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### State v. Dempsey Appellant's Brief Dckt. 46277

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 46277-2018
	)	
v.	)	ADA COUNTY NO. CR01-17-15991
	)	
MARISSA SHANNEL DEMPSEY,	)	
	)	APPELLANT'S BRIEF
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Marissa Shannel Dempsey pled guilty to aiding and abetting grand theft and was sentenced to a unified term of twelve years, with two years fixed. She appeals from the judgment of conviction, arguing the district court abused its discretion at sentencing. She contends the sentence imposed was not reasonable considering the mitigating factors that exist in this case.

## Statement of Facts and Course of Proceedings

Ms. Dempsey was charged by Information with burglary, grand theft, and two counts of aiding and abetting grand theft. (R., pp.77-79, 81-83, 87-89.) Ms. Dempsey entered into an agreement with the State pursuant to which she agreed to plead guilty to one count of aiding and abetting grand theft and, in exchange, the State agreed to dismiss the remaining counts and recommend a unified sentence of fourteen years, with two years fixed. (R., pp.106-12; Tr., p.5, Ls.10-20.) The district court accepted Ms. Dempsey's guilty plea and sentenced Ms. Dempsey to a unified term of twelve years, with two years fixed. (Tr., p.14, Ls.1-2, p.41, Ls.14-22.) The district court also ordered her to pay restitution in the amount of \$13,418.10 at the State's request and without objection. (Tr., p.28, L.20 – p.29, L.20; R., pp.126-28.) The judgment of conviction was entered on August 15, 2018, and Ms. Dempsey filed a timely notice of appeal on August 20, 2018.<sup>1</sup> (R., pp.119-25.)

## ISSUE

Did the district court abuse its discretion when it sentenced Ms. Dempsey for aiding and abetting grand theft to a unified term of twelve years, with two years fixed, considering the mitigating factors that exist in this case?

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<sup>1</sup> After she was convicted in this case, Ms. Dempsey was convicted in a related case in Elmore County, CR-17-1308, and was sentenced to a unified term of ten years, with five years fixed, to be served concurrently with the sentence in this case. The judgment of conviction in that case was entered on September 20, 2018, and a notice of appeal has been filed.

## ARGUMENT

### Considering The Mitigating Factors That Exist In This Case, The District Court Abused Its Discretion When It Sentenced Ms. Dempsey For Aiding And Abetting Grand Theft To A Unified Term Of Twelve Years With Two Years Fixed

Ms. Dempsey asserts that, given any view of the facts, her unified sentence of twelve years, with two years fixed, for one count of aiding and abetting grand theft, is excessive. Where, as here, the sentence imposed by the district court is within statutory limits, “the appellant bears the burden of demonstrating that it is a clear abuse of discretion.” *State v. Miller*, 151 Idaho 828, 834 (2011) (quoting *State v. Windom*, 150 Idaho 873, 875 (2011)). “When a trial court exercises its discretion in sentencing, ‘the most fundamental requirement is reasonableness.’” *Id.* (quoting *State v. Hooper*, 119 Idaho 606, 608 (1991)). “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.* (citation omitted). “When reviewing the reasonableness of a sentence this Court will make an independent examination of the record, ‘having regard to the nature of the offense, the character of the offender and the protection of the public interest.’” *Id.* (quoting *State v. Shideler*, 103 Idaho 593, 594 (1982)).

The sentence the district court imposed upon Ms. Dempsey was not reasonable considering the nature of her offenses, her character, and the protection of the public interest. The crimes Ms. Dempsey committed were serious, and caused real harm to the homeowner victims. However, Ms. Dempsey did not act alone, and her actions resulted from her relapse after eighteen years of sobriety. (PSI, p.14.) Ms. Dempsey drove her car and acted as a lookout while Jamie Shores committed two home robberies. (Presentence Investigation Report (“PSI”), p.4.) Ms. Dempsey was under the influence of methamphetamine at the time, and was helping

Mr. Shores in order to pay him back for drugs. (PSI, p.4; Tr., p.32, Ls.9-11.) Ms. Dempsey accepted responsibility for her conduct right after her arrest, and apologized to her victims at sentencing. (PSI, p.4.) She said, “I just want to say I am sorry to [the victims] for my actions. I know right from wrong and I shouldn’t have done what I did. And I am very sorry that you guys have to deal with this every single day and every night. And I wish I could take it back. I am just really sorry.” (Tr., p.38, L.24 – p.39, L.5.) While the fact that Ms. Dempsey’s accepted responsibility and apologized to her victims does not make up for her conduct, it is certainly a mitigating factor.

The sentence imposed upon Ms. Dempsey was also not reasonable considering her character. The district court received multiple letters from Ms. Dempsey’s family members attesting to her good character. (PSI, pp.37-41.) Ms. Dempsey had a very difficult childhood, but had largely turned her life around prior to relapsing on methamphetamine and committing the crimes that led to her conviction. Ms. Dempsey’s biological father played little role in her family life and was involved in criminal activity. (PSI, p.11.) Ms. Dempsey was physically abused by her stepfather and was raped at a young age. (PSI, p.11.) She became a ward of the State as a teenager and was on juvenile probation in Wyoming during her high school years. (PSI, p.10.) Significantly, Ms. Dempsey’s juvenile probation officer wrote a letter to the district court requesting a lenient sentence for Ms. Dempsey. (PSI, pp.42-43.) The probation officer described how common it is to relapse, and requested that the court provide Ms. Dempsey with “a chance to prove herself.” (PSI, pp.42-43.)

Ms. Dempsey, 26 years old at the time of sentencing, is a mother of two young children, being cared for by her brother. (PSI, pp.13-14, 20.) Ms. Dempsey said during the presentence investigation that she enjoys reading, music, being a mother, softball and crocheting. (PSI,

p.12.) She is active in church and participates in Alcoholics Anonymous. (PSI, p.12.) It appears that the instant offense resulted from a series of bad decisions—Ms. Dempsey traveled to Arizona to look for her biological father, began using methamphetamine on a daily basis, and ultimately ended up homeless. (PSI, p.13.) Ms. Dempsey does not have mental health issues and has worked in the past as a certified nurse’s assistant. (PSI, pp.15, 19-20.) Ms. Dempsey is deserving of a second chance and there is every indication that, if she can remain drug-free, she can be gainfully employed and a contributing member of her family and community.

The sentence Ms. Dempsey received was not necessary to protect the public interest. This was Ms. Dempsey’s first felony conviction. (PSI, p.10.) She had completed multiple classes at the Elmore County Jail prior to being sentenced, and had been accepted into Rising Sun Sober Living. (PSI, pp.13, 18, 44-48.) The GAIN assessment recommended intensive outpatient substance abuse treatment, which could have been accomplished in the community. (PSI, p.22.) Counsel for Ms. Dempsey recommended a suspended sentence of six years, with one year fixed. (Tr., p.31, L.24 – p.32, L.3.) This would have been a reasonable sentence. It is worth noting that Mr. Shores, the ring leader in the burglaries Ms. Dempsey aided and abetted, pled guilty to possession of a controlled substance, and received a seven-year sentence, with no restitution. (Tr., p.32, Ls.14-22.)

In light of the mitigating factors that exist in this case, and notwithstanding the aggravating factors, the district court abused its discretion when it sentenced Ms. Dempsey for one count of aiding and abetting grand theft to a unified term of twelve years, with two years fixed. This sentence was excessive and unreasonable.

CONCLUSION

Ms. Dempsey respectfully requests that the Court reduce her sentence as it deems appropriate. Alternatively, she requests that the Court remand this case to the district court for a new sentencing hearing.

DATED this 12<sup>th</sup> day of December, 2018.

/s/ Andrea W. Reynolds  
ANDREA W. REYNOLDS  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12<sup>th</sup> day of December, 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

AWR/eas