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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. CHARLES TYRONE MCCULLOCH, Defendant-Appellant.	)	NO. 46978-2019 Canyon County Case No. CR14-18-18886 RESPONDENT'S BRIEF

Issue

Has McCulloch failed to establish that the district court abused its discretion by imposing a unified sentence of 10 years, with three years fixed, upon his guilty plea to felony DUI?

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

In October 2017, while on parole for felony DUI, McCulloch consumed "'a lot'" of alcohol, drove his brother's pickup without a valid driver's license, and went to a bar with Steven Mocaby, where he and Mocaby "ended up drinking." (R., p.14; 3/11/19 Tr., p.11, Ls.4-9; p.13, Ls.6-9; 3/1/19 Tr., p.19, Ls.10-11.) Shortly after they left the bar, McCulloch drove his brother's

pickup off the roadway and crashed into a "wooden pole and street sign." (R., p.14.) When officers responded, the pickup's engine was still running and its "back end was down in a canal," McCulloch was in the driver's seat, and Mocaby was "unconscious and slumped over in the passenger seat. The passenger side door was crushed from the crash and the driver side door had to be pried open by the Fire Department." (R., p.14.) Officers noted that McCulloch had "a strong and distinct odor of an alcoholic beverage coming from his person," and McCulloch "admitted to consuming two 24 ounce Corona beers at [ ] Mocaby's house," but he "denied driving the vehicle" and refused to engage in field sobriety testing. (R., p.14.) McCulloch and Mocaby were transported to the hospital, where Mocaby was treated for "injuries and bleeding from the ears due to a head injury that occurred in the crash." (R., p.14.) McCulloch refused to submit to a breath test, stating, "'I'm not gonna sit here and give a breath test and fail it.'" (R., p.14.) Officers requested a blood draw, and results of the blood test showed that McCulloch's BAC was .218. (R., p.14.)

Officers later interviewed Mocaby, who reported that, a few days after the crash, he "received a call from McCulloch telling him to say that Mocaby was driving the pickup during the time of the crash." (R., p.14.) McCulloch told Mocaby that "Mocaby would only get a misdemeanor but it would be a felony charge for McCulloch." (R., p.14.) McCulloch "threatened to hurt Mocaby if he did not say he was driving." (R., p.14.)

The state charged McCulloch with felony DUI (second felony DUI within 15 years), felony intimidating a witness, and driving without privileges. (R., pp.27-31.) Pursuant to a plea agreement, McCulloch pled guilty to felony DUI and the state dismissed the remaining charges and agreed to recommend a unified sentence of seven years, with two years fixed. (R., pp.43-44, 63, 66-67.) The district court imposed a unified sentence of 10 years, with three years fixed, and

ordered that the sentence run concurrently with "any other sentence." (R., pp.64-65.) McCulloch filed a notice of appeal timely from the judgment of conviction. (R., pp.73-76.)

McCulloch asserts his sentence is excessive because the district court did not "follow the parties' sentencing recommendation" and because, "mindful of the district court's contrary factual finding" and "of this Court's deference to such findings," he "maintains that he was not the person driving when the truck left the roadway and crashed." (Appellant's brief, pp.3-5.) 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). "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), -8005(9). The district court imposed a unified sentence of 10 years, with three years fixed, which falls well within the statutory guidelines. (R., pp.64-65.) Furthermore, McCulloch's sentence is reasonable in light of the perilous nature of the offense and McCulloch's continuing disregard for the law, the conditions of community supervision, and the safety and well-being of others.

McCulloch has a history of criminal offending – his record includes, at the very least, convictions for burglary, felony eluding, and prior DUI convictions in 2008, 2014, and 2016. (R., pp.10-12, 14, 31.) He was on parole for a felony DUI when he committed the instant felony DUI offense in 2017, and he chose to disregard the terms of parole in multiple ways on the day of the instant offense, as he consumed alcohol, associated with a known felon (he reportedly met Mocaby "in jail" and later "threatened to have Mocaby violated by his *Parole* Officer"), frequented a bar, drove while his driver's license was suspended and while under the influence, and refused to submit to alcohol testing. (R., p.14 (emphasis added); 3/11/19 Tr., p.10, Ls.14-15; p.11, Ls.7-9; p.13, Ls.6-12.) McCulloch gravely endangered the community when he drove with a BAC of .218 – well over twice the legal limit – and ran his vehicle off the roadway, crashing into "a wooden pole and street sign." (R., p.14.) Furthermore, he caused harm to his passenger, who was treated at the hospital for "injuries and bleeding from the ears due to a head injury that occurred in the crash." (R., p.14.) At sentencing, the district court aptly stated, "You were lucky both in your last case but certainly again in this case that although you did injure someone that you didn't kill him, that you didn't kill yourself or kill someone else in our community." (3/11/19 Tr., p.13, Ls.18-21.)

On appeal, McCulloch "maintains that he was not the person driving when the truck left the roadway and crashed," and – "mindful of the district court's contrary factual finding" – he contends that his sentence is unreasonable "to the extent the district [court] sentenced him based on its finding that his drunk driving caused the crash." (Appellant's brief, pp.4-5.) Factual findings made at sentencing must be accepted on appeal unless shown to be clearly erroneous. State v. Thomas, 133 Idaho 682, 688, 991 P.2d 870, 876 (Ct. App. 1999). Such findings are clearly erroneous only if they are unsupported by substantial and competent evidence. State v. Shafer, 144 Idaho 370, 374, 161 P.3d 689, 693 (Ct. App. 2007) (citing Thomas at 686, 991 P.2d at 874). The credibility of witnesses and the weight of testimony are "entrusted to the trial court as trier of fact." Thomas at 686, 991 P.2d at 874. McCulloch offered no evidence to support his claim that he was not driving when the pickup crashed, and his mere denial that he was driving when the crash occurred does not show that the district court's finding to the contrary was erroneous, particularly because the evidence in the record supports the court's factual finding.

According to the Affidavit of Probable Cause and Finding by Court, prepared by Officer J. Krohn and filed on September 14, 2018, when officers arrived at the scene of the crash, *McCulloch* was in the driver's seat and Mocaby was "unconscious and slumped over in the passenger seat," the pickup's engine was still running, and the "back end" of the pickup was "down in a canal," the "passenger side door was crushed," and "the driver side door had to be pried open by the Fire Department." (R., p.14.) Mocaby – the only reported witness – stated that he "observed McCulloch drinking 'a lot' of alcoholic beverages" on the day of the instant offense, that "they came from the Monkey Bizness bar just prior to the crash," and that he "was the passenger in the vehicle and McCulloch was driving." (R., p.14.) McCulloch's blood was drawn at the hospital after the crash, and test results from the Idaho State Lab showed that his

BAC was .218. (R., p.14.) All of this evidence is consistent with, and supports, the district court's factual finding that McCulloch was driving while under the influence of alcohol and crashed the pickup.

Conversely, McCulloch's claim that he was *not* driving when the vehicle crashed is not supported by any evidence. Furthermore, his claim lacks credibility. McCulloch offered no explanation as to how or why he moved Mocaby – who was unconscious – from the driver's seat of the pickup to the passenger seat, or why he (McCulloch) chose to place himself "behind the wheel … in physical control of the truck," and leave the engine running, until officers arrived. (3/1/19 Tr., p.18, Ls.12-15; R., p.14.) McCulloch's claim that he chose to move into the driver's seat of a vehicle that was stuck in a canal, after the vehicle's other occupant drove the vehicle off the road and crashed it, is particularly nonsensical considering that McCulloch was on parole for a felony DUI, his driver's license was suspended, and he was aware that he would "'fail'" a breath test. (R., p.14; 3/11/19 Tr., p.13, Ls.6-9.) McCulloch's report that he requested or allowed Mocaby to drive his (McCulloch's) brother's pickup is also dubious, given McCulloch stated he "didn't know Mr. Mocaby very well," Mocaby had been consuming alcohol, and McCulloch apparently had no qualms about getting behind the wheel himself since he purportedly did just that after the vehicle crashed. (3/11/19 Tr., p.10, Ls.8, 14; 3/1/19 Tr., p.18, Ls.12-15.) McCulloch's self-serving statement that he was not driving the pickup, but merely decided to sit in the driver's seat with the engine running after someone else crashed it, does not show that the district court's finding that he drove while intoxicated and crashed the vehicle was erroneous, nor does it show that McCulloch's sentence is unreasonable "to the extent that the court sentenced him based on its finding" (Appellant's brief, pp.4-5).

The district court considered "all the factors of criminal sentencing" (3/11/19 Tr., p.14, Ls.1-6) and imposed a reasonable sentence in this case. McCulloch's sentence is appropriate in light of the seriousness of the offense, his ongoing criminal behavior, his repeated decisions to endanger the public by driving while intoxicated, his unwillingness to abide by the terms of community supervision, and his failure to rehabilitate or be deterred. Given any reasonable view of the facts, McCulloch has to establish an abuse of discretion.

Conclusion

The state respectfully requests this Court to affirm McCulloch's conviction and sentence.

DATED this 18th day of November, 2019.

_/s/ Kenneth K. Jorgensen_____
KENNETH K. JORGENSEN
Deputy Attorney General

VICTORIA RUTLEDGE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of November, 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:

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_/s/ Kenneth K. Jorgensen_____
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