

Uldaho Law

## Digital Commons @ Uldaho Law

---

Not Reported

Idaho Supreme Court Records & Briefs

---

3-31-2020

### State v. Fitschen Appellant's Brief Dckt. 47419

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/not\\_reported](https://digitalcommons.law.uidaho.edu/not_reported)

---

#### Recommended Citation

"State v. Fitschen Appellant's Brief Dckt. 47419" (2020). *Not Reported*. 6345.  
[https://digitalcommons.law.uidaho.edu/not\\_reported/6345](https://digitalcommons.law.uidaho.edu/not_reported/6345)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

ERIC D. FREDERICKSEN  
State Appellate Public Defender  
I.S.B. #6555

R. JONATHAN SHIRTS  
Deputy State Appellate Public Defender  
I.S.B. #10585  
322 E. Front Street, Suite 570  
Boise, Idaho 83702  
Phone: (208) 334-2712  
Fax: (208) 334-2985  
E-mail: documents@sapd.state.id.us

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 47419-2019
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR01-18-59187
v.	)	
	)	
BRANWYN FITSCHEN,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Branwyn Fitschen pleaded guilty to Possession of a Controlled Substance and received a unified sentence of five years, with two years fixed, and the court retained jurisdiction. Mindful that Ms. Fitschen asked for probation at sentencing, and that she has since been released on probation, she appeals and argues that the court abused its discretion by imposing an excessive sentence.

## Statement of the Facts & Course of Proceedings

In mid-December 2018, Ms. Fitschen was pulled over by a Meridian police officer for driving a vehicle with an expired registration. (PSI, p.3.) The officer discovered active warrants for Ms. Fitschen out of both Valley County and Ada County. (PSI, p.116.) After detaining her, a drug detection canine unit alerted on the vehicle. (PSI, p.116.) After a search of the vehicle revealed methamphetamine, Ms. Fitschen was arrested. (PSI, p.116.) A complaint was filed with charges of possession of methamphetamine and possession of drug paraphernalia. (R., pp.9-10.) Ms. Fitschen was released after posting bond. (R., p.19.) Ms. Fitschen waived her preliminary hearing and was bound over to the district court on those charges. (R., pp.22-23.) Ms. Fitschen then began the process of applying to a problem-solving court. (R., p.24.)

An Information was filed charging Ms. Fitschen with the same charges contained in the complaint. (R., pp.30-31 Ms. Fitschen pled guilty to the charge of possession of a controlled substance, and in exchange for her plea, the State would dismiss the other charge and recommend probation with an underlying sentence of five years, with two years fixed. (R., p.82; *see also* Tr., p.6, Ls.20-23.) At sentencing, was freed from its sentencing recommendation. (Tr., p.23, Ls.12-20.) The State asked “for a sentence of two years fixed followed by five years indeterminate, for a total of seven years. And the State is asking the Court to retain jurisdiction.” (Tr., p.23, Ls.21-25.) Ms. Fitschen asked for a sentence of four years, with one year fixed, and for that sentence to be suspended and for her to be placed on probation for four years. (Tr., p.34, Ls.16-21.) Ms. Fitschen was sentenced to a unified term of five years, with two years fixed, and

the court retaining jurisdiction. (R., p.111.) A Judgment of Conviction was entered. (R., pp.113-15.) Ms. Fitschen timely appealed from the Judgment of Conviction. (R., pp.120-21.)<sup>1</sup>

### ISSUE

Did the district court abuse its discretion by failing to place Ms. Fitschen on probation and instead imposing a unified sentence of five years, with two years fixed, with the court retaining jurisdiction, following her plea of guilty to possession of a controlled substance?

### ARGUMENT

#### The District Court Abused Its Discretion When It Failed To Place Ms. Fitschen On Probation And Instead Imposed A Unified Sentence Of Five Years, With Two Years Fixed, With The Court Retaining Jurisdiction, Following Her Plea Of Guilty To Possession Of A Controlled Substance

#### A. Introduction

“A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. A case is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome.” *State v. Manzanares*, 152 Idaho 410, 419 (2012) (citation omitted). Here, the district court retained jurisdiction after sentencing Ms. Fitschen. (R., pp.113-15.) Ms. Fitschen has since been placed on probation after the rider.<sup>2</sup> Mindful of the mootness doctrine, and that Ms. Fitschen was placed on probation after the rider, she maintains the district court erred by imposing an excessive sentence.

---

<sup>1</sup> Ms. Fitschen filed a Motion for Reduction of Sentence which was denied by the district court. (See iCourt.) However, she does not appeal that denial as it is moot given her release on probation.

<sup>2</sup> iCourt reflects that on March 25, 2020, Ms. Fitschen was placed on probation for five years, retroactive to her sentencing date. (Order Suspending Sentence After Retained Jurisdiction And Order of Probation, dated March 25, 2020).

B. Standard Of Review

A court's decisions at sentencing are generally reviewed for an abuse of discretion. *State v. Toohill*, 103 Idaho 565, 567 (Ct. App. 1982) (The Idaho "Supreme Court has applied a general standard of "clear abuse of discretion" to appellate review of sentencing decisions" (citing *State v. Ogata*, 95 Idaho 309, 508 P.2d 141 (1973))).

When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of *four* essentials. 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) (emphasis in original). "However, in exercising that discretion, reasonableness is a fundamental requirement." *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982) (citing *State v. Dillon*, 100 Idaho 723, 604 P.2d 737 (1979)).

C. The District Court Abused Its Discretion By Imposing An Excessive Sentence

Ms. Fitschen asserts the district court imposed an excessive sentence by not adequately considering mitigating evidence concerning her mental health and drug addiction, lack of criminal history, good character, family support, employability and positive work history, and remorse and willingness for treatment. *State v. Strand*, 137 Idaho 457, 460 (2002) (noting that when reviewing a sentence, Idaho's appellate courts will "review the record on appeal, having due regard for the nature of the offense, the character of the offender, and the protection of the public interest"); *State v. Oliver*, 144 Idaho 722, 726 (2007) (same).

"[I]f mental condition is a significant factor," a trial court is required to consider the defendant's mental illness using "factors listed in I.C. § 19-2523." *Hollon v. State*, 132 Idaho 573, 581 (1999); *see also State v. Odiaga*, 125 Idaho 384, 391-92 (1994) ("Idaho Code § 19-

2523, which requires that the trial court consider the defendant's mental illness as a sentencing factor, was an integral part of the legislature's repeal of mental condition as a defense.” “The sentencing court is not required to recite each of the factors listed. The record need only show that the court adequately considered the substance of the factors in arriving at its sentencing decision.” *State v. Strand*, 137 Idaho 457, 461 (2002) (citing *Fenstermaker v. State*, 128 Idaho 285 (Ct.App.1995)). And where a court does not “give proper consideration of the defendant’s [substance abuse] problem, the part it played in causing defendant to commit the crime[, or] the suggested alternatives for treating the problem,” it may be an abuse of discretion. *See State v. Nice*, 103 Idaho 89, 91 (1982).

Here, Ms. Fitschen acknowledges that she has mental health and substance abuse problems and asserts those concerns would have been better addressed in the community. In the guilty plea advisory form, she stated that she had “been diagnosed with a mental health disorder.” (Tr., p.9, Ls.14-19; R., p.85.) At sentencing, counsel for Ms. Fitschen said, “I think that her drug use is very much intertwined with mental health issues. I think she suffers from some pretty significant depression, and I think that it's hand in hand with methamphetamine use.” (Tr., p.29, Ls.21-25.) This was made evident when, shortly after pleading guilty, Ms. Fitschen was admitted to the hospital after attempting suicide. (Tr., p.25, Ls.17-21; PSI, p.13.) The PSI notes that after that attempt, Ms. Fitschen “was diagnosed with major depressive illness, moderate to severe and methamphetamine use disorder, moderate to severe.” (PSI, p.13.) One of the physicians who evaluated her during that time noted that she was “lacking in insight, [was] very concrete, black and white in her thinking and [was] catastrophizing her situation.” (PSI, p.13.) That physician also stated she was “minimizing her drug use and the need for mental health treatment.” (PSI, p.13.)

At sentencing, her attorney discussed that when the public defender's office sees civil commitments for mental health reasons, they were generally for just "two or three days," but that Ms. Fitschen was hospitalized for two weeks. (Tr., p.30, Ls.8-12.) Ms. Fitschen tried to downplay that incident as "a little breakdown," but acknowledged that she "did have some issues, certainly" and stated that she had "been doing better since [she] was released from behavioral health." (Tr., p.36, Ls.19-22.) The court stated, "with your suicide attempt here, I'm quite concerned about you." (Tr., p.39, Ls.23-24.)

Ms. Fitschen also recognizes that throughout her pretrial release, she struggled to comply with the terms of that release, including failing multiple urinalysis tests ("UA's"). (See, e.g., R., pp.103-08 (Affidavit of pretrial case manager detailing problems, including failed UA's).) The state said "she was positive for methamphetamine on -- I count 11 different occasions." (Tr., p.26, Ls.23-25.) She asserts, in the words of her counsel, that "her drug use is very much intertwined with [her] mental health issues." (Tr., p.29, Ls.21-22.) However, instead of allowing her to find inpatient or outpatient treatment in the community for her mental health and substance abuse issues, the court said, "what's going to happen is I'm going to send you on a rider. (Tr., p.39, Ls.24-25.) Ms. Fitschen asserts, mindful of the fact that she is now on probation, that this was an abuse of discretion.

Ms. Fitschen also asserts that the court did not adequately consider her lack of criminal history, general good character, and familial support when it retained jurisdiction. See *State v. Caudill*, 109 Idaho 222, 224 (1985) ("The sentencing judge found several mitigating factors, including Caudill's youthful age, prior nonviolent nature, lack of prior criminal record, potential for rehabilitation, and remorse."); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991) (reducing the defendant's aggregate sentence based, in part, on the "other positive attributes of his

character”); *State v. Baiz*, 120 Idaho 292, 293 (Ct. App. 1991) (treating the fact that the defendant “had considerable family support and was well liked by his friends” as mitigating, but nevertheless affirming his concurrent fifteen years sentences for two counts of delivery of heroin).

At her change of plea hearing, counsel for Ms. Fitschen said, “she really has no record. She’s 49, Judge, and [only] has a 2016 DUI from Valley County.” (Tr., p.13, Ls.20-23.) At sentencing, the State recognized that this case was Ms. Fitschen’s first felony. (Tr., p.27, Ls.8-10 (“This case . . . is her first felony, so we recognize that”).) Ms. Fitschen has also had people with her in the courtroom at multiple hearings supporting her. (*See* Tr., p.13, Ls.15-16 (“She does have people in her corner. They come to a lot of court dates with her”).) At the change of plea hearing, she had “her sister and friend with her [there] in support of her.” (Tr., p.13, Ls.13-14.) And at sentencing, Ms. Fitschen’s sister and aunt were at the hearing supporting her, and letters from multiple people in support were submitted for the court’s consideration before sentencing. (Tr., p.28, Ls.6-12.) At sentencing, the court said it “appreciate[d] her background,” but still imposed a five-year sentence, with two years fixed, and retained jurisdiction. (Tr., p.37, Ls.18-21.) Ms. Fitschen asserts this was an abuse of discretion.

Ms. Fitschen also asserts that her lengthy job history and educational background were mitigating factors that should have weighed in favor of probation. *See State v. Shideler*, 103 Idaho 593, 595 (1982) (reducing sentence of defendant who, *inter alia*, had been steadily employed, enjoyed his work, and expressed a desire to advance within his company), *State v. Mitchell*, 77 Idaho 115, 119 (1955) (finding that it was error for court to fail to consider, *inter alia*, a defendant’s gainful employment in determining the appropriate sentence); also *State v.*



*Hagedorn*, 129 Idaho 155, 161 (Ct. App. 1996) (approvingly referencing the district court’s consideration of the defendant’s good employment history in mitigation).

Ms. Fitschen graduated “magna cum laude” from Boise State University. (Tr., p.31, Ls.22-23; *see also* PSI, pp.33-36.) At the change of plea hearing, Ms. Fitschen’s counsel told the court, “She’s employed with the Idaho Department of Labor as, I think, a claims examiner. And she’s been there . . . [a]lmost ten years.” (Tr., p.13, L.24 – p.14, L.3.) He also said, “She is wanting to resolve this case in a way that hopefully will preserve her job at the Department of Labor.” (Tr., p.14, Ls.12-14.). At sentencing, Ms. Fitschen told the court that one of her driving goals in asking for probation was the opportunity to possibly “salvage [her] job” with disability determination services. (*See* Tr., p.35, L.22 – p.36, L.14.) The court said, “Ms. Fitschen, I appreciate you have a good job. I appreciate that was a very important thing for you to like to keep. I appreciate your background.” (Tr., p.37, Ls.18-21.) However, the court still imposed sentence and retained jurisdiction, causing Ms. Fitschen to tell the court, “I’m going to lose my house, and the opportunity I had to salvage my employment is out the window.” (Tr., p.42, Ls.5-7.) Accordingly, Ms. Fitschen asserts the court’s sentence was an abuse of discretion.

Ms. Fitschen also asserts the court did not fully consider her acceptance of responsibility for her actions, nor her amenability to treatment. *See State v. Shideler*, 103 Idaho 593, 595, 651 P.2d 527, 529 (1982) (reducing indeterminate portion of sentence based on, among other factors, defendant’s voluntary drug addiction rehabilitation and acceptance of responsibility for his actions); *State v. Coffin*, 146 Idaho 166, 171 (Ct. App. 2008) (“Coffin points to several mitigating circumstances [including] his willingness to seek treatment for an alcohol problem”).

Here, Ms. Fitschen acknowledged her drug addiction problem and expressed a desire to find treatment for that problem. (Tr., p.37, Ls.4-7 (“I know that I do have problems, and I'm

working on getting those addressed and facing them and acknowledging that they are problems”).) Yet despite her acknowledgements, the court still imposed sentence after discussing its experience as a drug court judge and what it considered appropriate reactions for individuals with drug addiction problems. (Tr., p.38, L.19 – p.39, L.8.) When acknowledging Ms. Fitschen’s desire to “get on top of this [problem] herself,” the court said it had seen that same desire “in a lot of people, but that’s not proved true.” (Tr., p.39, Ls.10-13.) The court said that because she wasn’t successful on pretrial release, it was “quite concerned about” her and didn’t believe she would be successful on probation. (See Tr., p.39, L.13 – p.40, L.5.) Ms. Fitschen asserts those statements show the court did not adequately consider her acceptance of responsibility for her actions, nor her desire to treat her drug addiction, thus abusing its discretion.

#### CONCLUSION

Mindful of the fact that she has been released on probation, Ms. Fitschen respectfully requests that this Court reduce her sentence as it deems appropriate.

DATED this 31<sup>st</sup> day of March, 2020.

/s/ R. Jonathon Shirts  
R. JONATHAN SHIRTS  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31<sup>st</sup> day of March, 2020, 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

RJS/eas