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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. LEWIS CANTU, Defendant-Appellant.	NO. 46691-2019 Twin Falls County Case No. CR42-2017-11519 RESPONDENT'S BRIEF

Issue

Has Cantu failed to establish that the district court abused its discretion when it imposed a unified sentence of seven years, with three years fixed, and declined to place him on probation or retain jurisdiction, following his guilty plea to possession of methamphetamine?

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

Cantu pled guilty to possession of methamphetamine and misdemeanor resisting and/or obstructing an officer, and the district court imposed a unified sentence of seven years, with three years fixed, for the possession of methamphetamine conviction, and a concurrent one-year

sentence for the misdemeanor resisting and/or obstructing an officer conviction. (R., pp.33-35, 79-86, 91-97.) Cantu filed a notice of appeal timely from the judgment of conviction. (R., pp.99-101.)

Cantu asserts that the district court abused its discretion by sentencing him to seven years, with three years fixed, "without probation or retained jurisdiction," in light of his substance abuse, mental health issues, willingness to participate in treatment, and the facts that he was "fully employed" and had "experienced a year of personal trauma." (Appellant's brief, pp.2-6.) Cantu has failed to establish an abuse of discretion.

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 decision whether to retain jurisdiction is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). The primary purpose of a district court retaining jurisdiction is to enable the court to obtain additional information regarding whether the defendant has sufficient rehabilitative potential and is suitable for probation. State v. Jones, 141 Idaho 673, 677, 115 P.3d 764, 768 (Ct. App. 2005). Probation is the ultimate goal of retained jurisdiction. Id. There can be no abuse of discretion if the district court has sufficient evidence before it to conclude that the defendant is not a suitable candidate for probation. Id. The goal of probation is to foster the probationer's rehabilitation while protecting public safety. State v. Cheatham, 159 Idaho 856, 858, 367 P.3d 251, 253 (Ct. App. 2016) (citations omitted). A decision to deny probation will not be deemed an abuse of discretion if it is consistent with the criteria articulated in I.C. § 19-2521. Id. (citing State v. Toohill, 103 Idaho 565, 567, 650 P.2d 707, 709 (Ct. App. 1982)).

The maximum prison sentence for possession of methamphetamine is seven years. I.C. § 37-2732(c)(1). The district court imposed a unified sentence of seven years, with three years fixed, which falls within the statutory guidelines. (R., pp.79-86, 91-97.) Contrary to Cantu's assertions on appeal, his ongoing substance abuse and criminal offending, disregard for the terms of probation and parole, and failure to rehabilitate or be deterred despite prior treatment

opportunities and legal sanctions demonstrate that he is not a viable candidate for probation and that his sentence appropriate.

Cantu's criminal history spans nearly 30 years. (PSI, pp.5-11.[1]) His record includes four juvenile adjudications, 10 misdemeanor convictions, two prior felony possession of a controlled substance convictions, and multiple charges that were ultimately dismissed. (PSI, pp.5-11.) Cantu has served time in prison and has also had multiple opportunities on probation, parole, and retained jurisdiction, but he performed poorly while in the community and in programming. (PSI, p.11.) Multiple terms of incarceration have failed to deter Cantu in his criminal offending, and he has also demonstrated a disregard for institutional rules. (PSI, pp.11-12.)

Cantu claims that he is willing to participate in treatment; however, Cantu has been afforded numerous opportunities to participate in programming, both while incarcerated and while in the community, but he has failed to rehabilitate. (PSI, pp.11, 13.) He admitted to having used methamphetamine and marijuana just one day before his GAIN-I assessment. (PSI, p.20.) He also admitted "[d]uring two separate GAIN-I assessments" to having used drugs intravenously—including during "30 of the 90 days prior to one assessment"—although he denied intravenous drug use during his presentence interview. (PSI, p.20.) Although Cantu claims on appeal that he "needs treatment" for his mental health issues (Appellant's brief, p.5), the mental health examiner reported that Cantu "den[ied] he is currently symptomatic," determined that Cantu "is not indicated to meet the criteria to be considered SMI or to have other possible MH needs," and indicated that Cantu's "current risk to himself and the community is not considered higher if he does not receive ongoing mental health treatment." (PSI, p.93

[1] PSI page numbers correspond with the page numbers of the electronic file "Supreme Court No. 46691-2019 Lewis Cantu Confidential Exhibits.pdf."

(emphasis original).) Cantu's employment status and the fact that he "experienced a year of personal trauma" do not outweigh his ongoing substance abuse and criminal offending, disregard for the terms of probation and parole, and failure to rehabilitate or be deterred despite prior treatment opportunities and legal sanctions.

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Cantu's sentence, and for declining to place him on probation or retain jurisdiction. (12/3/18 Tr., p.15, L.16 – p.17, L.15.) The state submits that Cantu 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 Cantu's conviction and sentence.

DATED this 11th day of July, 2019.

__/s/_Lori A. Fleming_____
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of July, 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:

KIMBERLY A. COSTER
DEPUTY STATE APPELLATE PUBLIC DEFENDER
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__/s/_Lori A. Fleming__
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

THE DEFENDANT: Yes, sir. I have made a mess of myself over the past year. I admit I didn't ever think I would be back on methamphetamines in my whole life, really. But when I was in the car wreck and I started eating the pills for the pain, I couldn't really think straight, and I -- well, one thing led to another and here I am in front of you.

And I've never really been through a treatment, like a good one with counselors and stuff; and if you give me the opportunity to go to the Walker Center, I think I could turn it around. That's really all I have. I have become addicted and can't manage my life.

THE COURT: All right. Thank you, sir.

All right. Mr. McRae, any legal reason why sentence should not be pronounced?

MR. MCRAE: No, Your Honor.

THE COURT: All right. The Court has reviewed the Presentence Investigation Report. I have thoroughly reviewed the file, and I have considered the comments and recommendations of counsel.

And in arriving at my sentence today, I have considered and applied the factors set forth in the ***Toohill*** case, as well as those set forth in Idaho Code Section 19-2521. And upon my review of the PSI and the facts involved in this case, quite frankly, Mr. Cantu, I don't find that you are a proper candidate for community supervision.

I think the good order and protection of society requires that I impose sentence in this case. It is based on a number of things, but one of the things that I do want to address is the idea that you made a number of bad choices in your twenties.

Well, your 2000 case didn't conclude until 2014, including multiple sanctions, disciplinary offense reports, as well as a CAPP rider program that was issued against you in 2012. That puts you at the late thirties, not your mid twenties.

Furthermore, in this particular case, the factors that are involved here, the officer attempted to arrest you on a warrant and you ran, resisted arrest, and that's how the methamphetamine was found. I don't think there is anything, quite frankly, in this PSI that indicates that you are a good candidate for community supervision. So in this case I am going to impose sentence.

And my sentence is as follows: I sentence you to a seven-year unified sentence consisting of a three-year fixed term and a four-year indeterminate term. You will be given any credit for time served in this case. I will impose court costs; I will impose restitution in the amount of $1,086.73. That's with respect to Count I.

With respect to the misdemeanor charge, I will impose a one-year sentence. You will be given credit for time

served in that one, as well. And that will run concurrent with the sentence in Count I.

MR. MCRAE: Your Honor, this is a Public Defender case.

THE COURT: And I will impose a reimbursement to the Public Defender's office in the amount of $500. Need a signature on the misdemeanor charge.

THE DEFENDANT: Your Honor, you really don't think a rider would help me out?

THE COURT: I don't. I don't think a rider is appropriate. You fought one rider and were unsuccessful on the CAPP program. So in this case, no. To the extent you haven't waived your right to appeal, you may appeal the judgment within 42 days of entry of that judgment. I will remand you to the custody of the Twin Falls County Sheriff's Department to remand to the custody of the IDOC.

(Proceeding adjourned.)