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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 46288
Plaintiff-Respondent,	)	
	)	Twin Falls County Case No.
v.	)	CR42-2017-8060
	)	
DENNIS CARL BOTHWELL,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Bothwell failed to establish that the district court abused its discretion by imposing a unified sentence of six years, with three years fixed, upon his guilty plea to felony DUI?

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

Bothwell pled guilty to felony DUI, and the district court imposed a unified sentence of six years, with three years fixed, and retained jurisdiction. (R., pp.104-08.) Bothwell filed a notice of appeal timely from the judgment of conviction. (R., pp.109-13.)

Bothwell asserts his sentence is excessive in light of his substance abuse issues, desire for treatment, completion of inpatient treatment prior to sentencing, support of family and friends, and purported remorse. (Appellant's brief, pp.3-6.) 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 felony DUI is 10 years. I.C. § 18-8005(6). The district court imposed a unified sentence of six years, with three years fixed, which falls well within the statutory guidelines. (R., pp.104-08.) Furthermore, Bothwell's sentence is appropriate in light of the seriousness of the offense, his continued disregard of the law, and his failure to be compliant with the Court Compliance Program.

Bothwell's criminal history demonstrates his failure to abide by the law and includes misdemeanor convictions for driving while ability impaired, possession of drug paraphernalia, assault, protection order violation, driver's license violation, and two counts of DUI. (PSI, pp.20-22.<sup>1</sup>) His record also includes a felony conviction for possession of a controlled substance, as well as numerous charges that were eventually dismissed, including DUI, driving under restraint–alcohol, felony vehicle eluding, and assault. (PSI, pp.20-21.) Furthermore, Bothwell's performance in the Court Compliance Program prior to sentencing was abysmal. Bothwell failed to appear for random drug testing on multiple occasions, submitted multiple samples that tested positive for marijuana, failed to meet with his Court Compliance officer on three separate occasions, and failed to make any payment towards his cost of supervision. (PSI, pp.22, 58-59.)

In this case, an officer observed Bothwell driving westbound in the eastbound lane of the road, "into oncoming traffic." (PSI, p.19.) The officer activated his emergency lights, but Bothwell drove straight toward the officer's vehicle. (PSI, p.19.) The officer swerved to avoid a collision with Bothwell, then turned around and began to follow him. (PSI, p.19.) The officer observed Bothwell strike the curb, continue going the wrong way, momentarily stop at an

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<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file "Supreme Court No. 46288-2018 Dennis Carl Bothwell Confidential Exhibits.pdf"

intersection, and eventually come to a stop at a hospital entrance. (PSI, p.19.) When the officer spoke with Bothwell, he noted that Bothwell's speech was slow and slurred and that his eyes were glassy and bloodshot. (PSI, p.19.) The officer also "observed an empty bottle of vodka on the front passenger floor, an open Budweiser, and a prescription pill bottle on the center console." (PSI, p.19.) Bothwell admitted to the officer that he had consumed "one Budweiser" and had taken "Ambien and Ativan" a couple of hours before driving. (PSI, p.19.) Bothwell failed field sobriety tests and, following his arrest, "provided two breath samples with resulting BAC's of .149/.145." (PSI, p.19.)

While Bothwell claims that he would like treatment for his substance abuse issues, he told the presentence investigator that "drinking is not an issue at this time because he's learned how to manage it." (PSI, p.28.) Bothwell also appeared to be less than forthcoming about his drug use. He reported that he has been smoking marijuana for over 25 years, that he has never smoked marijuana in Idaho, and that he last smoked marijuana in August of 2017. (PSI, pp.27-28.) However, while subject to the rules of the Idaho Court Compliance Program in this case, Bothwell tested positive for marijuana on six separate occasions during the months of September and October 2017. (PSI, p.22.) Bothwell has also abused cocaine and prescription medication. (PSI, pp.27-28.) The state acknowledges that Bothwell completed inpatient treatment at the Walker Center in April of 2018; however, Bothwell missed a UA appointment at his outpatient treatment center, Positive Connections, two weeks later. (PSI, pp.22-23, 28.) Bothwell's purported remorse and support from family and friends do not outweigh the seriousness of the offense, his prior criminal history, or his poor performance on the Court Compliance Program.

At sentencing, the district court addressed the serious nature of the offense, Bothwell's failure to adhere to Court Compliance, and the need for further programming. (6/8/18 Tr., p.17,

L.9 – p.19, L.8.) The state submits that Bothwell 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 Bothwell’s conviction and sentence.

DATED this 13th 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 13th 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:

ELIZABETH ANN ALLRED  
DEPUTY STATE APPELLATE PUBLIC DEFENDER  
[documents@sapd.state.id.us](mailto:documents@sapd.state.id.us).

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

# APPENDIX A

1 same time, I have my mother to take care of, I am working, and  
2 I -- I have my children that I need to provide for. I do pay  
3 child support every month.

4 But thank you for your time, Your Honor.

5 THE COURT: Thank you.

6 Okay. Mr. Beus, any reason why sentence should not  
7 be pronounced?

8 MR. BEUS: No, Your Honor.

9 THE COURT: All right. The Court has reviewed the  
10 presentence investigation report. I've considered the  
11 comments and recommendations of counsel today. I've also  
12 considered the comments of the defendant in this matter. I've  
13 considered and applied the Toohill factors to this case as  
14 well as the factors be set forth in 19-2521.

15 And I'll he just say up front, I don't ignore a  
16 plea agreement lightly. But in this particular case, I am not  
17 inclined to follow the plea agreement in this case as set  
18 forth in the plea agreement document.

19 I'm not going to impose probation right off. I'm  
20 going to impose a sentence of six years unified, three years  
21 determinate, three years indeterminate, and I'm going to  
22 retain jurisdiction for a period of 365 days. And I will tell  
23 you why I'm doing that.

24 In reviewing this case, I noted the -- I reviewed  
25 very carefully the Court Compliance progress report. And to

1 say that you failed on Court Compliance and they were  
2 extremely patient would be an understatement.

3 One of the comments you made was that you had been  
4 sober since this DUI. Yet in the Court Compliance report, it  
5 shows that you tested positive for marijuana throughout  
6 September and October following this DUI. So the fact that --  
7 or the assertion that you remained sober after this DUI is  
8 simply not correct.

9 This Court views DUI as an extreme risk of danger  
10 to the community. I think you recognized that when you said  
11 it was reckless. And given how things proceeded on Court  
12 Compliance, both before and after your Walker Center  
13 completion, indicates to me that you need more programming in  
14 order to understand and be successful on probation.

15 Even after you completed your Walker Center  
16 program, you missed at least one appointment with Court  
17 Compliance up in -- with Positive Connections.

18 So I don't think, at this point, sir, that you are  
19 ready for a probation. For that -- for that reason, I am  
20 going to retain jurisdiction.

21 I will impose court costs in this case.

22 Is there any restitution in this case, ma'am,  
23 Ms. Harrington?

24 MS. HARRINGTON: No, Your Honor. This was a blow.

25 THE COURT: Okay. I will impose a fine of \$2,000.



1 I will impose a reimbursement to the public  
2 defender's office in the amount of \$500.

3 I will suspend your license for two years following  
4 your release from incarceration.

5 Given the fact that I do see your mother back there  
6 in a wheelchair, I will grant you the ability to check in at  
7 the jail tomorrow morning at 8:00 a.m. That will give you an  
8 opportunity to get your mother home.

9 THE DEFENDANT: Thank you, sir.

10 THE COURT: Certainly, if you don't check in at that  
11 time, there will be -- I think you understand the  
12 consequences, so I'm not going to go into that.

13 THE DEFENDANT: Yes, sir.

14 THE COURT: So at this time I will impose that  
15 sentence.

16 You have 42 days within which to file an appeal of  
17 this judgment.

18 Are there any questions from counsel at this time?

19 MS. HARRINGTON: No, Judge.

20 MR. BEUS: No, Your Honor.

21 THE COURT: Okay. Thank you.

22 Good luck, sir. And I hope to see you back here  
23 after the retained jurisdiction, and we can talk about  
24 probation at that point.

25 (Proceedings concluded at 3:00 p.m.)