 thinking for a change and anger replacement therapy or
25 treatment. I'm not sure which -- whether it's

SHERYL ENGLER, RPR, CSR - LATAH COUNTY DISTRICT COURT
(208)883-2255 - email: sherylengler@gmail.com

1111

1 treatment or training.

2 I'm imposing restitution to Daigle
3 Contracting in the amount of \$1,711.01. I am imposing
4 court costs in the amount of \$245.50.

5 It's a long day. It's been a long time
6 getting to the day we are at now. Um, I don't have a
7 good explanation for why it's taken as long as it has.
8 If I could have compressed that time, in retrospect I
9 would have, but I didn't think I could. Um, but one of
10 the reasons we're here today is because you've dragged
11 your feet. Uh, I'm trying to get over that.

12 I also want to tell you, Mr. Fenner, that
13 um, I try not to send people to the penitentiary that
14 I'm mad at. I'm clearly mad at you. Clearly
15 disappointed in you. Clearly disheartened by your
16 behavior. But I expect you to go on this rider, and if
17 you don't do a stellar job and show me that you can and
18 will change, my expectation would be that I would
19 relinquish your -- my jurisdiction over you, and have
20 the sentence served.

21 You have the ability to appeal this
22 decision. If you cannot afford counsel, one can and
23 will be appointed for you in the bringing of that
24 appeal.

25 Mr. Fenner, I think that the State made a

SHERYL ENGLER, RPR, CSR - LATAH COUNTY DISTRICT COURT
(208)883-2255 - email: sherylengler@gmail.com

1112

1 very strong argument for my not retaining jurisdiction.
2 I believe in redemption. I believe in the power to
3 change. I don't think I would do this job if I didn't.
4 And I'm hoping that you can and will show me that you
5 can change. You have a lot more responsibility now
6 than you did when I first met you. It's time to grow
7 up. Is there anything else we have to take up?

8 MS. JENNINGS: Your Honor, do you want to
9 set a rider review date?

10 THE COURT: I'm going to guess it's going to
11 take longer than six months to complete, so I'm
12 tentatively scheduling it for September 24th at 3:30
13 p.m.

14 MS. HUNTER: Your Honor, I, um -- forgive me
15 if you do not do this ever, and I don't want to appear
16 impertinent, but, um, I believe Mr. Fenner, due to the
17 sentencing date being set so close to the -- to the
18 verdict, um, he may need some time to figure out
19 custody arrangements for his daughter. Is there any
20 way he could have a couple days before he's to report
21 to the jail to do that?

22 THE COURT: No. As I said, it's taken us a
23 long time to get to this day, and I think this is the
24 day. Anything else we need take up?

25 MS. JENNINGS: No, Your Honor. Thank you.

SHERYL ENGLER, RPR, CSR - LATAH COUNTY DISTRICT COURT
(208)883-2255 - email: sherylengler@gmail.com

1113