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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 46816-2019
)	
v.)	ADA COUNTY NO. CR01-18-10035
)	
KELLI M. ROGERS,)	
)	
Defendant-Appellant.)	APPELLANT'S BRIEF
_____)	

STATEMENT OF THE CASE

Nature of the Case

Kelli M. Rogers challenges the district court's decision to sentence her to five years, with two years fixed, for grand theft. She maintains the district court abused its discretion by imposing an excessive sentence.

Statement of Facts and Course of Proceedings

The State charged Ms. Rogers with three counts of grand theft for taking her client's money through her property management company. (R., pp.23-24; see Presentence Investigation

Report (“PSI”),¹ p.3.) Pursuant to a plea agreement with the State, Ms. Rogers pled guilty to one count of grand theft, and the State agreed to dismiss the remaining charges. (R., pp.41–42; Tr.,² pp.6, 13–19.) Sentencing recommendations were left open. (Tr., p.6.)

At sentencing, the State requested a sentence of fourteen years, with two years fixed. (Tr., p.24.) The PSI and Ms. Rogers recommended probation. (PSI, p.21; Tr., p.32.) The district court sentenced her to five years, with two years fixed. (R., p.58.) Ms. Rogers timely appealed from the district court’s judgment of conviction. (R., pp.59–61, 63–64.)

ISSUE

Did the district court abuse its discretion by sentencing Ms. Rogers to five years, with two years fixed, for grand theft?

ARGUMENT

The District Court Abused Its Discretion By Sentencing Ms. Rogers To Five Years, With Two Years Fixed, For Grand Theft

“It is well-established that ‘[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.’” *State v. Pierce*, 150 Idaho 1, 5 (2010) (quoting *State v. Jackson*, 130 Idaho 293, 294 (1997) (alteration in original)). Similarly, “[t]he choice of probation, among available sentencing alternatives, is committed to the sound discretion of the trial court” *State v. Landreth*, 118 Idaho 613, 615 (Ct. App. 1990). Here, Ms. Rogers’s sentence does not exceed the statutory maximum. *See* I.C. § 18-2408(2)(a) (fourteen year maximum). Accordingly, to show that the sentence imposed was unreasonable, Ms. Rogers “must show that the sentence, in light of the

¹ Citations to the PSI refer to the 1,407-page electronic document with the confidential sentencing materials.

² The transcript on appeal does not contain line numbers.

governing criteria, is excessive under any reasonable view of the facts.” *State v. Strand*, 137 Idaho 457, 460 (2002).

“‘Reasonableness’ of a sentence implies that a term of confinement should be tailored to the purpose for which the sentence is imposed.” *State v. Adamcik*, 152 Idaho 445, 483 (2012) (quoting *State v. Stevens*, 146 Idaho 139, 148 (2008)).

In examining the reasonableness of a sentence, the Court conducts an independent review of the entire record available to the trial court at sentencing, focusing on the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public; (3) possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

Stevens, 146 Idaho at 148. “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.” *State v. Delling*, 152 Idaho 122, 132 (2011).

In this case, Ms. Rogers asserts the district court abused its discretion by imposing an excessive sentence under any reasonable view of the facts. Specifically, she contends the district court should have sentenced her to a lesser term of imprisonment or probation in light of the mitigating factors, including her mental health issues, alcohol abuse, current gainful employment, minor criminal history, family support, and acceptance of responsibility and remorse.

██████████ Ms. Rogers grew up with her mother and adoptive father in a tumultuous home. (PSI, p.8.) Her parents fought constantly. (PSI, p.8.) Her adoptive father would berate and demean her as well. (PSI, p.35.) Ms. Rogers also struggled with feeling unwanted by her biological father. (PSI, p.8.) As a young teenager, she was sexually abused for many years by her older cousin. (PSI, pp.8–9.) Ms. Rogers reported that her parents knew about the abuse, but never did anything to stop it. (PSI, p.35.) To deal with the stress and trauma at

home, Ms. Rogers started drinking alcohol at age eleven and was “partying daily” by sixteen. (PSI, p.8.) She barely graduated high school. (PSI, p.11.) Ms. Rogers had periods of sobriety, but her alcohol addiction has been a lifelong battle. (PSI, pp.16, 36.) She recognized that her alcoholism ruined family relationships, affected friendships, and contributed to the instant offense. (PSI, p.17.) In addition to her alcohol use, Ms. Rogers has significant mental health issues. (PSI, p.14.) She was recently diagnosed with bipolar disorder and post-traumatic stress disorder. (PSI, pp.14, 43.) She also had frequent suicidal thoughts and multiple suicide attempts. (PSI, pp.14, 36–37, 42.) During the time of the instant offense, Ms. Rogers explained that she was under the influence of alcohol and experiencing bipolar manic episodes. (PSI, p.6.)

Ms. Rogers’s traumatic childhood, alcoholism, and mental health condition are proper considerations in favor of mitigation. A sentencing court must give “proper consideration of the defendant’s alcoholic problem, the part it played in causing defendant to commit the crime and the suggested alternatives for treating the problem.” *State v. Nice*, 103 Idaho 89, 91 (1982). The impact of substance abuse on the defendant’s criminal conduct is “a proper consideration in mitigation of punishment upon sentencing.” *State v. Osborn*, 102 Idaho 405, 414 n.5 (1981). Further, Idaho Code § 19-2523 requires the sentencing court to consider the defendant’s mental health condition if it is a significant factor, and the record must show that the sentencing court adequately considered this factor when imposing a sentence. I.C. § 19-2523; *Delling*, 152 Idaho at 132–33. Finally, the Court of Appeals has recognized that a defendant’s “extremely troubled childhood is a factor that bears consideration at sentencing.” *State v. Williams*, 135 Idaho 618, 620 (Ct. App. 2001). In light of this mitigating information of Ms. Rogers’s troubled childhood, alcohol addiction, and mental health issues, she asserts the district court did not exercise reason in its sentencing decision.

In addition to these mitigating circumstances, Ms. Rogers has expressed remorse and accepted responsibility for the crime. Acceptance of responsibility, remorse, and regret are all factors in favor of mitigation. *State v. Shideler*, 103 Idaho 593, 595 (1982). In the PSI, Ms. Rogers stated:

I understand the nature of my charges and I understand that I spent money that wasn't mine. It was not my intention to misappropriate funds and to hurt any of my clients emotionally and financially. I do have deep regret and will always remember what I have done and use this experience to be a healthier, better person. I also have the sincere knowing that I will be able to pay back all the monies that are due to my victims. I am very sorry for what I have done and take full responsibility. Please take in to consideration that my life circumstances and my mental illness was prevalent [sic] when I committed the crime against my clients and am asking that my the plea agreement be upheld so that I can work and start the process of paying back my victims all that they are owed. Thank you for your time.

(PSI, p.17.) She also explained:

Looking back now, I feel horrible about my actions that ultimately led to this lawsuit. I understand that while my mental illness and alcohol use played an intregal [sic] part in and are reasons for my impulsivity and lack of consequences while committing this crime, I am responsible for my actions and feel so bad that I have hurt people I once had a close business relationship with. I know I have affected them financially and emotionally. I broke their trust and how I affected them is something I've thought about every day since the sale of my business. I have sincere regret for the harm I have caused, I also feel I cannot be forgiven but while I cannot reverse the damage already done, I can and I want to pay restitution to pay back what is due.

(PSI, p.6.) Ms. Rogers made similar remarks at sentencing:

I just wanted to let you know that I'm very sorry for what I've done, and it has been really horrible for me to think about what I created and what I did to my victims. I know it's unforgiveable, as far as the personal side goes, but for me, I'm learning that I need to take responsibility, and I've never said that I didn't take funds that weren't mine. I'm fully accountable for my actions, and I would like the opportunity to continue working and pay restitution and be on probation for as long as the court sees fit. I am very remorseful, and I'm very sorry.

(Tr., p.33.) Ms. Rogers's remorse, regret, and acceptance of responsibility warrant a lesser sentence, including probation.

Along with these mitigators, Ms. Rogers had the tools to succeed on probation. She had a job, supportive family and friends, regular therapy sessions, and a minor criminal history. For example, Ms. Rogers worked part-time as a cashier at a hotel. (PSI, p.12.) *See State v. Mitchell*, 77 Idaho 115, 118 (1955) (recognizing gainful employment as a mitigating factor); *see also State v. Shideler*, 103 Idaho 593, 594–95 (1982) (employment and desire to advance within the company were mitigating circumstances). In addition, Ms. Rogers was the primary caregiver for her [REDACTED] daughter. (PSI, p.11.) It was very important to Ms. Rogers to be a good mother and regain her family’s trust. (PSI, p.17.) Further, Ms. Rogers had a supportive family and friends. *Shideler*, 103 Idaho at 594–95 (family support and good character as mitigation); *see State v. Ball*, 149 Idaho 658, 663–64 (Ct. App. 2010) (district court considered family and friend support as mitigating circumstance). Her mother wrote a letter in support explaining that she would help Ms. Rogers get to work, attend therapy, and go to doctors’ appointments. (PSI, p.53.) Ms. Rogers’s mother also wrote that Ms. Rogers and her daughter were “extremely close,” and her daughter needed her mother’s support. (PSI, p.53.) Ms. Rogers and her daughter could live with Ms. Rogers’s mother. (PSI, p.53.) Ms. Rogers’s younger sister also wrote a letter of support. (PSI, pp.56–57.) She explained:

In the fallout of the business losses and resulting need for inpatient stabilization, I struggled with anger for the hurt she had caused others and a fear of losing her to her disease. Since that time, Kelli has spent a significant amount of time in inpatient and outpatient stabilization care working with various treatment strategies to stabilize her bipolar swings and address her alcoholism. Stabilizing and handling her health while absorbing the consequences of her actions has proven difficult. She has accepted full responsibility for her actions. She has expressed extreme sorrow and shame relating to the losses she caused her clients as well as the stress and upset that she has caused her children, her mother and other family. Kelli has shown that she willing to do what is needed to become self-sufficient and mentally stable and has expressed her desire to return to be a productive member of the community. The actions she has taken include weekly counseling and recovery classes, organizing and showing up for medical appointments, applying for jobs and working, and continuing to help her underage

daughter with classes and work through these transitions. In recent months Kelli has quickly recognized when her mental health has become unstable and has taken actions to seek medical assistance immediately. These actions show significant progress in Kelli's insight to her illness and gives me hope for her success. I believe that she would be a good candidate for probation and continued participation in outpatient recovery. I am supportive of my sister's recovery and believe she is capable of successfully abiding by the conditions of her probation set by the court.

(PSI, pp.56–57.) Additionally, a long-time friend of Ms. Rogers wrote in a letter of support:

Kelli explained to me the circumstances of her situation and never blamed another person and was remorseful for her role in the events. I believe Kelli did these actions due to her diagnosis of Bi-Polar. I honestly do not see this as part of her character, as I have never seen her act in a malicious way in 35 years. Kelli has accepted full responsibility and acknowledges the harm it caused.

(PSI, p.54.) Her friend also stated that Ms. Rogers's daughter relied on her. (PSI, p.54.) Two other family friends and two cousins wrote letters of support, explaining that Ms. Rogers was a good person who struggled with mental illness and substance abuse. (PSI, pp.58–63.) They all believed she could be rehabilitated in the community. (PSI, pp.58–63.) Ms. Rogers reported that she did not have any friends involved in criminal activity. (PSI, p.9.) Along the same lines, she had a minor criminal record. "The absence of a criminal record is a mitigating factor that courts consider." *State v. Miller*, 151 Idaho 828, 836 (2011). "It has long been recognized that '[t]he first offender should be accorded more lenient treatment than the habitual criminal.'" *State v. Hoskins*, 131 Idaho 670, 673 (Ct. App. 1998) (alteration in original) (quoting *Nice*, 103 Idaho at 91). This was Ms. Rogers's first felony offense. (PSI, pp.6–7.) Finally, Ms. Rogers participated in counseling and therapy with Recovery4Life and the Center for Creativity and Healing. (PSI, pp.65–68.) Her counselor opined that Ms. Rogers's criminal conduct was directly connected to her untreated bipolar disorder. (PSI, p.66.) Her counselor recommended mental health court. (PSI, p.67.) These factors—employment, family and friend support, minimal criminal history,

and amenability to treatment—show Ms. Rogers can succeed in the community under proper control and supervision.

In summary, Ms. Rogers argues the district court did not exercise reason and thus abused its discretion by imposing an excessive sentence. The district court did not give adequate weight to the many mitigating circumstances in Ms. Rogers’s case, including her difficult childhood, alcohol abuse issues, mental health condition, acceptance of responsibility and remorse, family and friend support, minimal criminal history, and amenability to treatment. Proper consideration of these mitigation factors support a lesser term of imprisonment or probation.

CONCLUSION

Ms. Rogers respectfully requests this Court reduce her sentence as it deems appropriate. In the alternative, she respectfully requests this Court vacate her judgment conviction and remand her case for a new sentencing hearing.

DATED this 26th day of June, 2019.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June, 2019, 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

JCS/eas