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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|------------------------|---|---------------------------------|
| STATE OF IDAHO, |) | |
| |) | NO. 47736-2020 |
| Plaintiff-Respondent, |) | |
| |) | MADISON COUNTY NO. CR-2018-1367 |
| v. |) | |
| |) | |
| JESSICA ARLEEN CONSER, |) | APPELLANT'S BRIEF |
| |) | |
| Defendant-Appellant. |) | |
| _____ |) | |

STATEMENT OF THE CASE

Nature of the Case

While experiencing psychosis, Jessica Arleen Conser shot and killed her father. Pursuant to a plea agreement, Ms. Conser pleaded guilty to second-degree murder. The parties stipulated to the district court imposing a unified life sentence, with the parties free to argue as to the fixed term. Ms. Conser recommended that the district court impose a fixed term of seven years, but the district court imposed a fixed term of eighteen years. On appeal, Ms. Conser asserts that the district court abused its discretion when it imposed the fixed term of her sentence.

Statement of the Facts & Course of Proceedings

In 2016, Ms. Conser moved with her two children from California to Butte, Montana. (*See Presentence Report (hereinafter, PSI), p.57.*)¹ She had decided to move closer to her father, Matthew Travao, who had relocated with his second wife to Rexburg. (*See PSI, pp.3, 57.*) Ms. Conser's older child had high-functioning autism and ADHD. (*PSI, p.57.*) After Ms. Conser and the father of her children divorced, the father did not pay child support. (*PSI, p.57.*) She found a job as a certified nursing assistant at a rehab center in Butte. (*See PSI, p.57.*) By the fall of 2017, Ms. Conser had moved to Missoula, Montana, taken out student loans, and started at the University of Montana. (*PSI, pp.57-58.*)

Ms. Conser had suffered from migraine headaches for years. (*PSI, p.58.*) Her mother reported that Ms. Conser complained of headaches after sustaining a head injury in a car accident when she was [REDACTED] (*See PSI, p.60.*) Ms. Conser stated she had lesions in her brain, and reported a history of abnormal MRIs. (*See PSI, p.58.*) She had some medical tests done in Missoula, including MRIs, because of her concern about having multiple sclerosis. (*PSI, p.58.*) Ms. Conser later reported that a doctor had diagnosed her with multiple sclerosis, but it was not a definitive diagnosis. (*PSI, p.58.*) She had a lumbar puncture procedure in July 2017, and the test results were possibly consistent with multiple sclerosis. (*See PSI, pp.286, 336.*)

Attending the University of Montana was very stressful for Ms. Conser. (*PSI, p.61.*) She reported that she was having health problems, including headaches and blindness during migraines at least monthly. (*PSI, p.61.*) During spring break of her second semester, she and her children went to California to visit family. (*PSI, p.58.*) Ms. Conser felt like she could not

¹ All citations to "PSI" refer to the 439-page PDF version of the Presentence Report and its attachments.

remember any of the information from her studies, and she thought she should not finish the semester and instead find a job in California, but her family urged her to go back to school. (*See* PSI, p.58.) She went back to school a week late, and was able to catch up. (PSI, p.58.) At the end of the semester, Mr. Travao came to help Ms. Conser with her children. (PSI, p.58.)

Mr. Travao's second wife later reported that she heard Ms. Conser tell Mr. Travao in spring 2018 that someone was hacking into her computer, getting into her bank account, and threatening to kill her and her children. (*See* PSI, p.62.) Around Easter 2018, Mr. Travao took the children with him back to Rexburg while Ms. Conser finished the semester. (*See* PSI, pp.19, 58.) Mr. Travao's second wife later reported that she and Mr. Travao had concerns about Ms. Conser's accusations, which led them to take the children to live with them. (*See* PSI, p.62.)

In late May 2018, Ms. Conser wanted to figure out whether she was going to complete school, so she went alone to Butte. (*See* PSI, pp.19, 58.) At that time, she was self-medicating with cannabidiol (CBD) oils. (PSI, p.61.) She reported that she became paranoid and thought that her brother and father had sexually and physically abused her. (PSI, p.61.) Mr. Travao's second wife later reported that Ms. Conser, in a conversation with Mr. Travao in late May 2018, accused him of molesting her when she was a child, and/or failing to protect her from being molested by her brother. (*See* PSI, p.62.) Ms. Conser indicated during a psychological evaluation that she knew her father had not abused her at all, but she did recall whether her brother abused her as a child. (*See* PSI, p.61.)

Ms. Conser contacted the National Human Trafficking Hotline about her children. (*See* PSI, p.3.) She reported that her father had drugged and sexually and physically abused her when she was a child. (*See* PSI, p.3.) Ms. Conser also reported that her children were staying with her father, and while she had no information that he was abusing or neglecting them, she was

concerned for their safety given what happened to her. (*See* PSI, p.3.) She indicated that she was homeless, had contacted the children telepathically, and had telepathically learned that her father was accessing her bank accounts and password. (*See* PSI, p.3.) On June 2, 2018, a National Human Trafficking Hotline employee passed information about Ms. Conser's call to Idaho Child Protective Services. (*See* PSI, p.3.) A few days later, Ms. Conser contacted the Butte Police Department to request a welfare check at her father's residence, but it was not clear if they conducted that check. (*See* PSI, p.3.)

On the morning of June 5, 2018, staff in the church that Ms. Conser had attended in Butte found her and her dog sleeping in the church. (*See* PSI, p.63.) Ms. Conser had attended Mass earlier that morning, and the parish priest reported that she appeared to be very troubled. (*See* PSI, pp.63-64.) Church staff asked Ms. Conser to leave the pew where she had been sleeping, and she indicated she was in the church because she wanted to feel safe. (*See* PSI, pp.63-64.)

Later that day, while at a gym in Butte, Ms. Conser began thinking that she was among spiritual beings, and that her father was the devil. (*See* PSI, p.61.) She reported getting a telepathic message from a priest in Butte, telling her that her daughter was in the morgue. (PSI, p.61.) Ms. Conser also reported that she heard the voices of her mother and brother, telling her to shoot her father. (PSI, p.61.) She stated that the voices never gave her a reason to shoot her father. (*See* PSI, p.61.)

Ms. Conser then drove to her father's house in Rexburg, although she later reported she did not remember the ride. (*See* PSI, p.61.) She entered the home and shot her father in the eye. (*See* PSI, pp.3, 61.) Ms. Conser later stated that she remembered the shooting, and remembered saying, "I love you, Daddy." (PSI, p.61.) She reported that she shot Mr. Travao because she thought she had to, but she was not sure why she had to. (*See* PSI, p.61.) She indicated that, at

the time of the shooting, she was thinking that her father had killed her children and that he deserved to die. (*See* PSI, p.61.)

Ms. Conser left the house, and law enforcement, the fire department, and EMTs arrived afterwards. (*See* PSI, p.3.) An ambulance transported Mr. Travao to the hospital, where he died late in the evening on June 5, 2018. (*See* PSI, p.3.) A subsequent autopsy indicated that Mr. Travao had suffered a penetrating intermediate range gunshot wound of the head, with resulting severe skull and brain injuries, leading to his death. (PSI, p.3.)

Officers from the Idaho State Police and Clark County Sheriff's Office found Ms. Conser in Clark County on June 5. (*See* PSI, p.3.) After pulling her over, officers found a pistol under the driver's seat of her vehicle. (*See* PSI, p.3.) Officers arrested Ms. Conser and took her to the Madison County Jail. (*See* PSI, p.3.)

The State filed a Criminal Complaint against Ms. Conser, alleging that she had committed the crime of first-degree murder, with a weapons enhancement. (R., pp.15-17.) Upon Ms. Conser's motion, the magistrate court ordered an Idaho Code § 18-211 competency examination. (R., pp.30, 35-37.) Under the competency evaluation order, John E. Landers, Ph.D, examined Ms. Conser and concluded that she lacked the capacity to understand the proceedings against her, assist in her own defense, and make informed decisions about treatment. (PSI, pp.437-39; *see* R., pp.39-40, 42.) Dr. Landers wrote that Ms. Conser "demonstrates symptoms consistent with Schizophrenia." (PSI, p.438.)

Based on Dr. Landers' psychological assessment, the magistrate court ordered Ms. Conser into the custody of the Department of Health and Welfare. (R., pp.39-41.) About two months later, the Chief of Psychology at State Hospital South filed a Report to the Court, stating Ms. Conser was now fit to proceed. (*See* R., p.50.) Ms. Conser's discharge diagnosis

from State Hospital South contained diagnoses for schizophrenia, paranoid type; major depression; and substance abuse disorders. (*See* PSI, pp.42, 53.)

The magistrate subsequently conducted a preliminary hearing and bound Ms. Conser over to the district court. (*See* R., pp.56-59.) The State then filed a Prosecuting Attorney Information charging Ms. Conser with first-degree murder, with a weapons enhancement. (R., pp.68-71.) Ms. Conser pleaded not guilty. (R., p.74.)

The district court granted Ms. Conser's motion for a psychological evaluation, appointing Linda Hatzenbuehler, Ph.D., to evaluate her. (R., pp.86-87, 90-91.) Dr. Hatzenbuehler completed her report in July 2019. (PSI, p.51.) Dr. Hatzenbuehler summarized her findings as follows:

At the time of the events leading to Ms. Conser's charges, she was not in contact with reality. She was experiencing false beliefs about her safety and the safety of her children. Her false ideas appear to have increased in severity during spring 2018. At that time, she was experiencing high stress in her life, which appeared to destabilize her. She began hearing command hallucination in the form of voices telling her to do things, and the source of the voices were credible individuals with whom she placed her trust. She acted upon the false ideas that she believed and heard, and the primary source of support in her life died as a result of her actions. She felt no animosity toward her father prior to experiencing her psychosis.

(PSI, p.55.) Dr. Hatzenbuehler believed that Ms. Conser "currently meets criteria for the following DSM diagnosis: Schizophrenia, Paranoid type." (PSI, p.69.)

The parties subsequently stipulated to a district court order to have Robert C. Engle, Ph.D., examine Ms. Conser. (R., pp.113-16.) Dr. Engle completed his report in August 2019. (PSI, p.90.) He had reviewed Dr. Hatzenbuehler's report, and wrote, "The report is adequate in its focus and procedures, and the diagnosis follows from the data it is based upon. I noted Dr. Hatzenbuehler's report did not address the question of whether Ms. Conser had a capacity to form the intent to kill her father." (PSI, pp.99-100). Dr. Engle concluded, "Although

Ms. Conser told me she intended to shoot the devil in her father, she also indicated she knew at the time of the shooting that her father would die as a result. Therefore, she had a capacity to form the intent of her charged offense.” (PSI, p.100.) According to Dr. Engle, Ms. Conser “knew her father was a human being, and reported the last thing she said to him before his death was, ‘I love you, daddy’ indicating she knew specifically which human being she shot.” (PSI, p.100.)

Pursuant to a plea agreement, Ms. Conser later agreed to plead guilty to an amended charge of second-degree murder. (R., pp.137-40; 10/2/19 Tr., p.5, L.3 – p.8, L.13.) The parties agreed to have the district court impose a unified life sentence. (R., p.137; 10/2/19 Tr., p.6, L.14 – p.8, L.7.) As for the fixed term of the sentence, the parties would be free to argue. (10/2/19 Tr., p.6, Ls.19-21.) The State agreed to dismiss the weapons enhancement. (R., p.137; 10/2/19 Tr., p.6, Ls.13-14.) The district court accepted Ms. Conser’s guilty plea. (10/2/19 Tr., p.23, Ls.13-19.)

As part of the presentence investigation, Jessica Waldron, LCPC, evaluated Ms. Conser for an Idaho Standard Mental Health Assessment. (PSI, p.102.) Ms. Waldron diagnosed Ms. Conser with “Schizophrenia, unspecified.” (PSI, p.114.)

At the sentencing hearing, Ms. Conser recommended that the district court impose a fixed term of seven years. (12/16/19 Tr., p.90, L.24 – p.91, L.1.) The State recommended that the district court impose a fixed term of thirty years. (12/16/19 Tr., p.79, Ls.2-10.) The district court imposed a unified life sentence, with eighteen years fixed. (R., pp.156-60.)

Ms. Conser filed a Notice of Appeal timely from the Judgment of Conviction. (R., pp.169-71, 176-80.)

ISSUE

Did the district court abuse its discretion when it imposed a fixed term of eighteen years, as part of a unified life sentence, upon Ms. Conser following her plea of guilty to second-degree murder?

ARGUMENT

The District Court Abused Its Discretion When It Imposed A Fixed Term Of Eighteen Years, As Part Of A Unified Life Sentence, Upon Ms. Conser Following Her Plea Of Guilty To Second-Degree Murder

Ms. Conser asserts that the district court abused its discretion when it imposed the fixed term of eighteen years as part of her unified life sentence. The district court should have instead followed Ms. Conser's recommendations by imposing a fixed term of seven years. (*See* 12/16/19 Tr., p.90, L.24 – p.91, L.1.)

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 “due regard to the nature of the offense, the character of the offender, and the protection of the public interest.” *State v. Strand*, 137 Idaho 457, 460 (2002).

The Idaho Supreme Court has held 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. Jackson*, 130 Idaho 293, 294 (1997) (internal quotation marks omitted). Further, a trial court “generally has the discretion to commute a felony prison sentence and confine a defendant in the county jail.” *State v. Brooks*, 131 Idaho 608, 609 (Ct. App. 1998) (citing I.C. §§ 19-2601 & 19-2513). Ms. Conser does not assert that her sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Ms. Conser 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.* An appellate court, “[w]hen reviewing the length of a sentence . . . consider[s] the defendant’s entire sentence.” *State v. Oliver*, 144 Idaho 722, 726 (2007). The reviewing court will “presume that the fixed portion of the sentence will be the defendant’s probable term of confinement.” *Id.*

Ms. Conser asserts that the fixed term of her sentence is excessive considering any view of the facts, because the district court did not adequately consider mitigating factors. Specifically, the district court did not adequately consider Ms. Conser’s remorse and acceptance of responsibility. During the presentence investigation, she wrote, “During the time of the crime I was suffering from mental illness and now as I reflect out of psychosis I’m whole heartedly sorry for what I did.” (PSI, p.5.) At the sentencing hearing, Ms. Conser stated:

I’m so sorry for what I’ve done. My heart is broken. I feel the pain and live with the emotions every day. I took a loving father and a husband away from his family, including myself. I love my dad, and I miss him. And I don’t understand how my psychosis could have been so deep that it controlled over my actions. I know my actions have changed the lives of so many people.

(12/16/19 Tr., p.91, Ls.16-23.)

After apologizing to her brother and Mr. Travao’s second wife, who were at the hearing, Ms. Conser stated, “I hope that someday you both can forgive me. And I know it’s everyone in pain. I’ll live with the sorrow and guilt everyday for the rest of my life.” (12/16/19 Tr., p.91, L.24 – p.92, L.2.)

The district court also did not adequately consider the fact that the instant offense is Ms. Conser’s first felony conviction. The presentence report reflects that, “Beyond the index case, no criminal record was located for” Ms. Conser. (PSI, p.5.) Dr. Hatzenbuehler wrote,

“Ms. Conser has no history of aggressive or violent behavior or any other type of criminal behavior.” (PSI, p.55.)

Additionally, the district court did not give adequate consideration to Ms. Conser’s amenability to treatment for her mental health issues. On Ms. Conser’s mental health issues, Dr. Hatzenbuehler stated, “At the time of the events leading to her pending charges, Ms. Conser was experiencing a severe mental illness evidenced by psychotic symptoms.” (PSI, p.53.) Dr. Hatzenbuehler wrote, “Ms. Conser demonstrated symptoms of thought disorder previous to the day of the events leading to her pending charges.” (PSI, p.53.) Dr. Engle stated that Dr. Hatzenbuehler’s report “is adequate in its focus and procedures, and the diagnosis follows from the data it is based upon.” (PSI, pp.99-100.) Further, Dr. Hatzenbuehler and Dr. Engle both concluded that Ms. Conser had not been malingering. (*See* PSI, pp.53, 100.)

Dr. Hatzenbuehler wrote, “The events leading to her pending offenses appear to be an anomaly; family and friends support this conclusion as does her criminal history.” (PSI, p.55.) According to Dr. Hatzenbuehler, Ms. Conser’s “future risk to act out violently toward others will decrease as she remains compliant with her medications.” (PSI, p.55.) In her recommendations, Dr. Hatzenbuehler wrote that Ms. Conser “has been compliant with medications that have assisted in decreasing her false beliefs and stabilizing her mood. She will need to be followed medically to assure that her medication continues to be effective in controlling her psychotic symptoms.” (PSI, p.69.) Dr. Hatzenbuehler concluded, “In the absence of psychotic symptoms, Ms. Conser does not appear to pose a danger to the community.” (PSI, p.69.)

Dr. Engle wrote, “With regard to Ms. Conser’s dangerousness in the future, that prediction revolves in the majority around whether she continues to be compliant taking the medications she has been prescribed.” (PSI, p.100.) Dr. Engle stated, “In the community, or in

an institution, she is likely to be at the ‘Low’ probability to behave violently if on her medications.” (PSI, p.100.) While Dr. Engle noted that Ms. Conser had engaged in some “acting out behavior” while in jail, he stated that “was mostly self-harm, and resisting officers when she tried to run away. There were no indications in the records I reviewed of Ms. Conser behaving in a physically aggressive way.” (PSI, pp.100-01.)

Similarly, in the Idaho State Mental Health Assessment, Ms. Waldron stated that “Ms. Conser’s risk of harm to others, related to her symptoms of mental illness, appears to be low as long as she remains compliant with prescribed medications and her symptoms of psychosis are being effectively managed with those medications.” (PSI, p.114.) During the sentencing hearing, defense counsel advised the district court, “Schizophrenia can be treated. And Jessica Conser can be productive once again in society.” (12/16/19 Tr., p.89, Ls.8-9.)

Because the district court did not adequately consider the above mitigating factors, Ms. Conser asserts that the fixed term of her sentence is excessive considering any view of the facts. Thus, the district court abused its discretion when it imposed the fixed term of eighteen years as part of her unified life sentence. The district court should have instead followed Ms. Conser’s recommendations by imposing a fixed term of seven years.

CONCLUSION

For the above reasons, Ms. Conser respectfully requests that this Court reduce her sentence as it deems appropriate.

DATED this 2nd day of August, 2021.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of August, 2021, 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

BPM/eas