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### State v. Cross Appellant's Brief Dckt. 46959

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 46959-2019
Plaintiff-Respondent,	)	
	)	TWIN FALLS COUNTY NO. CR42-18-7189
v.	)	
	)	
GERRY WAYNE CROSS,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Gerry Wayne Cross appeals from the district court's Judgment of Conviction. Mr. Cross was sentenced to a unified sentence of six years, with two years fixed, for his possession of a controlled substance conviction. Mindful that he waived his right to appeal, he asserts that the district court abused its discretion in sentencing him to an excessive sentence without giving proper weight and consideration to the mitigating factors that exist in this case.

## Statement of the Facts & Course of Proceedings

While attempting to locate an individual with an active warrant, Officer Gonzales ran into Mr. Cross. (PSI, p.4.)<sup>1</sup> After speaking with Mr. Cross and looking around a shed, Mr. Cross allowed the officer to look in his space and items containing residue were located. (PSI, p.4.) On August 8, 2018, an Information was filed charging Mr. Cross with possession of a controlled substance. (R., pp.23-24.)

Mr. Cross entered a guilty plea to the possession of a controlled substance charge. (R., p.36.) He entered into a plea agreement in which he agreed to waive his right to appeal if the district court did not exceed the State's sentencing recommendation. (R., p.47.) At sentencing, the prosecution requested the imposition of a unified sentence of seven years, with two years fixed. (Tr., p.8, Ls.17-18.) Defense counsel recommended a period of retained jurisdiction. (Tr., p.11, L.16.) The district court imposed a unified sentence of six years, with two years fixed. (R., pp.53-58.) Mr. Cross filed a Notice of Appeal timely from the district court's Judgment of Conviction. (R., pp.64-67.)

### ISSUE

Did the district court abuse its discretion when it imposed, upon Mr. Cross, a unified sentence of six years, with two years fixed, following his plea of guilty to possession of a controlled substance?

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<sup>1</sup> For ease of reference, the electronic file containing the Presentence Investigation Report and attachments will be cited as "PSI" and referenced pages will correspond with the electronic page numbers contained in this file.

## ARGUMENT

### The District Court Abused Its Discretion When It Imposed, Upon Mr. Cross, A Unified Sentence Of Six Years, With Two Years Fixed, Following His Plea Of Guilty To Possession Of A Controlled Substance

Mindful that he waived his right to appeal, Mr. Cross asserts that, given any view of the facts, his unified sentence of six years, with two years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held 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. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Cross does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, he must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978), *overruled on other grounds by State v. Coassolo*, 136 Idaho 138 (2001)).

Appellate courts use a four-part test for determining whether a district court abused its discretion: Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards

applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018). Mr. Cross asserts that the district court failed to give proper weight and consideration to the mitigating factors that exist in his case and, as a result, did not reach its decision by an exercise of reason.

Specifically, he asserts that the district court failed to give proper consideration to his admitted substance abuse problem (PSI, pp.12-13), desire to maintain sobriety (PSI, pp.13, 22), and friend and family support (PSI, pp.42-47). Idaho courts have previously recognized that substance abuse and a desire for treatment should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982). Furthermore, in *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that family and friend support were factors that should be considered in the Court's decision as to what is an appropriate sentence.

Based upon the above mitigating factors, Mr. Cross asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his substance abuse, desire to maintain sobriety, and friend and family support, it would have crafted a less severe sentence.

#### CONCLUSION

Mr. Cross respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing.

DATED this 22<sup>nd</sup> day of August, 2019.

/s/ Elizabeth Ann Allred  
ELIZABETH ANN ALLRED  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of August, 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](mailto:ecf@ag.idaho.gov)

/s/ Evan A. Smith  
\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

EAA/eas