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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46987-2019
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-19-2215
v.)	
)	
MARSHALL L. BURNHAM,)	
)	APPELLANT'S BRIEF
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Marshall L. Burnham was convicted of felony driving under the influence of alcohol (DUI) following a negotiated guilty plea, and was sentenced to a unified term of ten years, with four-and-a-half years fixed. He appeals from his judgment of conviction, challenging his sentence as an abuse of discretion.

Statement of Facts and Course of Proceedings

On January 15, 2019, Mr. Burnham drove his vehicle while under the influence of alcohol, was involved in an accident causing damage to another vehicle, left the scene of the

accident, and ultimately entered a nearby house and hid in the crawlspace to avoid being apprehended by the police. (Presentence Investigation Report (“PSI”), pp.1-2; R., p.50.) Mr. Burnham’s blood alcohol level was measured at .252. (Tr., p.17, Ls.2-4; R., p.50; PSI, p.137.)

Mr. Burnham was charged by Information with felony DUI, having one prior felony DUI conviction within fifteen years; misdemeanor resisting and/or obstructing an officer; and misdemeanor leaving the scene of an accident involving vehicle damage. (R., pp.36-37.) He entered into an agreement with the State pursuant to which he agreed to plead guilty to the DUI charge, and the State agreed to dismiss the misdemeanor charges and recommend a unified sentence of ten years, with three years fixed, to be served concurrently with the sentence imposed in a Canyon County case for which he was on probation at the time. (Tr., p.5, Ls.10-17, p.12, Ls.2-4; R., pp.42-52.) The district court accepted Mr. Burnham’s guilty plea, and sentenced him to a unified term of ten years, with four and one-half years fixed. (Tr., p.17, Ls.11-18, p.28, Ls.7-12.) The judgment of conviction was entered on April 16, 2019, and Mr. Burnham filed a timely notice of appeal on April 24, 2019. (R., pp.59-66.)

Mr. Burnham filed an Idaho Criminal Rule 35 motion for reconsideration of sentence on July 26, 2019. (R., pp.69-71.) The district court denied the motion on August 6, 2019, without holding a hearing.¹

¹ Mr. Burnham does not challenge the district court’s denial of his Rule 35 motion on appeal in light of *State v. Huffman*, 144 Idaho 201, 203 (2006).

ISSUE

Did the district court abuse its discretion when it sentenced Mr. Burnham for felony DUI to a unified term of ten years, with four and one-half years fixed, considering the mitigating factors that exist in this case?

ARGUMENT

Considering The Mitigating Factors That Exist In This Case, The District Court Abused Its Discretion When It Sentenced Mr. Burnham For Felony DUI To A Unified Term Of Ten Years, With Four And One-Half Years Fixed

This Court reviews sentencing decision for an abuse of discretion. *State v. McIntosh*, 160 Idaho 1, 8 (2016). This Court considers whether the trial court: “(1) correctly perceived the issue as one of discretion; (2) acted within the 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 an exercise of reason.” *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018) (citation omitted). Generally, when appealing a sentence as an abuse of discretion, the appellant “must establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment.” *State v. Varie*, 135 Idaho 848, 856 (2001) (citation omitted). Considering the objectives of criminal punishment, and the mitigating factors that exist in this case, the sentence the district court imposed on Mr. Burnham represents an abuse of discretion.

The first objective of criminal punishment is protection of society. *See Varie*, 135 Idaho at 856. While Mr. Burnham recognizes his conduct of drinking and driving poses an extreme risk to the public, he believes the best way to protect the public is to design a sentence that fosters his recovery. Mr. Burnham told the presentence investigator he did not need to be locked up, but needed more treatment as he “let alcohol get back into [his] life.” (PSI, p.4.) If Mr. Burnham is able to abstain from using alcohol, he will not pose any risk to himself or the public.

The second objective of criminal punishment is deterrence of the individual and the public generally. *See Varie*, 135 Idaho at 856. Mr. Burnham does need to be deterred from drinking and driving. Rather, he needs to be given the tools to overcome his addiction to alcohol, recognizing that there are always ups and downs during recovery.

The third objective of criminal punishment is the possibility of rehabilitation. *See Varie*, 135 Idaho at 856. This should have been the most important objective guiding the district court's sentencing decision, but it was not furthered by the sentence the district court imposed. Mr. Burnham suffers from mental health issues, having previously been diagnosed with bipolar disorder, depression, anxiety, and ADHD. (PSI, pp.81, 86.) But most fundamentally, Mr. Burnham is an alcoholic in need of treatment. (Tr., p.24, Ls.8-16.) Mr. Burnham began drinking alcohol at age 14 and was drinking up to one liter of Vodka per day prior to committing the instant offense. (PSI, p.83.) Mr. Burnham was assessed in March 2019 as being highly motivated for treatment, and was recommended for intensive outpatient treatment. (PSI, pp.88, 92.) Rather than simply locking Mr. Burnham up, the district court should have fashioned a sentence that furthered his rehabilitation.

The fourth objective of criminal punishment is retribution for wrongdoing. *See Varie*, 135 Idaho at 856. This objective may have played a role in the court's sentencing decision, but it does not justify the sentence the district court imposed. Mr. Burnham recognizes his need for treatment, and apologized to the district court at sentencing. (Tr., p.25, Ls.7-8.) He explained:

I know what I did was wrong. I'm sorry for jeopardizing people's lives by my actions. I fell off my medication and I was self-medicating with the alcohol, which I knew was wrong. I was sober for a year and a half before that and I did really well I would just like a chance to get some treatment and be able to get back with my kids and my family.

(Tr., p.25, Ls.8-16.) Mr. Burnham struggles with alcohol addiction, but his criminal conduct should not result in him being imprisoned for up to ten years, when he has the chance to turn his life around, and become a good father and a contributing member of society.

Considering the four objectives of criminal punishment, and the mitigating factors that exist in this case, the district court abused its discretion when it sentenced Mr. Burnham to a unified term of ten years, with four and one-half years fixed. Counsel for Mr. Burnham recommended a unified sentence of ten years, with two years fixed, with the district court retaining jurisdiction so that Mr. Burnham could participate in a rider program. (Tr., p.24, Ls.24-25.) This would have been a reasonable and appropriate sentence considering the objectives of criminal punishment.

CONCLUSION

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

DATED this 17th day of December, 2019.

/s/ Andrea W. Reynolds
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

AWR/eas