

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46220
Plaintiff-Respondent,)	
)	Latah County Case No.
v.)	CR-2017-3208
)	
MICHELLE KATHERINE IHM,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Ihm failed to establish that the district court abused its discretion, either by revoking her withheld judgment and probation, or by imposing a unified sentence of four years, with one year fixed, and retaining jurisdiction, upon her conviction for violation of a no contact order?

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

The state charged Ihm with two counts of felony witness intimidation and three counts of felony violation of a no contact order. (R., pp.78-84.) Pursuant to a plea agreement, Ihm pled guilty to one count of violation of a no contact order, and the state dismissed the remaining charges, as well as charges in two other cases (CR-2017-2588 and CR-2017-2804), and also

agreed to recommend a withheld judgment and supervised probation. (R., pp.106-17, 132-33.) The district court withheld judgment and placed Ihm on supervised probation for four years. (R., pp.134-42.)

Less than two months later, the state filed a motion for bench warrant, alleging Ihm had violated the conditions of her probation. (R., pp.146-48.) Attached to the motion was an Offender Behavioral Response Notification completed by Ihm's probation officer, who reported:

On January 22, 2018, Ms. Ihm was sentenced to probation. I met with Ms. Ihm on this day and during this meeting I requested substance abuse treatment funding for Ms. Ihm and Ms. Ihm was ordered to begin substance abuse treatment. Before ending this meeting with Ms. Ihm, I scheduled my next appointment with her for February 6, 2018. Ms. Ihm failed to attend her scheduled appointment with me on February 6, 2018, and to date she has not followed through with her ordered substance abuse treatment. I have attempted to locate Ms. Ihm at her residence and by telephone but I have not been able to make contact with her. I have left messages with her family and on her listed phone number but Ms. Ihm refuses to contact me. During a home visit I spoke with Ms. Ihm's family who told me Ms. Ihm may still live with them, at her approved residence, but she has only been staying there occasionally. Ms. Ihm has also had recent police contact as she was called in as an unwanted person at her boyfriend's house. Ms. Ihm has not contacted me to discuss this police contact issue with her. At this time, it appears Ms. Ihm is unwilling to comply with her court ordered probation conditions.

(R., p.149.) Prior to the evidentiary hearing, the state filed a notice of supplemental probation violation alleging that Ihm had again violated the conditions of her probation by committing three new law violations: battery, resisting or obstructing an officer, and felony battery upon a peace officer. (R., pp.160-62.) At the evidentiary hearing, the state withdrew the battery allegation, and the district court found Ihm had otherwise violated the terms of her probation as alleged. (R., pp.175-77; 5/30/18 Tr., p.41, Ls.2-9, p.95, L.25 – p.96, L.17.) The district revoked Ihm's withheld judgment and probation and imposed a sentence of four years, with one year fixed, and retained jurisdiction. (R., pp.187-91.) Ihm filed a notice of appeal timely from the judgment of conviction. (R., pp.192-95.)

Ihm argues that the district court abused its discretion by revoking her probation,¹ claiming “her conduct appears to have resulted from a misunderstanding regarding the status of the no contact order protecting her boyfriend.” (Appellant’s brief, pp.3-5.) Ihm has failed to establish an abuse of discretion.

“Probation is a matter left to the sound discretion of the court.” I.C. § 19-2601(4). The decision whether to revoke a defendant’s probation for a violation is within the discretion of the district court. State v. Garner, 161 Idaho 708, 710, 390 P.3d 434, 436 (2017) (quoting State v. Knutsen, 138 Idaho 918, 923, 71 P.3d 1065, 1070 (Ct. App. 2003)). In determining whether to revoke probation, a court must examine whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society. State v. Cornelison, 154 Idaho 793, 797, 302 P.3d 1066, 1070 (Ct. App. 2013) (citations omitted). A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. Id. at 798, 302 P.3d at 1071 (citing State v. Beckett, 122 Idaho 324, 326, 834 P.2d 326, 328 (Ct. App. 1992)).

The district court’s decision to revoke Ihm’s probation was reasonable in light of Ihm’s complete disregard for the conditions of probation and her continued minimization of her criminal conduct. Ihm’s claim that her probation violations were the result of a “misunderstanding regarding the status of the no contact order” is without merit. The state

¹ According to the iCourt portal, the district court held a “Rider Review Hearing” on December 31, 2018. (See Latah County case number CR-2017-3208 at <https://mycourts.idaho.gov/odysseyportal/Home/WorkspaceMode?p=0>, last accessed 1/4/19.) As of the date of the filing of this brief, the portal does not indicate whether the district court relinquished its jurisdiction or, instead, suspended the balance of Ihm’s sentence and placed her on probation. The state submits, however, that if the court placed her on probation, Ihm’s claim that the court erred by revoking her probation is moot. State v. Barclay, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010) (quotations and citations omitted) (“An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief.”).

acknowledges that the no contact order had been lifted when Ihm was placed on probation; however, the probation officer, knowing the no contact order had been lifted, specifically instructed Ihm not to have any contact with her boyfriend. (5/30/18 Tr., p.56, L.7 – p.57, L.7.) Moreover, that was not Ihm’s only probation violation. Ihm’s probation officer also reported that Ihm had absconded supervision, failed to attend substance abuse treatment, and had police contact when she was called in as an unwanted person at her boyfriend’s house. (R., p.149; see also 5/30/18 Tr., p.95, L.25 – p.96, L.6 (court finding Ihm in violation of probation for “failing to cooperate with her probation officer and failing to comply with a validly issued direction”).) Ihm also violated the conditions of her probation when she was charged with battery upon a peace officer (a felony) and resisting or obstructing an officer. (R., pp.160-62; see also 5/30/18 Tr., p.96, Ls.7-14 (court finding Ihm in violation of probation for battering an officer and resisting and obstructing).) The district court’s decision to revoke Ihm’s probation and the withheld judgment was reasonable in light of Ihm’s criminal conduct and her complete disregard for the conditions of probation.

The district court considered all of the relevant information and appropriately determined that Ihm was no longer a viable candidate for probation. Ihm’s failure to comply with the conditions of community supervision and her continued criminal conduct demonstrate that probation was not achieving the goals of rehabilitation or protection of the community. Given any reasonable view of the facts, Ihm has failed to establish that the district court abused its discretion by revoking her probation.

Ihm next asserts that her underlying unified sentence of four years, with one year fixed is excessive in light of her character, her claim that “there is no indication that a sentence of incarceration was necessary to protect the public interest,” and her claim that, although her

“actions were criminal,” they “did not warrant a term of incarceration.” (Appellant’s brief, pp.6-8.) 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 penalty for violation of a no contact order is five years in prison. I.C. § 18-920(3). The district court retained jurisdiction and imposed an underlying unified sentence of

four years, with one year fixed, which falls well within the statutory guidelines. (R., pp.187-91.) Although Ihm argues otherwise, her underlying sentence is reasonable based both upon her character—as evidenced in part by her prior criminal history—and the circumstances of the offense.

Ihm’s prior criminal history demonstrates an inability or unwillingness to conform her behavior to the law. Her record includes three juvenile adjudications (possession of drug paraphernalia, possession of tobacco by a minor, and minor in possession of alcohol), misdemeanor convictions for DUI, malicious injury to property, trespass, two counts of a no contact order violation, and three counts of disturbing the peace (two amended from battery and one amended from malicious injury to property), and multiple misdemeanor charges that were ultimately dismissed, including charges for domestic battery and a no contact order violation. (PSI, pp.13-15.) Additionally, as part of the plea agreement in this case, Ihm received the benefit of the dismissal of numerous other felony and misdemeanor charges. (See PSI, pp.15-16 (pending charges “to be dismissed per plea agreement” included criminal trespass and resisting or obstructing officers in CR-2017-2588, felony no contact order violation in CR-2017-2804, and three counts (one misdemeanor and two felonies) of witness intimidation and two additional felony counts of a no contact order violation in this case).)

Ihm has previously been granted probation; however, her performance was abysmal. (PSI, pp.15-17.) She was placed on supervision in March 2016, after being convicted of malicious injury to property. (PSI, pp.15-16.) Two months later, Ihm’s probation officer reported that Ihm had ingested methamphetamine and amphetamines and consumed alcohol on several different occasions in April and May 2016. (PSI, p.16.) The probation officer also reported that Ihm had “been in contact with Brandon Hall,” despite being “ordered not to.” (PSI, p.16.)

According to the report of violation, officers responded to a report of malicious injury to property on May 5, 2016, based on information that Ihm had broken Brandon's glasses, scratched his face, and broken the side mirror of his car. (PSI, pp.16-17.) Responding officers also reported that Ihm had traces of alcohol on her breath and was in possession of alcohol. (PSI, p.17.) When Ihm's probation officer instructed her to meet with him about the incident, she did not show up. (PSI, p.17.) Ihm's probation officer also reported that Ihm entered the home of Toby Meyers and stole his dentures, and was also involved in an altercation with Chinelle Pickler. (PSI, p.17.) Ihm's probation officer summarized: "Ms. Ihm has been involved in three incidents over the past couple of weeks that give concern for the safety of others in the community." (PSI, p.17.) Despite these violations, Ihm was continued on probation, but was ultimately terminated from probation after another report of violation was filed. (PSI, p.17.) When asked about her performance on probation, Ihm stated, "My PO said I wasn't complying with the Court's request. I didn't check in with him for 8 months. I guess i was just kind of done with it." (PSI, p.16 (verbatim).)

In this case, Ihm, who was incarcerated for violating an order that she have no contact with her boyfriend, Edward Dahlin, continued to contact Edward in violation of the order. (PSI, pp.10-11.) Ihm wrote a Edward letter that was hand delivered, had one person text him, and had another person leave him a voicemail. (PSI, p.10.) In the letter, Ihm wrote, "Please don't tell them [(prosecutors or judge) we had any contact. I will go to prison!!!" (PSI, p.10.) While Ihm never threatened Edward, she was aware that any contact was prohibited. Ihm's prior criminal history, poor performance while in the community, and her continued disregard of the law demonstrate that her underlying sentence is not an abuse of discretion.

At the disposition hearing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Ihm’s underlying sentence. (6/19/18 Tr., p.123, L.10 – p.125, L.2.) The state submits that Ihm has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the disposition hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm the district court’s “Order Revoking Withheld Judgment, Judgment of Conviction, And Order Retaining Jurisdiction.”

DATED this 4th day of January, 2019.

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

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of January, 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:

ANDREA W. REYNOLDS
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

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

APPENDIX A

1 of relationships do, they -- it appears they have run
2 hot and cold, but he does care about her and would
3 like -- would like to see her out of jail so she can
4 resume that relationship, Your Honor.

5 THE COURT: Thank you, Ms. McCormick. Does
6 the defendant have any lawful cause to show why I
7 should not dispose of her probation violations at this
8 time?

9 MS. MCCORMICK: No, Your Honor.

10 THE COURT: Very well. Then on the
11 underlying sentence for the felony violation of a no
12 contact order, I'm imposing a sentence of not less than
13 one and not more than four years in the State
14 penitentiary. The real question, I think, is whether
15 to commute the sentence or to retain jurisdiction. And
16 I think that's a hard question. And I think it also is
17 a situation in which commutation is more appropriate
18 under circumstances where it is as a last resort as
19 opposed to the first effort to try to deal with the
20 situation.

21 Uh, I know Ms. Ihm thinks that that's what
22 she -- at least says that's what she thought would
23 happen, um, when she first entered into the Rule 11
24 Agreement. Having gone back and listened to the
25 interchange that she and I engaged in, I don't think

SHERYL ENGLER, RPR, CSR - LATAH COUNTY DISTRICT COURT
(208)883-2255 - email: sengler@latah.id.us

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1 that's a reasonable belief by her.

2 One of the things that, uh, I have to try to
3 do is to try to fashion a sentence that I think will be
4 one in which society will be protected. And, frankly,
5 Ms. Ihm, you have done very little in the past to
6 demonstrate that you can comply with society's rules.
7 You seem to act as if they don't apply to you. So, um,
8 I think that the appropriate result is to retain
9 jurisdiction and to see whether you can comply with
10 society's rules.

11 So your future is very much in your own
12 hands. You're going to go on a period of retained
13 jurisdiction. You're going to have to demonstrate that
14 you can comport yourself in a way that complies with
15 the rules and doesn't result in a recommendation coming
16 back that my successor relinquish jurisdiction.

17 So I'm tentatively scheduling the review of
18 retained jurisdiction for 2:30 on December 10. I don't
19 know if that's when you'll come back, Ms. Ihm, but
20 that's my best guess right now.

21 I can also tell you if you go and do well
22 and demonstrate that you can comply with the rules, I
23 have every reason to believe that you'll have a
24 favorable recommendation and that that recommendation
25 would be that you be placed on probation. And then

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1 you'd have to demonstrate that you can, in fact, comply
2 with the strictures of probation.

3 I think, since I am imposing sentence, if
4 you have objection to the sentence that's being
5 imposed, you have the ability to appeal that decision.
6 If you cannot afford counsel, one can and will be
7 appointed in the bringing of that appeal. Good luck,
8 Ms. Ihm. Is there anything else we need to take up?

9 MR. CAVANAGH: Not from the State, Your
10 Honor. Thank you.

11 MS. MCCORMICK: No, Your Honor.

12 THE COURT: Then we are in recess.

13 (COURT HEARING RECESSED AT 11:29 A.M.)

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(208)883-2255 - email: sengler@latah.id.us

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