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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 48047-2020 & 48048-2020
Plaintiff-Respondent,)	
)	SHOSHONE COUNTY NOS. CR40-19-2086
v.)	& CR40-20-179
)	
BRETT ALLEN SUCKOW,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Brett Suckow pled guilty to one count of possession of methamphetamine. He received a unified sentence of seven years, with three years fixed, but the district court suspended the sentence and placed Mr. Suckow on probation for two years. After a probation violation, including a new charge for felony DUI, the district court revoked his probation. On the new DUI conviction, the district court sentenced Mr. Sockow to seven years, with three years fixed, to be served concurrently with his possession of methamphetamine sentence.

On appeal, Mr. Suckow contends that the DUI sentence represents an abuse of the district court's discretion, as it is excessive given any view of the facts. He further contends that the district court abused its discretion in failing to reduce his sentences in light of the additional information submitted in conjunction with his Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motions.

Statement of the Facts & Course of Proceedings

On December 16, 2019, law enforcement observed that Brett Suckow's car had expired registration and pulled him over. (R.48047, p.11.) Mr. Suckow was arrested on an active arrest warrant. (R.48047, p.11.) Mr. Suckow was searched incident to his arrest, an officer located four small baggies containing a substance which tested presumptively positive for methamphetamine. (R.48047, p.11.)

Based on these facts, Mr. Suckow was charged by Information with one count of felony possession of a controlled substance. (R.48047, pp.50-52.) Pursuant to a plea agreement, Mr. Suckow pled guilty as charged. (R.48047, pp.53-54.) Mr. Suckow was sentenced to seven years, with three years fixed. (R.48047, pp.54-62.) The district court suspended the sentence and placed Mr. Suckow on probation for two years. (R.48047, pp.55-56.)

One month later, the State filed a report of probation violation, in which it alleged that Mr. Suckow violated the terms and conditions of his probation by committing the crimes of felony DUI and misdemeanor domestic battery. (R.48047, pp.67-87.) In the DUI case (Supreme Court No. 48048-2020), Mr. Suckow was in a disagreement with his girlfriend. (R.48047,

pp.81-82; Presentence Investigation Report (*hereinafter*, PSI),¹ p.4.) She called law enforcement alleging Mr. Suckow chest-bumped her and pulled her hair. (R.48047, p.81; PSI, p.4.) When law enforcement arrived at the house, they saw Mr. Suckow driving an ATV. (R.48047, pp.81-82; PSI, pp.4, 6.) Officers smelled the odor of alcohol and believed Mr. Suckow was impaired. (R.48047, pp.81-82; PSI, pp.4-5.) An analysis of Mr. Suckow's breath resulted in a BAC of .130/.128. (R.48047, p.83; PSI, p.6.) He was charged by Information with felony DUI and misdemeanor domestic battery. (R.48048, pp.79-80.)

The two cases were consolidated and, pursuant to a plea agreement,² Mr. Suckow pled guilty as charged to the DUI and admitted to violating a terms and condition of his probation in the methamphetamine case. (3/16/20 Tr., p.7, Ls.19-22; p.8, Ls.7-9; R.48047, p.95; R.48048, p.81.)

At the sentencing/disposition hearing, the State asked the district court to sentence Mr. Suckow to a unified sentence of seven years, with three years fixed, for the DUI conviction. (5/11/20 Tr., p.12, Ls.2-8.) The State asked the district court to revoke Mr. Suckow's probation on the methamphetamine case. (5/11/20 Tr., p.12, Ls.4-6.) Mr. Suckow's counsel asked the district court to sentence him to probation, or to retain jurisdiction. (5/11/20 Tr., p.13, L.23 – p.14, L.20.) Mr. Suckow was sentenced to seven years, with three years fixed, for the DUI case,

¹ Appellant's use of the designation "PSI" includes the packet of documents grouped with the electronic copy of the PSI, and the page numbers cited shall refer to the corresponding page of the electronic file.

² The terms of the plea agreement required Mr. Suckow to waive his "appeal as of right as to conviction and sentence." (R.48048, p.82.) However, Mr. Suckow apparently did not realize he was waiving these rights as the plea advisory form indicated Mr. Suckow was not waiving his right to appeal his judgment of conviction or his right to appeal his sentence. (R.48048, p.86.) The district court did not address the discrepancy at the change of plea hearing. (*See* 3/16/20 Tr.)

and his probation was revoked in the methamphetamine case. (5/11/20 Tr., p.18, Ls.7-15; R.48047, pp.97-99; R.48048, pp.96-101.)

Mr. Suckow then filed timely Rule 35 motions asking the district court to reconsider the sentences. (R.48047, pp.100-102; R.48048, pp.105-07.) The State filed an objection to Mr. Suckow's Rule 35 motions for leniency. (R.48047, pp.103-04; R.48048, pp.108-09.) The district court denied Mr. Suckow's Rule 35 motions after a hearing. (7/20/20 Tr., p.11, Ls.3-4; R.48047, pp.115-17; R.48048, pp.120-22.) Mr. Suckow filed a notice of appeal timely from the judgments of conviction and the district court's orders denying his Rule 35 motions. (R.48047, pp.105-08; R.48048, pp.110-13.)

ISSUES

- I. Did the district court abuse its discretion when it imposed a unified sentence of seven years, with three years fixed, upon Mr. Suckow following his plea of guilty to felony DUI?
- II. Did the district court abuse its discretion when it denied Mr. Suckow's Idaho Criminal Rule 35 Motions?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Seven Years, With Three Years Fixed, Upon Mr. Suckow Following His Plea Of Guilty To Felony DUI

Mr. Suckow asserts that, given any view of the facts, his unified sentence of seven years, with three years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct 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. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982). In

reviewing a trial court's decision for an abuse of discretion, the relevant inquiry regards four factors:

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).

Mr. Suckow does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show the district court abused its discretion by failing to reach its decision by the exercise of reason, Mr. Suckow must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

In light of the mitigating factors present in this case, Mr. Suckow's sentence is excessive considering any view of the facts.

Mr. Suckow has been diagnosed with depression, anxiety, and a traumatic brain injury (TBI). (PSI, pp.16-17.) Mr. Suckow suffered the TBI while on the job—he was struck by a tree. (PSI, p.17.) The Idaho Supreme Court has held that the trial court must consider a defendant's mental illness as a factor at sentencing. *Hollon v. State*, 132 Idaho 573, 581 (1999). Mr. Suckow also suffered three back injuries necessitating surgery, injuries sustained during the course and scope of his employment. (PSI, p.17.) Further, Mr. Suckow suffers from serious cardiac problems. (PSI, pp.16-17.) He had heart surgery in 2018 and takes 6-7 daily medications. (PSI, pp.16-17.)

Mr. Suckow is addicted to alcohol. (PSI, pp.6, 18-19.) This case and most of his criminal history can be attributed to his alcohol abuse. (PSI, pp.5-10, 12.) Mr. Suckow would like to stay alcohol-free and indicated that staying sober was a goal. (PSI, pp.18, 20.) The Idaho Supreme Court has held that substance abuse should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982).

Further, Mr. Suckow expressed considerable remorse and accepted responsibility for his actions. (3/16/20 Tr., p.7, L.19 – p.8, L.3; PSI, pp.6, 20.) At his sentencing hearing, Mr. Suckow expressed regret and expressed how sorry he was for his actions. He told the court:

I would like to apologize first and foremost for being back after given an opportunity to be on probation. I do have a substance abuse problem. I would really like another chance at probation. I would like to utilize what they have to offer, the resources they have to offer, and some counseling and some help with these issues.

The last year and a half -- I don't want to make excuses, but there's still a lot of curve balls and I've handled them miserably and I need some help. Just getting through a lot of the things that I've [], and I just need some help with it. And I'd want -- my biggest fear is to die incarcerated, I guess. I don't know my greater fear than that would be to hurt someone. And I've sold my vehicles. And -- insurance to deal with these heart issues that I have. And the last 90 days have given me a chance to reassess my life and not just exist to live, and be a good part of the community and be the positive role model that I need to be to my friends in Montana, and my family, and to society for that matter. I guess I'm just asking for another shot at probation.

(5/11/20 Tr., p.14, L.24 – p.15, L.20.) Idaho recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *Shideler*, 103 Idaho at 595; *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

Based upon the above mitigating factors, Mr. Suckow asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his considerable remorse, substance abuse, and his mental and physical health conditions, it would have imposed a less severe sentence.

II.

The District Court Abused Its Discretion When It Denied Mr. Suckow's Rule 35 Motion For A Sentence Reduction, In Light Of The New Information Offered In Support Of His Rule 35 Motion

Although Mr. Suckow contends that his sentence is excessive in light of the information in front of the district court at the time of his May 11, 2020 sentencing hearing (*see* Part I, *supra*), he asserts that the excessiveness of his sentence is even more apparent in light of the new information submitted in conjunction with Mr. Suckow's Rule 35 motion. Mr. Suckow asserts that the district court's denial of his motion for a sentence modification represents an abuse of discretion.

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.*

In support of his motion for a sentence reduction, Mr. Suckow submitted information regarding his underlying health conditions that make him more vulnerable to becoming extremely ill or dying should he contract COVID-19 while incarcerated during the global pandemic. (7/20/20 Tr., p.5, L.24 – p.6, L.6.) He told the district court that he had heart failure in November of 2018, and his heart has not been doing very well since that time. (7/20/20 Tr., p.5, L.24 – p.6, L.6.) Mr. Suckow expressed concern that he would be unable to finish the three-year sentence due to his increased risk of dying should he contract COVID-19. (7/20/20

Tr., p.4-9.) Mr. Suckow apologized for blowing the opportunity given to him by the court, and said that he was humiliated by his current predicament. (7/20/20 Tr., p.6, Ls.7-13; p.7, Ls.5-8.) He asked the district court to reduce his fixed time. (7/20/20 Tr., p.6, Ls.14-24.) In denying Mr. Suckow's Rule 35 motion, the district court found "that the sentences that were originally imposed are the appropriate sentences." (7/20/20 Tr., p.10, Ls.5-8.) The district court denied Mr. Suckow's Rule 35 motion, finding "As far as the intervening pandemic and how that may or may not affect Mr. Suckow's health, that is somewhat in the realm of speculation. You don't know how this COVID-19 is or is not going to affect anything. And if there are health conditions that need to be addressed, the State has the legal responsibility for addressing them." (7/20/20 Tr., p.10, L.13 – p.11, L.4.)

In light of Mr. Suckow's remorse and additional health conditions placing him at an increased risk of suffering serious or even fatal symptoms of COVID-19, the district court should have reduced his sentences. Based on the foregoing, in addition to the mitigating evidence before the district court at the time of sentencing, it is clear the district court abused its discretion by failing to reduce Mr. Suckow's sentences in response to his Rule 35 motions.

CONCLUSION

Mr. Suckow respectfully requests that this Court reduce his sentences as it deems appropriate.

DATED this 17th day of December, 2020.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December, 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

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

SJC/eas