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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 47419-2019
Plaintiff-Respondent,)	
)	Ada County Case No. CR01-18-59187
v.)	
)	
BRANWYN FITSCHEN,)	RESPONDENT’S BRIEF
)	
Defendant-Appellant.)	
_____)	

Has Fitschen failed to show that the district court abused its discretion by imposing two years fixed with three years indeterminate and retaining jurisdiction following her plea of guilty to felony possession of methamphetamine?

ARGUMENT

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

A. Introduction

In December 2018, law enforcement officers stopped Branwyn Fitschen in her vehicle for expired registration. (PSI, p. 117.) A record search revealed that Fitschen had an active warrant.

(PSI, p. 117.) A drug detection dog alerted on the vehicle. (PSI, p. 117.) Officers found 3.6 grams of methamphetamine and a glass pipe. (PSI, p. 117.)

The state charged Fitschen with felony possession of methamphetamine and misdemeanor possession of paraphernalia. (R., pp. 30-31.) Fitschen was placed on supervised pre-trial release. (R., p. 13.) During that time, she missed scheduled urinalysis tests, provided diluted samples, and tested positive for drugs on multiples occasions. (R., pp. 42-44, 57-60, 66-70, 93-97, 103-08.) Pursuant to a plea agreement,¹ Fitschen pled guilty to felony possession of methamphetamine and the state dismissed the misdemeanor paraphernalia charge. (R., pp. 83-91; Tr., p. 6, L. 17 – p. 7, L. 9; p. 11, Ls. 9-17.) The district court sentenced Fitschen to two years fixed and three years indeterminate, and retained jurisdiction. (R., pp. 113-15.) Fitschen filed a timely notice of appeal. (R., pp. 120-21.)

B. Standard Of Review

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). In evaluating whether a lower court abused its discretion, the appellate court conducts a four-part inquiry, which asks "whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within

¹ As part of the plea agreement, the state agreed to recommend probation. (See Tr., p. 6, Ls. 20-22.) However, the state was released from that obligation by Fitschen's positive drug tests while on pre-trial release. (See Tr., p. 23, Ls. 12-19.)

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.” State v. Herrera, 164 Idaho 261, 272, 429 P.3d 149, 160 (2018) (citing Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

C. Fitschen Has Shown No Abuse Of The District Court’s Sentencing Discretion

“Mindful” that she recommended a sentence of probation and has since been placed on probation following the completion of a rider, Fitschen argues that her sentence is excessive. (See Appellant’s brief, p. 3.) The issue Fitschen raises is moot because, following the period of retained jurisdiction, the district court placed Fitschen on probation. “An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief.” State v. Barclay, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010) (quotations and citations omitted). Although the district court retained jurisdiction, it subsequently placed Fitschen on probation at the conclusion of the retained jurisdiction program.² Thus, even if this Court were to determine that the district court erred by retaining jurisdiction, such a determination would have no practical effect upon the outcome of the case because the district court already placed Fitschen on probation. Fitschen’s claim is therefore moot and this Court must decline to consider it.

If this Court nonetheless addresses the merits of her argument that her sentence is excessive, Fitschen has failed to show that the district court abused its sentencing discretion. To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive. State v. Farwell, 144 Idaho 732,

² Contemporaneously with the filing of this brief, the state is filing a motion to augment the appellate record with a file-stamped copy of the Order Suspending Sentence After Retained Jurisdiction And Order Of Probation, filed in the district court on March 25, 2020. For this Court’s convenience, a copy of the cited document is attached to this brief as Appendix A.

736, 170 P.3d 397, 401 (2007). In determining whether the appellant met this burden, the court considers the entire sentence but presumes that the determinate portion will be the period of actual incarceration. State v. Bailey, 161 Idaho 887, 895, 392 P.3d 1228, 1236 (2017) (citing Oliver, 144 Idaho at 726, 170 P.3d at 391). “When reviewing the reasonableness of a sentence, this Court conducts 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.” State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2015). To establish that the sentence was excessive, the appellant must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Farwell, 144 Idaho at 736, 170 P.3d at 401. “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” State v. Matthews, 164 Idaho 605, 608, 434 P.3d 209, 212 (2018) (quoting State v. Stevens, 146 Idaho 139, 148-49, 191 P.3d 217, 226-27 (2008)).

The district court’s decision to retain jurisdiction was reasonable in light of Fitschen’s performance on pre-trial release. Between December 2018 and June 2019, Fitschen demonstrated consistent drug use. (See R., pp. 103-08.) Fitschen tested positive for amphetamines and/or methamphetamine on December 20, February 20, February 28, March 19, March 29, April 25, May 20, May 28, May 30, June 4, June 11, June 20, and June 27. (R., pp. 103-08.) Several times, Fitschen denied that she had used, despite her positive tests and even ordered confirmation testing, which confirmed the presence of controlled substances in her sample. (R., pp. 104-08.) In addition to the positive tests, Fitschen provided diluted samples or failed to show up for scheduled testing on several occasions. (R., pp. 104-06.)

At the time Fitschen entered her guilty plea, the district court expressed concerns about her behavior on pre-trial release and urged her to make active efforts in treatment. (See Tr., p. 17, L. 22 – p. 21, L. 3.) The district court told her plainly that any positive tests in the time between the entry of plea and her sentencing would signal to the court that “treatment is not working.” (Tr., p. 21, Ls. 4-9.) Following her June 5th entry of plea, Fitschen tested positive on June 11th, 20th, and 27th. (R., pp. 107-08, 110.) On July 3, the date set for a hearing on the state’s motion to revoke bond, Fitschen was hospitalized following an attempted suicide by drug overdose. (R., pp. 99-101, 110; PSI, p. 13.) The district court reasonably determined that Fitschen’s repeated drug use while being monitored on pre-trial release demonstrated both that she would not be successful on probation and that she would benefit from more structured treatment.

Additionally, Fitschen’s attitude and apparent unwillingness or inability to recognize the severity of her substance abuse issues further support the district court’s decision to retain jurisdiction. The PSI noted that Fitschen had “a flippant attitude” and “did not assume responsibility for her actions.” (PSI, p. 18.) In her description of what happened in this case, Fitschen said she pled guilty but it “felt like a lie of sorts, but was just tired of dealing with the stress.” (PSI, p. 4.) Even after pleading guilty, Fitschen was still “not convinced she needs substance abuse treatment.” (PSI, p. 15.) Fitschen “appears to minimize her drug addiction. She does not seem convinced she has a drug problem despite her continued use of methamphetamine while pending in the instant offense and while released on Pretrial Services.” (PSI, p. 19.) The PSI noted that Fitschen’s minimization of the situation and failure to disclose information shows “a barrier to rehabilitation.” (PSI, p.19.) Fitschen “is in need of structure and professional assistance” and a period of prolonged incarceration may provide her with the time and resources to address and treat her issues. (PSI, p. 19.) The PSI recommended the district court retain

jurisdiction, because it “has the most potential to assist the defendant in rehabilitation and sustained change.” (PSI, p. 19.) The district court reasonably determined that a sentence of two years fixed with three years indeterminate and retained jurisdiction was necessary to accomplish the objectives of sentencing.

Fitschen argues the sentence is excessive in light of mitigating factors, including “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.” (Appellant’s brief, pp. 4-9.) The district court was aware of and considered those factors. (See Tr., p. 28, L. 6 – p. 34, L. 8; p. 37, Ls. 18-21.) However, based on her failure on pre-trial release, the district court did not “have a lot of confidence on [Fitschen’s] success on probation” and expressed concern about her well-being, given her suicide attempt. (Tr., p. 39, Ls. 21-24.) After considering the mitigating factors along with Fitschen’s inability to abstain from drug use while being monitored by pre-trial services, the district court agreed with the PSI’s recommendation that retained jurisdiction was “the best hope for [Fitschen] going forward.” (Tr., p. 39, L. 21 – p. 40, L. 1; PSI, p. 19.) The district court did not abuse its discretion when it sentenced Fitschen to two years fixed and three years indeterminate, and retained jurisdiction. (Tr., p. 39, L. 24 – p. 40, L. 21.)

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 28th day of April, 2020.

/s/ Kacey L. Jones
KACEY L. JONES
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of April, 2020, served a true and correct copy of the foregoing RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

R. JONATHAN SHIRTS
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Kacey L. Jones
KACEY L. JONES
Deputy Attorney General

ATTACHMENT A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,

Plaintiff,

vs.

BRANWYN FITSCHEN,



Defendant.

Case No. CR01-18-59187

ORDER SUSPENDING SENTENCE
AFTER RETAINED JURISDICTION
AND ORDER OF PROBATION

On August 13, 2019, the defendant, BRANWYN FITSCHEN, was adjudged guilty in the District Court of the Fourth Judicial District, in and for the County of Ada, of the crime of I. POSSESSION OF A CONTROLLED SUBSTANCE, FELONY, I.C. §37-2732(c), and was committed to the custody of the State of Idaho Board of Correction for an aggregate term of five (5) years, with the first two (2) years of said term to be FIXED, and the remaining three (3) years of said term to be INDETERMINATE. The Court retained jurisdiction for a period of time not to exceed 365 days pursuant to I.C. § 19-2601(4).

On March 25, 2020, J. Matthew Haynes, Deputy Prosecuting Attorney for the County of Ada, State of Idaho, and the defendant, BRANWYN FITSCHEN, with her attorney, Jonathan Loschi, appeared before this Court for further disposition following the period of retained jurisdiction.

The District Court, having ascertained the desirability of suspending execution of judgment and placing the defendant on probation for the balance of said sentence;

1 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that sentence is hereby
2 suspended for the balance of the five (5) year period, and the defendant is placed on probation
3 for **five (5) years**, effective August 13, 2019, upon the following conditions, to-wit:

4 A. That probation is granted to and accepted by the probationer, subject to all its terms
5 and conditions and with the understanding that the Court may at any time, in case of the
6 violation of the terms of the probation, cause the probationer to be returned to the Court for
7 imposition of sentence as prescribed by law or any other punishment as the Court may see fit to
8 hand down.

9 B. That the probationer shall be under the legal custody and control of the Director of
10 Probation and Parole of the State of Idaho and the District Court, with supervised probation
11 and subject to the rules of probation as prescribed by the Board of Correction and the District
12 Court.

13 C. That during said period of probation the said defendant shall not violate any law or
14 ordinance of the United States or any City, State or County therein, wherein a fine or bond
15 forfeiture of more than \$100.00 or a jail term could have been imposed as a penalty.

16 D. Special conditions, to wit:

17 1. Defendant shall enter into and comply with the Idaho Department of
18 Correction's agreement of supervision.

19 2. Defendant shall pay any and all sums set out previously in this case for fines,
20 fees, restitution, and court costs to the Ada County Clerk's Office in reasonable monthly
21 installments as arranged through her probation officer.

22 3. Defendant shall participate in any and all programs of rehabilitation treatment
23 recommended by her probation officer, including but not limited to programs of mental health,
24 substance abuse, criminal thinking errors, anger management and vocational rehabilitation as
25 deemed necessary by the probation officer.

1 4. Defendant has completed a rider and shall take part in any and all programs
recommended in the rider review report.

2 5. During the entire term of probation, the defendant shall maintain steady
3 employment, be actively seeking employment or be enrolled as a full-time student, to the
extent she is physically and mentally able to do so.

4 6. Defendant shall not purchase, carry or have in her possession any firearm(s) or
5 other weapons.

6 7. Defendant shall serve an additional (90) days in the Ada County Jail at the
7 discretion of her probation officer, without prior approval of the Court. The probation officer
8 has the discretion and authority to immediately deliver defendant to the Sheriff for
9 incarceration in the county jail for the purpose of having defendant serve this discretionary
time and the Sheriff shall commit the defendant to serve this time on request of the probation
10 officer without further order from the Court. The probation officer shall immediately file with
the Court a written statement of the reasons defendant has been placed in custody, for review
11 by the Court. The probation officer shall have all options available. *Unless otherwise specified
in this judgment, discretionary jail time may be served as SILD (Sheriff's Inmate Labor Detail)
at the discretion of the probation officer and the Ada County Sheriff's Office.*

12 8. Defendant shall not purchase, possess or consume any alcoholic beverages while
13 on probation.

14 9. Defendant shall not purchase, possess or consume any drug or narcotic unless
15 specifically prescribed by a medical doctor.

16 10. Defendant shall not frequent or work at any establishments where alcohol is the
main source of income.

17 11. Defendant shall not associate with individuals specified by her probation officer.

18 12. Defendant agrees to tests of blood, breath, saliva or urine or other chemical tests
19 for the detection of alcohol and/or drugs at the request of her probation officer, or any law
enforcement officer, to be administered at defendant's own expense.

20 13. Defendant agrees to waive her Fourth Amendment rights applying to search and
21 seizure as provided by the United States Constitution, and to submit to a search by her
22 probation officer or any law enforcement officer of her person, residence, vehicle or other
property upon request. Defendant shall not reside with any person who does not consent to
23 such a search.

24 14. Defendant shall waive her Fifth Amendment rights to the extent that she must
25 answer truthfully all questions of a probation officer reasonably related to compliance or non-
compliance with the conditions of probation.

1 15. Defendant shall waive her Sixth Amendment rights of confrontation insofar as
2 the State may use reliable hearsay evidence at any probation violation hearing.

3 16. Defendant is advised that time spent on probation is not credited against any
4 underlying incarceration (jail time or prison) imposed. Defendant is at risk for imposition of
5 the entire underlying sentence, with credit for any time served which was not imposed as a
6 condition of probation, no matter how long defendant has been on probation, if she violates the
7 terms of probation and the violation should be proved or admitted.

8 E. That the probationer, if placed on probation to a destination outside the State of
9 Idaho, or leaves the confines of the State of Idaho with or without permission of the director of
10 probation and parole, does hereby waive extradition to the State of Idaho and also agrees that
11 the said probationer will not contest any effort by any state to return the probationer to the
12 State of Idaho.

13 Defendant is to pay supervision of probation and parole costs in an amount not to exceed
14 the maximum allowable by I.C. § 20-225.

15 Pursuant to I.C. § 18-309, the defendant shall be given credit for time already served
16 upon the charge specified herein of 230 days. The credit consists of four (4) days served
17 previously (as of 8/13/19) and 226 days on the rider (8/13/19 to 3/25/20).

18 This probation shall expire at midnight on August 13, 2024, unless otherwise ordered by
19 the Court.

20 **NOTICE OF RIGHT TO APPEAL**

21 You, BRANWYN FITSCHEN, are hereby notified that you have the right to appeal
22 this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two
23 (42) days from the entry of this judgment.
24
25

1 You are further notified that you have the right to be represented by an attorney in any
2 appeal, and that if you cannot afford to retain an attorney, one may be appointed at public
3 expense. Further, if you are a needy person, the costs of the appeal may be paid for by the
4 State of Idaho. If you have questions about your appeal rights, you should consult your present
5 attorney.

6 IT IS SO ORDERED.

Signed: 3/25/2020 12:18 PM



8 PETER G. BARTON
9 District Judge

1 This is to certify that I have read or had read to me and fully understand and accept all
2 the conditions, regulations and restrictions under which I am being granted probation. I will
3 abide by and conform to them strictly, and fully understand that my failure to do so may result
4 in the revocation of my probation and commitment to the Board of Correction to serve the
5 sentence originally imposed.
6

7 _____
8 Probationer's Signature
9

10 _____
11 Date of Acceptance
12

13 WITNESSED:

14 _____
15 Probation and Parole Officer
16 State of Idaho
17
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CERTIFICATE OF MAILING

I hereby certify that on the 25 day of March, 2020, I mailed (emailed) a true and correct copy of the foregoing document to:

ADA COUNTY PROSECUTOR'S OFFICE
VIA EMAIL

ADA COUNTY PUBLIC DEFENDER'S OFFICE
VIA EMAIL

PROBATION AND PAROLE
VIA EMAIL

CENTRAL RECORDS
DEPARTMENT OF CORRECTION
ATTN: CCD PROBATION SENTENCING TEAM
VIA EMAIL

PHIL MCGRANE
Clerk of the District Court

Signed: 3/25/2020 01:06 PM

By: *Luigi Abenti*
Deputy Clerk

