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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46091
Plaintiff-Respondent,)	
)	Canyon County Case No.
v.)	CR14-2017-17537
)	
JAVIER JUAN GARCIA,)	
)	RESPONDENT’S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Garcia failed to establish that the district court abused its discretion by imposing a sentence of 10 years, with six years fixed, upon his guilty plea to conspiracy to recruit criminal gang members?

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

Garcia pled guilty to conspiracy to recruit criminal gang members and the district court imposed a sentence of 10 years, with six years fixed, to run concurrently with Garcia’s sentence

in an aggravated battery case. (R., pp.137-38; 4/30/18 Tr., p.95, L.23 – p.96, L.6.) Garcia filed a notice of appeal timely from the judgment of conviction. (R., pp.139-42.)

Garcia argues that the district court abused its discretion by imposing an excessive sentence in light of his “background,” “tendency to cave to peer pressure,” “potential for success in the future,” and his claim that his conduct in this case “does not warrant a fixed term of six years.” (Appellant’s brief, pp.3-6.) Garcia has failed to establish an abuse of discretion.

“An appellate review of a sentence is based on an abuse of discretion standard. Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable and, thus, a clear abuse of discretion.” State v. Bonilla, 161 Idaho 902, 905, 392 P.3d 1243, 1246 (Ct. App. 2017). To show an abuse of discretion, the defendant must show that in light of the governing criteria, the sentence was excessive, considering any view of the facts.” State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016). “A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to a given case.” State v. Reed, 163 Idaho 681, 417 P.3d 1007, 1013 (Ct. App. 2018). The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. McIntosh, 160 Idaho 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 State v. Stevens, 146 Idaho 139, 148-49, 191 P.3d 217, 226-27 (2008)). 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 conspiracy to recruit criminal gang members is 10 years. I.C. § 18-8504. The district court imposed a sentence of 10 years, with six years fixed, which falls within the statutory guidelines. (R., pp.137-38.) Furthermore, Garcia’s sentence is appropriate in light of the seriousness of the offense, his culpability compared to that of his co-conspirators, his continued criminal offending, and the danger he presents to the community.

Garcia was a founding member and the leader of the Sureno Mob Trece (“SMT”) criminal gang. (G.J. Tr.,¹ p.6, Ls.1-3, p.16, L.3 – p.17, L.2, p.81, L.5 – p.83, L.7, p.87, L.11 – p.90, L.24, p.94, Ls.9-24, p.115, Ls.12-18.) Between January 2016 and October 2017, Garcia and others worked together to recruit new SMT gang members, including by orchestrating and/or engaging in a number of “jump-ins” (*i.e.*, initiations), wearing gang clothing and throwing gang signs in social media posts, “engag[ing] in fights with rival gang members or other targets,” using and selling and/or coordinating the sale of controlled substances, unlawfully possessing and/or selling firearms, “tagg[ing] SMT graffiti,” and maliciously injuring property. (R., pp.9-12, 112-15; 2/16/18 Tr., p.6, L.12 – p.7, L.3; G.J. Tr., p.13, L.13 – p.14, L.5, p.15, L.3 – p.79, L.9, p.87, L.18 – p.89, L.23, p.96, L.6 – p.97, L.14.) As noted by the prosecutor at sentencing in this case, it appears “[e]verything [Garcia] did with [the SMT] gang was to try to build up the respect, build up the reputation amongst the other already-established gangs in Canyon County” (4/30/18 Tr., p.89, Ls.4-6); and those efforts “culminated” in August 2017, when Garcia and his fellow gang members brutally attacked and severely injured a man who is the father of someone

¹ The grand jury transcript (cited herein as “G.J. Tr.”) is included in the appellate record at pages 110-146 of the electronic file “Confidential Exhibits Appeal.pdf” (cited herein as “PSI”).

Garcia believed to be a member of a rival gang (4/30/18 Tr., p.89, L.11 – p.90, L.10; PSI, pp.4-6). Garcia ultimately pled guilty to an aggravated battery charge stemming from that attack and, while that charge was pending, he was indicted in this case—following a months-long multi-jurisdictional investigation—for conspiring to recruit criminal gang members. (PSI, pp.1-2, 4, 6, 9, 20, 67-86; G.J. Tr., generally; R., pp.9-12, 112-15.)

As he did below, Garcia appears to argue on appeal that he was not the leader of the SMT gang and, he contends, his “tendency to cave to peer pressure stands in mitigation.” (Appellant’s brief, pp.3, 5.) As support for his claim, Garcia points to statements by his parole officer, mother, and former high school vice principal that he asserts “described him as a kind, respectful young man who was more of a follower.” (Appellant’s brief, p.5 (citing PSI, pp.10, 104-08).) While the statements and letters of support are nice, they in no way refute the state’s assertions below and on appeal that Garcia was, in fact, the leader of the SMT gang. More importantly, they do not refute the *evidence* underlying those assertions. This is not a case, as suggested by Garcia, in which the state merely “attempt[ed] to paint Mr. Garcia as a leader and original founding member of SMT.” (Appellant’s brief, p.5.) Nor is it a case in which the state’s case was based solely on the word of the confidential informant who Garcia claimed was actually the founding member of the gang. (See Appellant’s brief, p.3 (noting defense counsel below argued Garcia “was not a co-founder, but was recruited by his sister’s boyfriend” who ultimately “acted as a confidential informant in this case against the rest of the members of the SMT” (citing 4/30/18 Tr., p.92, L.6 – p.93, L.2)).) Instead, according to the law enforcement officers who investigated this case, multiple people who were associated with and/or members of SMT identified Garcia as the leader, or “shot-caller,” of that gang. (G.J. Tr., p.16, L.3 – p.17, L.2, p.81, L.5 – p.83, L.7, p.87, L.11 – p.89, L.8, p.94, Ls.9-24.) Garcia’s culpability as the one who

led and promoted the SMT gang activity is aggravating, not mitigating, and supports the sentence imposed.

Contrary to Garcia's assertions, nothing about his "background supports a lower sentence." (Appellant's brief, p.4.) At just 26 years old, Garcia has an extensive criminal record, including a felony marijuana trafficking conviction for which he was on parole when he committed both the aggravated battery offense in Canyon County Case No. CR-2017-14049 and the conspiracy charge of which he was convicted in this case. (PSI, pp.1, 6-9.) He also has misdemeanor convictions for, among other things, possessing drug paraphernalia, carrying a concealed weapon without a license, resisting or obstructing officers, and driving under the influence. (PSI, pp.6-8.) He has previously been incarcerated and has a history of violating the terms of community supervision, including by committing new crimes. (PSI, pp.10-11.) That Garcia has a learning disability, claimed to be a "loner" when he was younger, began using drugs and alcohol in his teens, and is a high school graduate—aspects of his "background" Garcia cites as mitigating (Appellant's brief, p.4)—does not diminish the fact that Garcia appears to have chosen a criminal lifestyle and has actively encouraged others to do the same.

Garcia next argues that the conduct he "admitted to participating in does not warrant a fixed term of six years." (Appellant's brief, p.5.) The state acknowledges that, when pleading guilty, Garcia only admitted to certain of the overt acts alleged in the Amended Indictment. (See 2/16/18 Tr., p.6, Ls.12-23, p.15, L.7 – p.20, L.7.) The state, however, specifically reserved the right to argue *all* of the alleged conduct as the basis for its sentencing recommendation. (2/16/18 Tr., p.6, L.24 – p.7, L.4.) As noted above, that conduct included more than just "jumping others into SMT, wearing gang clothing and throwing SMT signs in social media posts, fighting with rival gang members, and buying marijuana." (Appellant's brief, p.5 (citation omitted).) The

state also alleged, and the evidence showed, that Garcia and his co-conspirators also engaged in the unlawful possession or sale of firearms (with Garcia himself coordinating the sale of a firearm on three separate occasions), “tagged SMT graffiti,” and maliciously injured property.” (R., pp.112-15; G.J. Tr., p.13, L.13 – p.14, L.5, p.15, L.3 – p.79, L.9, p.87, L.18 – p.89, L.23, p.96, L.6 – p.97, L.14.) Moreover, while Garcia had already been sentenced for the aggravated battery he committed in August 2017, the conduct underlying that charge was fairly included among the overt acts Garcia was alleged to have committed in further of the conspiracy charge in this case. (See R., p.114 (overt act number 10 alleged that “between January 2016 and October 11, 2017, some or all of the above named individuals engaged in fights with rival gang members *or other targets*” (emphasis added)); 2/16/18 Tr., p.18, Ls.7-13 (Garcia admitting overt act number 10).) Consideration of all of this conduct, together with Garcia’s heightened culpability as the gang leader and his prior criminal history, supports the court’s decision to impose a unified sentence of 10 years, with six years fixed, to run concurrently with Garcia’s sentence in the aggravated battery case.² This is so despite Garcia’s “potential for success” and his

² In making its sentencing recommendation, the state initially requested that the court impose a sentence of “six years fixed followed by four indeterminate” so that the “fixed time would mirror” the sentence imposed in the aggravated battery case. (4/30/18 Tr., p.91, Ls.10-16.) Immediately following the state’s recommendation, the district court sought “clarification” and indicated its understanding of the plea agreement was that “the recommendation from the State would be that [the fixed portions of the sentences] would match, but it would be no less than three, nor more than five.” (4/30/18 Tr., p.91, Ls.18-25.) The state concurred and corrected its recommendation, requesting a sentence of “five plus five imposed.” (4/30/18 Tr., p.92, Ls.1-3.) Garcia did not object below but, on appeal, he asserts “it is concerning that the Court adopted the State’s initial recommendation of six years fixed,” claiming, “[t]hat recommendation was in breach of the plea agreement and the State modified it after realizing as much, but it appears that the damage was done.” (Appellant’s brief, p.6 (citation omitted).) The state disagrees that the court “adopted” the state’s initial sentencing recommendation; to the contrary, it appears from the court’s comments at sentencing that it was not influenced by the state’s recommendation and that it intended to impose a fixed sentence of *at least* six years based solely on the seriousness of Garcia’s “activities in this case.” (4/30/18 Tr., p.95, L.10 – p.96, L.6.)

purported remorse (see Appellant’s brief, p.6), as neither of those factors outweigh his continued criminal offending or the danger he presents to the community.

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Garcia’s sentence. (4/30/18 Tr., p.95, L.4 – p.96, L.25.) The state submits that Garcia has failed to establish an abuse of discretion, both for the reasons set forth above and for the reasons set forth by the district court in the attached excerpt of the sentencing hearing transcript, which the state adopts as part of its argument on appeal. (Appendix A.)

Conclusion

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

DATED this 27th day of March, 2019.

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

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of March, 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:

MAYA P. WALDRON
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/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

1 because he, you know, once again turned in some people that he
 2 had recruited to help him out when he needed it.
 3 I would agree with the State, Judge, that a lot of
 4 this stuff -- most of it -- all of it was -- is low level.
 5 Fighting other gang members. Spray painting. Throwing up
 6 signs at different places. Not -- you know, not your biggest
 7 gang case.
 8 Javier refutes, Judge, he's ever been in a gang
 9 before. This was the first gang that he was in.
 10 Now, regarding the incident the State brought up,
 11 Judge, about the beating of the -- the rival gang member's
 12 father, Javier pled to that. He was sentenced to that. He got
 13 a six plus seven. And I don't think Javier was the main --
 14 main player in that situation either, although he was -- he
 15 admitted and pled guilty to being involved in it. But Judge,
 16 he's already been punished for that.
 17 What we're here today is a charge of recruiting
 18 criminal gang members. There are some videos of some fighting,
 19 some pictures of, you know, him at McDonald's throwing up gang
 20 signs, things like that, but I think it's low level. It's low
 21 level is what -- and I think it's important to distinguish that
 22 between the aggravated battery that he'd already pled to
 23 because, as I said before, he pled to that. He's been punished
 24 for that, and a very significant sentence for that.
 25 So Judge, Javier, he's got some family support.

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1 THE COURT: All right. You don't want to tell me
 2 anything before I sentence you in this case?
 3 THE DEFENDANT: No.
 4 THE COURT: Okay. All right. I've considered all the
 5 factors of criminal sentencing, including protection of
 6 society, deterrence of crime, rehabilitation of the offender as
 7 well as punishment, along with the factors set out in Idaho
 8 Code section 19-2521 about whether probation or imprisonment is
 9 appropriate.
 10 Considering all those factors, I do believe that
 11 imprisonment is appropriate for several reasons. First of all,
 12 Mr. Garcia, it's clear to me that you helped establish this
 13 gang. You helped recruit other gang members to join. Gang
 14 activity, recruitment, violence will not be tolerated in our
 15 community. They will be detected by law enforcement, and cases
 16 will be brought before the court to impose appropriate
 17 sentences.
 18 Based upon your activities in this case, I think
 19 imprisonment is appropriate. I'm going to sentence you -- one
 20 question that I need to answer, and I'll tell you my rationale
 21 for the reason I give this answer, is whether or not to exceed
 22 the fixed portion of the charge that he received in the
 23 aggravated battery. I think, based upon the actions in both
 24 cases, that a concurrent sentence is warranted, that the fixed
 25 sentence of six years that he received for the aggravated

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1 His mom and his grandmother have been to every court hearing.
 2 They stay in contact with me. His grandmother especially is
 3 very concerned for Javier, but she's also wanting to help him
 4 wherever she can.
 5 I've spoke with Javier. He knows he's going to
 6 prison for a while in that other sentence. And I think it
 7 would be -- you know, when we were talking about what we were
 8 going to recommend, once that other sentence came down, it
 9 makes sense for him to go to prison for a while on this case as
 10 well.
 11 So Judge, regarding this case we're going to
 12 recommend a two years fixed plus zero indeterminate. He would
 13 serve all of that. The case would be closed after that.
 14 Because he wouldn't be getting out. As it stands right now,
 15 he's got six years fixed on that other case. So this case
 16 would be closed. He'd still have that other case to worry
 17 about where he's got a much more significant sentence, and
 18 which I think rightly so. I think it was a much more
 19 significant event than the events that took place in this case.
 20 Thank you, Judge.
 21 THE COURT: Thank you.
 22 Mr. Garcia, this is your opportunity to talk to me
 23 this morning and tell me what's on your mind and what you think
 24 I should do in this case.
 25 THE DEFENDANT: I really don't have anything to say.

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1 battery -- it was aggravated battery; is that correct?
 2 MS. SOMOZA: (Nodded.)
 3 THE COURT: -- is also warranted in this case. So I'm
 4 going to sentence the defendant to ten years with six years
 5 fixed, four years indeterminate, and run that concurrently with
 6 all of his other cases.
 7 The defendant will be required to provide a DNA
 8 sample and a right thumbprint impression to the State of Idaho
 9 within ten days if he has not already done so. Failure to do
 10 so is a felony offense.
 11 The defendant will be required to pay court costs
 12 in this case as well as reimburse the Canyon County Public
 13 Defender's Office in the amount of \$350 for the time that his
 14 attorney has spent working on this case.
 15 Mr. Garcia, you do have the right to appeal my
 16 sentence in this case within 42 days of judgment being entered.
 17 You may be represented by an attorney in that appeal. If you
 18 cannot afford an attorney for that appeal, one will be provided
 19 to you at public expense.
 20 I'm going to provide you a notice entitled to
 21 defendant -- notice to defendant -- a document entitled "Notice
 22 to Defendant Upon Sentencing." It sets out your appeal rights
 23 in this case. I'll ask that you review it with Mr. Woolf, sign
 24 it, and return it to me.
 25 (Mr. Woolf and the defendant conferred.)

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