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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 46987-2019
Plaintiff-Respondent,)	Ada Co. Case No. CR01-19-2215
)	
v.)	
)	RESPONDENT’S BRIEF
MARSHALL L. BURNHAM,)	
)	
Defendant-Appellant.)	
_____)	

Issue

Has Burnham failed to establish that the district court abused its discretion by imposing a unified sentence of ten years with four-and-a-half years fixed upon Burnham’s guilty plea to felony DUI?

ARGUMENT

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

According to the Presentence Report (“PSI”), Burnham’s felony DUI conviction was the result of the following facts, as related through a police officer’s report:

On 01/15/19, at approximately 1618 hours, Marshall Burnham was involved in an accident with another vehicle at the intersection of W. Bigwood Dr. and S. Southdale Ave. in Boise, Idaho 83709. Marshall did not stop to report the incident, but instead drove away and parked near 10315 W. Tanglewood Dr. Marshall was seen running away from his damaged vehicle (black Chevy Blazer

Idaho #2CTL858) and entering the above residence. Deputies were given permission by the owner to enter the residence. After an exhaustive search, Marshall was located hiding inside the crawl space under the house. Marshall did not cooperate and stated he would shoot deputies if they attempted to come toward him. Eventually Marshall crawled close enough to deputies and he was placed into custody. I could hear Marshall's speech was extremely slurred. Marshall's eyes were bloodshot, watery, and glassy. I could smell the odor of an alcoholic beverage emanating from Marshall's breath and person from several feet away. Marshall later admitted to deputies that he drank a fifth of liquor throughout the day. Due to Marshall's lack of cooperation, SFST's (standardized field sobriety tests) were not performed. Marshall was transported to St. Als hospital in Boise due to saying he ingested an ounce of methamphetamine. Once at the hospital, I contacted the Honorable Judge T. Gardunia and requested a telephonic warrant. I was granted a telephonic warrant and a blood draw was performed on Marshall. Marshall was cleared from the hospital and transported to the Ada County Jail. Marshall was booked into the jail for felony DUI, leaving the scene of an accident, and resist or obstruct an investigation.

(PSI, pp.1-2.)¹ The state charged Burnham with felony DUI (second felony within 15 years), resisting and/or obstructing an officer, and leaving the scene of an accident involving vehicle damage. (R., pp.36-37.) Pursuant to a plea agreement, Burnham pled guilty to felony DUI and the state dismissed the remaining charges. (R., pp.42-52.) The district court imposed a unified sentence of ten years with four-and-a-half-years fixed. (R., pp.59-63.) Burnham filed a notice of appeal timely from the judgment of conviction. (R., pp.64-66.) He also filed a Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.69-70; *see* iCourt Portal, State v. Burnham, Ada Co. Case No. CR01-19-2215, 8/6/19 "Order on Defendant's Motion for Reconsideration of Sentence".)

On appeal, Burnham asserts that the district court abused its discretion by imposing a unified sentence of ten years with four-and-a half fixed upon his guilty plea to felony DUI. (Appellant's Brief, pp.3-5.)

¹ All page numbers for the PSI are pursuant to the numbering ascribed by the electronic file "Burnham 46987 psi.pdf."

ARGUMENT

Burnham Has Failed To Show That The District Court Abused Its Sentencing Discretion

A. Introduction

Burnham contends the district court abused its sentencing discretion in light of the “objectives of criminal punishment, and the mitigating factors that exist” in his case. (Appellant’s Brief, p.3.) The record supports the sentence imposed.

B. Standard Of Review

“An appellate review of a sentence is based on an abuse of discretion standard. Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable and, thus, a clear abuse of discretion.” State v. Bonilla, 161 Idaho 902, 905, 392 P.3d 1243, 1246 (Ct. App. 2017). “To show an abuse of discretion, the defendant must show that in light of the governing criteria, the sentence was excessive, considering any view of the facts.” State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016). “A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to a given case.” State v. Reed, 163 Idaho 681, 417 P.3d 1007, 1013 (Ct. App. 2018). The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. McIntosh, 160 Idaho at 9, 368 P.3d at 629. “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” Id. at 8, 368 P.3d at 628 (quoting State v. Stevens, 146 Idaho 139, 148-49, 191 P.3d 217, 226-27 (2008)). 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)).

C. The District Court Did Not Abuse Its Discretion

At sentencing, the district court stated that it has considered the four sentencing criteria under Toohill v. State, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982), “including the nature of the offense and the character of the offender, as well as information in mitigation and in aggravation.” (Tr., p.25, Ls.18-22.) The court was “mindful of the objectives of protecting society, first and foremost, as well as deterrence, both generally and specifically to [Burnham], the potential for rehabilitation and the need for punishment or retribution[,]” and had “reviewed and considered the PSI materials,” and reviewed and considered the additional information of regarding a new felony DUI charge that had recently been filed in Canyon County that had not been known by the prosecutor. (Tr., p. 25, L.18 – p.26, L.6; *see id.*, p.19, L.15 – p.16, L.10.)

The district court noted that Burnham had a “significant criminal history” not limited to DUI’s, and acknowledged that “a number of other criminal offenses” may have been alcohol related. (Tr., p.26, Ls. 7-10.) The court stated that Burnham was “clearly” an alcoholic in need of “significant help.” (Tr., p.26, Ls.11-12.) The court further explained:

Unfortunately, however, you continue to put the community at risk. People use the roads and the sidewalks and the streets in this community believing they can do so safely. But people who drink and drive or use other substances and drive to the point where they can’t drive safely, you put them at risk. And we have up here all the time, folks who have driven drunk and killed somebody. Your actions are frankly as culpable as theirs, except that you fortunately didn’t kill somebody. But you keep driving, you keep driving impaired. This is effectively your third felony DUI. I recognize you have not been convicted in Canyon County. I do see from the probable cause affidavit it appears you blew well over the limit.

And what is consternating about that is that after you were arrested on that crime initially, this crime then happened after that. You were allowed back into the community even before prosecuting, and that event was not enough for you to stop at least driving even if you couldn’t stop drinking.

You may be an alcoholic and you may not be able to have the power to stop drinking, but you certainly have the ability to stop driving.

Furthermore, your behavior in this case was also reckless and dangerous. By running and hiding in the crawl space and then threatening officers if they came you were going to go shoot them – thankfully doesn't sound like you had a gun – that's the kind of thing that could have gotten you killed. It tells me you've got a serious problem and you need a lot of help.

More importantly, right now you are a danger to the community, and I think what is best is that you have some time away from the community where you can be treated and where the community can be safe from you and it be sufficient enough time that it be a deterrent.

The fact that you were arrested in Canyon County would have been, if you were convicted for that DUI there, your second felony DUI, not being enough to deter you from then committing at least chronologically your third felony DUI. I think there needs to be a significant penalty for deterrence here so there is a point where you recognize it's just not worth at least driving anymore.

(Tr., p.26, L.13 – p.28, L.3.) Accordingly, the district court imposed a unified sentence of ten years, with four and one-half years fixed. (Tr., p. 28, Ls.4-12.)

The district court's analysis is supported by the record. Burnham has an extensive criminal history, including ten juvenile adjudications, 29 misdemeanor convictions, felony DUI in 2012, and a grand theft in 2016 for which he was given a rider, and was charged with a new felony DUI in Canyon County (apparently in 2019) that predated the offense in this case. (PSI, pp.2, 22; Tr., p.19, Ls.15-22.) As the district court noted, Burnham's criminal record shows that being convicted and/or charged with felony DUI was not enough to deter him from committing another public-endangering felony DUI.

Nor has Burnham fared well while under supervision – especially with efforts to address his alcohol addiction. According to the PSI, at the time of sentencing, Burnham was facing five probation violation allegations in his grand theft case, including that “he failed to enroll in Social Detox and Outpatient treatment recommended by his GAIN assessment.” (PSI, p.2.) The PSI continued:

Within the PV, IDOC Probation Officer (PO) Leslie Roman noted, “Mr. Burnham has been given multiple opportunities to prove to his Probation Officer that he is willing to abide by the terms and conditions of his probation. Mr. Burnham does not appear to appreciate the privilege of probation nor does it appear that he is amenable to supervision at the community level.” Within her professional assessment she stated, “Mr. Burnham does not take accountability of his own actions and is unwilling to complete treatment. We have tried addressing his drinking behavior by increasing his supervision as well as obtaining funding for treatment. Mr. Burnham is still unwilling to enroll into treatment recommended by his GAIN assessment.”

(Id., pp.2-3.) Burnham’s presentence investigator concluded that, “Based on Mr. Burnham’s actions he has not displayed an intrinsic motivation to change and, to date, interventions and programs provided have failed to meet the goals of positive change and deterrence. Mr. Burnham’s attitude and behaviors indicate a continued risk to the community.” (PSI, p.4.)

In short, Burnham’s criminal history and his unwillingness to address his alcohol addiction while on probation support the district court’s conclusions that the protection of society was a significant concern in this case and that a prison sentence was necessary to meet the goals of sentencing.

On appeal, Burnham argues his sentence is excessive because “the best way to protect the public is to design a sentence that fosters his recovery” from alcohol addiction, and that the other sentencing goals can be met that way. (Appellant’s Brief, pp.3-5.) Burnham misses the court’s point. He was sentenced for driving while under the influence, not for being addicted to alcohol. After multiple opportunities to change his behavior, Burnham still chose to drive and jeopardize the public’s safety by driving while intoxicated.

Burnham also argues that he suffers from bipolar disorder, depression, anxiety, and ADHD, but these factors do not establish that the district court abused its discretion. Burnham has been abusing alcohol (and possible marijuana) for many years, and other substances (methamphetamine, designer stimulants) more recently, and he has been afforded the opportunity of rehabilitative

treatment and programming, yet he has failed to rehabilitate. (PSI, pp.2, 27.) Despite this, Burnham has continued to abuse substances, commit crimes, and endanger the community by driving while intoxicated.

Burnham's sentence is appropriate in light of Burnham's ongoing disregard for the law, his failure to rehabilitate or be deterred despite numerous prior legal sanctions and the extensive rehabilitative opportunities afforded him, and the danger he presents to the community. Burnham has failed to establish an abuse of sentencing discretion.

CONCLUSION

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

DATED this 10th day of March, 2020.

/s/ John c. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of March, 2020, 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/ John c. McKinney
JOHN C. McKINNEY
Deputy Attorney General

JCM/dd