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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|--------------------------|---|------------------------------------|
| STATE OF IDAHO, |) | |
| |) | NO. 48188-2020 |
| Plaintiff-Respondent, |) | |
| |) | TWIN FALLS COUNTY NO. CR42-19-6711 |
| v. |) | |
| |) | |
| CHRISTOPHER JAY BARSUHN, |) | APPELLANT'S BRIEF |
| |) | |
| Defendant-Appellant. |) | |
| _____ |) | |

STATEMENT OF THE CASE

Nature of the Case

Christopher Barsuhn appeals from his judgment of conviction for felony driving under the influence. After accepting Mr. Barsuhn's guilty plea, the district court sentenced Mr. Barsuhn to a unified sentence of eight years, with three years determinate, and retained jurisdiction. Following entry of his judgment of conviction, Mr. Barsuhn filed an Idaho Criminal Rule 35 motion, which the district court denied. Mr. Barsuhn now appeals. On appeal, he argues the district court abused its discretion twice: when it imposed an excessive sentence and when it denied his Rule 35 motion.

Statement of the Facts & Course of Proceedings

During a tumultuous time in Mr. Barsuhn's life, he was charged with driving under the influence, enhanced to a felony for having two prior DUI conviction within the last ten years. (R., p.16.)¹ Mr. Barsuhn pleaded guilty to the DUI and the enhancement. (Plea Tr.,² p.9, L.2 – p.11, L.8.) After accepting Mr. Barsuhn's guilty plea, the district court ordered a presentence investigation report ("PSI"). (Plea Tr., p.12, Ls.3-6.) Included in the PSI report was a "Referral to Problem Solving Court," conditionally accepting Mr. Barsuhn into DUI Court pending the receipt of his GAIN-1 report. (Conf. Doc., p.2.) The "Referral to Problem Solving Court" further provided that should Mr. Barsuhn participate in DUI Court, it was recommended that his sentence be suspended for three years, with participation in, and successful completion of, DUI Court as a special condition of probation. (Conf. Doc., p.2.) The PSI recommended the district court retain jurisdiction. (Conf. Doc., p.17.) However, this recommendation was made prior to receiving the GAIN-1 report. (Conf. Doc., p.16.) According to the GAIN-I report, Mr. Barsuhn meets the criteria for severe alcohol use disorder. (Conf. Doc., p.28) Further, the GAIN-1 report recommended Level 1 Outpatient Treatment. (Conf. Doc., pp.33, 35.)

At the sentencing hearing, Mr. Barsuhn requested a chance to be placed on probation and to participate in DUI Court, with an underlying unified sentence of six years, with three years determinate. (Sent. Tr., p.14, Ls.2-7.) The State recommended a unified sentence of seven years, with three years determinate, and that the district court retain jurisdiction. (Sent. Tr., p.7, Ls.19-

¹ The State amended both the Complaint and Information, though the only changes were to the case numbers for Mr. Barsuhn's previous DUI charges. (See R., pp.8-9, 15-16, 21-22, 24-25.)

² There are three transcripts in the record. The transcripts titled "20200316 16105" and "20200316 16105 fdc" are two versions of the Change of Plea Hearing. "20200316 16105 fdc" is the corrected version of the Change of Plea Hearing, and references to this transcript will be to "Plea Tr." The transcript titled "20200608 1605" is the Sentencing Hearing and references to this transcript will be to "Sent. Tr."

22.) The district court exceeded both recommendations, sentencing Mr. Barsuhn to a unified sentence of eight years, with three years determinate, and retaining jurisdiction. (Sent. Tr., p.18, Ls.6-10.)

Mr. Barsuhn timely filed a Rule 35 motion, requesting leniency due to his acceptance into an outpatient treatment program and seeking some compassion regarding a very significant dishevelment of his life during the time leading up to the instant offense. (R., pp.115-17.) In his motion, Mr. Barsuhn requested both a reduction in his sentence and to be placed on probation. (R., p.117.) The district court denied Mr. Barsuhn's motion in a brief, five-sentence order. (R., p.119.) Mr. Barsuhn timely appealed from both his judgment of conviction and the district court's order denying his Rule 35 motion. (R., pp.110, 119, 131.)

ISSUES

- I. Whether the district court abused its discretion by imposing an excessive sentence of eight years, with three years determinate, upon Mr. Barsuhn following his guilty plea.
- II. Whether the district court abused its discretion when it denied Mr. Barsuhn's Idaho Criminal Rule 35 Motion for a Reduction of Sentence.

ARGUMENT

I.

The District Court Abused Its Discretion By Imposing An Excessive Sentence Upon Mr. Barsuhn Following His Guilty Plea

Mr. Barsuhn asserts that, given any view of the facts, his unified sentence of eight years, with three years determinate, is excessive. Where a defendant contends his sentence is excessively harsh, the appellate court will independently review the record, taking into consideration the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772 (Ct. App. 1982).

“It is well-established that ‘[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.’” *State v. Pierce*, 150 Idaho 1, 5 (2010) (quoting *State v. Jackson*, 130 Idaho 293, 294 (1997) (alteration in original)). In determining if an abuse of discretion occurred, appellate review centers on 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.” *State v. Bodenbach*, 165 Idaho 577, 591 (2019).

Here, Mr. Barsuhn’s sentence does not exceed the statutory maximum. *See* I.C. § 18-8005(6)(a) (ten year maximum). Accordingly, to show the sentence imposed was unreasonable, Mr. Barsuhn “must show that the sentence, in light of the governing criteria, is excessive under any reasonable view of the facts.” *State v. Strand*, 137 Idaho 457, 460 (2002).

“‘Reasonableness’ of a sentence implies that a term of confinement should be tailored to the purpose for which the sentence is imposed.” *State v. Adamcik*, 152 Idaho 445, 483 (2012) (quoting *State v. Stevens*, 146 Idaho 139, 148 (2008)).

In examining the reasonableness of a sentence, the Court conducts an independent review of the entire record available to the trial court at sentencing, focusing on the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public; (3) possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

Stevens, 146 Idaho at 148. “A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution.” *State v. Delling*, 152 Idaho 122, 132 (2011).

Mr. Barsuhn asserts that, given any view of the facts, his unified sentence of eight years, with three years determinate, is excessive. Mr. Barsuhn was forty-four at the time he was

sentenced. (Conf. Doc., p.28.) Notwithstanding the absence of his father during his life, he has a supportive family. (Conf. Doc., pp.9, 34; Sent. Tr., p.6, L.6 – p.7, L.1.) *See State v. Ball*, 149 Idaho 658, 663–64 (Ct. App. 2010) (family support as mitigating circumstance). He is the father of three, and keeps in good contact with his children. (Conf. Doc., p.12; Sent. Tr., p.7, L.1.) At the time of his sentencing, Mr. Barsuhn was gainfully employed (Sent. Tr., p.7, Ls.2-3) with only positive reviews of his work. (Conf. Doc., p.12.) *See State v. Mitchell*, 77 Idaho 115, 118 (1955) (recognizing gainful employment as a mitigating factor).

Mr. Barsuhn was first exposed to alcohol at [REDACTED], but did not start drinking regularly until his thirties. (Conf. Doc., p.14.) While alcohol use has been an issue in the past, Mr. Barsuhn made efforts to obtain sobriety, and was successful. (Conf., Doc., p.37.) However, Mr. Barsuhn suffered from a heart attack and stroke, and struggled to keep his life on track. (Conf. Doc., p.13.) *See State v. Cobell*, 148 Idaho 349, 356 (Ct. App. 2009) (acknowledging district court's consideration of defendant's health problems as mitigating factor). Like many with substance abuse problems, Mr. Barsuhn relapsed after his health failed and his wife divorced him. (Conf. Doc., pp.7; Sent. Tr., p.10, L.23 – p.11, L.17.) *See State v. Osborn*, 102 Idaho 405, 414 n.5 (1981) (impact of substance abuse as mitigation).

Prior to sentencing, Mr. Barsuhn was conditionally accepted into drug court, pending receipt of his GAIN-1 report. (Conf. Doc., pp.2, 16-17.) His GAIN-1 report revealed that he suffers from severe alcohol use disorder (Conf. Doc., p.28), but has a willingness for treatment and a commitment to sobriety. (Conf. Doc., p.37.) *See State v. Coffin*, 146 Idaho 166, 177 (Ct. App. 2008) (considering, in part, defendant's willingness to seek treatment for an alcohol problem as mitigation). The GAIN-1 report noted that while Mr. Barsuhn “requires monitoring and motivating strategies,” he does not need “a structured milieu program” (Conf. Doc., p.37),

and recommended Mr. Barsuhn participate in Level 1 Outpatient treatment. (Conf. Doc., pp.33, 35; R., pp.115-16.) *See State v. Nice*, 103 Idaho 89, 91 (1982) (alternatives for treating alcoholic problem as proper consideration for mitigation). Although Mr. Barsuhn had a few hiccups during his pretrial release, he worked through them, was successful, and wants nothing more than to get his life back in order. (Sent. Tr., p.13, Ls.1-19, p.8, L.15 – p.9, L.16.)

Mr. Barsuhn contends proper consideration of the mitigating factors warranted probation and a more lenient sentence, especially in light of his acceptance into DUI Court and/or outpatient treatment. Mr. Barsuhn therefore submits the district court did not exercise reason, and thus abused its discretion, by imposing an excessive sentence.

II.

The District Court Abused Its Discretion When It Denied Mr. Barsuhn's Rule 35 Motion For A Reduction Of Sentence Because He Was Accepted Into Outpatient Treatment

Idaho Criminal Rule 35 allows for the reduction or modification of a sentence. *State v. Huffman*, 144 Idaho 201, 203 (2006). If a sentence is within the statutory limits, then the request is a plea for leniency and is reviewed for an abuse of discretion. *Id.* “The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable.” *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). As noted above, in determining if an abuse of discretion occurred, appellate review centers on 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.” *Bodenbach*, 165 Idaho at 591. “When presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently

provided to the district court in support of the Rule 35 motion.” *Huffman*, 144 Idaho at 203. In reviewing a denial of a Rule 35 motion where new information is presented, appellate courts “consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence.” *State v. Carter*, 157 Idaho 900, 903 (Ct. App. 2014).

In support of his Rule 35 motion, Mr. Barsuhn submitted information that the Walker Center would accept Mr. Barsuhn into its outpatient treatment program. (R., pp.115-16.) *See State v. Nice*, 103 Idaho 89, 91 (1982) (alternatives for treating alcoholic problem as proper consideration for mitigation). Even if Mr. Barsuhn’s sentence was not excessive as originally imposed, when this new compelling information is considered alongside the other powerful mitigation evidence already before the district court, it is apparent the district court failed to exercise reason and therefore the district court abused its discretion when it declined to place Mr. Barsuhn on probation. This is especially true in light of the fact that the GAIN-I specifically stated Mr. Barsuhn did not require immersive treatment, but rather needed outpatient treatment. (Conf. Doc., pp.33, 35, 37; R., pp.115-16.) Mr. Barsuhn asserts the district court abused its discretion and should have placed him on probation and allowed him to participate in the outpatient program.

CONCLUSION

Mr. Barsuhn respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing. Alternatively, he requests that the order denying her Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 22nd day of December, 2020.

/s/ Emily M. Joyce
EMILY M. JOYCE
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd 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

EMJ/eas