

LAWRENCE G. WASDEN
Attorney General
State of Idaho

COLLEEN D. ZAHN
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
Email: ecf@ag.idaho.gov

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 47938-2020
Plaintiff-Respondent,)	
)	
v.)	Twin Falls County Case No.
)	CR42-19-10165
)	
THERON DEAN FISCUS, JR.,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Has Theron Dean Fiscus, Jr. failed to show that the district court abused its discretion by imposing and executing a sentence of five years, with 1.5 years determinate for felony violation of a no contact order?

ARGUMENT

Fiscus Has Failed To Show That The District Court Abused Its Discretion

A. Introduction

Theron Dean Fiscus, Jr. violated a no contact order through tablet video visits with Marisela Gonzalez-Godoy from the Twin Falls County Jail. (PSI, p. 4 (citations to electronic file

named “Supreme Court No. 47938-2020 Theron Dean Fiscus, Jr. Confidential Exhibits.pdf”).) The no contact order referenced case number CR42-19-2908, in which Fiscus had been charged with assault-domestic violence, second offense. (PSI, p. 4.) In one of the video visits, Fiscus told Marisela she needed to come to his sentencing hearing, and say that she needed him home and he learned his lesson. (PSI, p. 4.) In another video visit, Fiscus told Marisela to “change her fucking attitude,” to “shut up,” and called her “psycho” until one of the individuals ended the visit. (PSI, p. 4.) Authorities found that there were over eighty violations of the no contact order, as Fiscus and Marisela communicated through video visits and phone calls. (PSI, p. 5.)

The state charged Fiscus with three counts of felony violation of a no contact order. (R., pp. 13-15.) Fiscus pleaded guilty to one count of violation of a no contact order, and the district court sentenced him to five years, with 1.5 years determinate. (R., pp. 36-38.)

On appeal, Fiscus argues that “his sentence is excessive and unreasonable in light of the circumstances of his case, representing an abuse of the district court’s sentencing discretion.” (Appellant’s brief, p. 1.) Fiscus has failed to show that the district court abused its discretion by imposing a sentence of five years, with 1.5 years determinate, and by denying him probation, or retained jurisdiction.

B. Standard Of Review

“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. Schiermeier, 165 Idaho 447, 451, 447 P.3d 895, 899 (2019) (internal quotations and citations omitted). 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. Id. at 454, 447 P.3d at 902. “A sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion.” Id. (internal quotations omitted). “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 (2019) (citation omitted).

The decision to place a defendant on probation is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. State v. Reed, 163 Idaho 681, 684, 417 P.3d 1007, 1010 (Ct. App. 2018) (citations omitted). Rehabilitation and public safety are dual goals of probation. State v. Le Veque, 164 Idaho 110, 114, 426 P.3d 461, 465 (2018). A decision to deny probation will not be deemed an abuse of discretion if it is consistent with the criteria articulated in I.C. § 19-2521. State v. Reber, 138 Idaho 275, 278, 61 P.3d 632, 635 (Ct. App. 2002) (citing State v. Toohill, 103 Idaho 565, 567, 650 P.2d 707, 709 (Ct. App. 1982)).

The decision whether to retain jurisdiction is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). The primary purpose of a district court retaining jurisdiction is to enable the court to obtain additional information regarding whether the defendant has sufficient rehabilitative potential and is suitable for probation. State v. Jones, 141 Idaho 673, 677, 115 P.3d 764, 768 (Ct. App. 2005). Probation is the ultimate goal of retained jurisdiction. Id. There can be no abuse of discretion if the district court has sufficient evidence before it to conclude that the defendant is not a suitable candidate for probation. Id.

C. Fiscus Has Shown No Abuse Of The District Court's Discretion

The sentence imposed is within the statutory limits of I.C. § 18-920(3). The record shows the district court perceived its discretion, employed the correct legal standards to the issue before it, and acted reasonably and within the scope of its discretion.

At the sentencing hearing, the district court stated that Fiscus has been “given an opportunity for help,” but he “failed,” “dropped out” or “didn’t do what [he was] supposed to.” (01/21/2020 Tr., p. 10, Ls. 2-7.) The district court stated that the “Department of Probation and Parole and PSI recommends a to-serve sentence. She was originally giving [Fiscus] an opportunity to get the county jail sentence if [he] could comply and [Fiscus] got out and didn’t comply and now she’s revoked that and recommending a to-serve sentence.” (01/21/2020 Tr., p. 11, Ls. 11-18.) The district court stated that “[a]ll indications that seems to be the place where [Fiscus is] more—if [he’s] in a confined facility that is the only place [he] really get[s] an opportunity to get the treatment because if [he’s] out on [his] own [he] won’t do it.” (01/21/2020 Tr., p. 11, Ls. 18-23.) The district court noted that Fiscus’ “PSI is a 36 LSI, which [he’s] a very high risk to reoffend. It recommends treatment, which [he was] given treatment where [he] did not complete or [he] failed.” (01/21/2020 Tr., p. 12, Ls. 9-12.) The district court determined that Fiscus has “made no change to [his] criminogenic-thinking behaviors errors. And [he] continued to abide by a criminal code.” (01/21/2020 Tr., p. 12, Ls. 16-18.) Given “the history that exist and a history of effort [Fiscus] had in the past or lack thereof in terms of treatment,” the district court determined that “a secure setting is the most appropriate place for [Fiscus] to get that type of treatment.” (01/21/2020 Tr., p. 13, Ls. 2-6.) The district court stated that the sentence “serves as a deterrent for [Fiscus] or anyone else who might be given an opportunity to go out and continue to use before they come

back. It also gives [Fiscus a chance to get rehabilitative treatment.” (01/21/2020 Tr., p. 13, L. 22 – p. 14, L. 1.)

Fiscus argues that the mitigating factors—mental health and substance abuse issues—show an abuse of discretion, and that the “district court should have granted probation or retained jurisdiction.” (Appellant’s brief, pp. 5-6.) Fiscus’ argument does not show an abuse of discretion.

Fiscus’ extensive criminal history consists of numerous felonies, and opportunities on probation and retained jurisdiction. (PSI, pp. 6-11.) As the district court noted, Fiscus’ LSI score is 36, and he was on misdemeanor probation prior to the instant offense. (PSI, pp. 22-23.) The presentence investigator recommended that Fiscus be “sentenced to the physical custody of the Idaho Department of Correction.” (PSI, p. 23.) Fiscus had also been charged with two counts of violation of a no contact order just months before the instant offense. (PSI, p. 10.)

Fiscus’ criminal history, failure on alternative treatment, and repeated incompliance with the no contact order shows that Fiscus does not take the criminal justice system seriously, and that he’s not amenable to community supervision or retained jurisdiction. The seriousness of the instant offense, Fiscus’ risk to reoffend, and his inability to reform through probation and retained jurisdiction shows that the imposition and execution of the sentence provides protection to the community, as well as proper punishment and deterrence. Fiscus has failed to show that the district court abused its discretion by sentencing him to five years, with 1.5 years determinate for felony violation of a no contact order.

CONCLUSION

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

DATED this 28th day of December, 2020.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

ZACHARI S. HALLETT
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of December, 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:

KIMBERLY A. COSTER
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General