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### State v. Bauer Appellant's Brief Dckt. 48393

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NOS. 48393-2020 & 48394-2020
Plaintiff-Respondent,	)	
	)	BONNEVILLE COUNTY NOS.
v.	)	CR-2018-8208 & CR10-2019-01085
	)	
RAWDY ALAN BAUER,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

After Rawdy Bauer pled guilty to grand theft and burglary, the district court sentenced him to seven years, with two years fixed, for grand theft, and ten years, with two years fixed, for burglary, to run concurrently. On appeal, he argues the district court abused its discretion by imposing excessive sentences in both cases. He submits the district court should have imposed lesser indeterminate sentences.

## Statement of the Facts & Course of Proceedings

In August 2018, officers received a report that two men were wandering around late at night in a neighborhood that was under construction. (No. 48393 R., pp.15-16.) When officers arrived, they approached the men, who were parked in the garage of one of the houses under construction. (No. 48393 R., pp.15-16.) As they approached the car to speak with the men, the officers saw a small butane torch on the dashboard of the car, and noticed that the man in the driver's seat, Mr. Bauer, was sweating profusely, talking very fast, unable to sit still, and appeared nervous. (No. 48393 R., pp.15-16.) The officers then requested a drug dog, which alerted to the smell of drugs inside the car. (No. 48393 R., p.16.) Upon a search of the car, officers discovered a glass smoking pipe, as well as credit cards and other items that were recently reported as stolen. (No. 48393 R., p.16.)

The State filed a complaint against Mr. Bauer for grand theft by possession of stolen property, possession of drug paraphernalia, and unlawful entry. (No. 48393 R., pp.13-14.) After he waived his preliminary hearing, Mr. Bauer was bound over to district court on those charges. (No. 48393 R., pp.44-45, 58-60.) Pursuant to a plea agreement, in January 2019, Mr. Bauer entered an *Alford*<sup>1</sup> plea to grand theft, and the State dismissed the remaining charges. (Tr., p.11, L.2 – p.13, L.23; No. 48393 R., pp.86-96.)

In early February 2019, while Mr. Bauer was out on bond in the first case, officers received a report from an individual that his car had been broken into, and that the alleged suspect was stuck in the snow in a nearby parking lot. (No. 48394 R., pp.9-10.) The reporting party also told officers that a fellow employee of his also had his car broken into around the same time and at the same location. (No. 48394 R., pp.9-10.) Officers went to the parking lot and

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<sup>1</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

spoke with the driver, Mr. Bauer. (No. 48394 R., pp.9-10.) After officers asked him to get out of his car, they noticed various items inside that were reported stolen. (No. 48394 R., pp.9-10.) After he was read his *Miranda*<sup>2</sup> rights, Mr. Bauer admitted to stealing items from two different cars, and also informed officers that he had a methamphetamine pipe in his car. (No. 48394 R., pp.9-10.)

The State filed a complaint against Mr. Bauer in February 2019, for two counts of burglary and possession of drug paraphernalia. (No. 48394 R., pp.7-8.) After he waived his preliminary hearing in that case, he was bound over to district court on those charges. (No. 48394 R., pp. 48-56.) Pursuant to a plea agreement, Mr. Bauer pled guilty to one count of burglary, and the State dismissed the remaining charges. (No. 48394 R., pp.69-77, 87; Tr., p.25, L.12 – p.26, L.15.)

Prior to sentencing, Mr. Bauer applied to the Wood Pilot Project program, however; he was not admitted. (No. 48393 R., p.124; PSI, p.31; Tr., p.34, Ls.11-15; *see also* Conf. Docs.)

A joint sentencing hearing was held in May 2019. (*See generally* Tr., pp.34-49.) In each case, defense counsel recommended that the district court sentence Mr. Bauer to five years, with two years fixed, to run concurrently, and retain jurisdiction (a “rider”). (Tr., p.38, Ls.17-20.) The State recommended that, in each case, the district court sentence Mr. Bauer to ten years, with three years fixed, and run the sentences consecutively, for an aggregate sentence of twenty years, with six years fixed. (Tr., p.43, Ls.2-7.) The district court sentenced him to seven years, with two years fixed, for grand theft, and ten years, with two years fixed, for burglary, to run concurrently, and it declined to retain jurisdiction. (Tr., p.47, Ls.13-18; No.48394 R., pp.83-86; No. 48393 R., pp.128-31.)

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

Shortly after sentencing, Mr. Bauer filed an Idaho Criminal Rule 35 motion.<sup>3</sup> (No. 48394 R., pp.88-89; No. 48393 R., pp.132-33.) The district court denied this motion in June 2019. (No. 48394 R., pp.92-94; No. 48393 R., pp.136-38.)

Initially, untimely notices of appeal were filed in both cases. (*See* No. 48393 R., pp.141-44; No.48394 R., pp.97-100.) Those appeals were dismissed by the Supreme Court. (No. 48393 R., pp.150-56; No. 48394 R., pp.106-12.) However, pursuant to a grant of post-conviction relief on September 25, 2020, in Case No. CV10-19-6364, the district court re-entered the judgments of conviction in both cases in order to re-open the appeal period. (No. 48393 R., pp.157-60, 167; No. 48394 R., pp.113-16, 127.) Mr. Bauer timely appealed from the judgments of conviction and the denial of his Rule 35 motion in both cases in October 2020.<sup>4</sup> (No. 48393 R., pp.152-56, 161-64; No. 48394 R., pp.108-11, 119-26.)

### ISSUE

Did the district court abuse its discretion when it imposed an excessive aggregate sentence of ten years, with two years fixed, upon Mr. Bauer?

### ARGUMENT

#### The District Court Abused Its Discretion When It Imposed An Excessive Aggregate Sentence of Ten Years, With Two Years Fixed

Mr. Bauer asserts that, given any view of the facts, his aggregate sentence of ten years, with two 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

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<sup>3</sup> The Rule 35 motion bears both case numbers, however, there is a line through Ada County Case No. CR-2018-8208, and the motion only references one sentence. (No. 48393 R., pp.132-33; No. 48394 R., pp.88-89.) Nevertheless, the State's motion in opposition and the district court's order denying the Rule 35 motion addressed the sentences in both cases. (*See* No. 48393 R., pp.134-38; No. 48394 R., pp.90-94.)

<sup>4</sup> Mr. Bauer does not challenge the denial of his Rule 35 motion on appeal.

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).

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) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Bauer does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, he 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.*

Appellate courts use a four-part test for determining whether a district court abused its discretion: 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).

Here, Mr. Bauer asserts the district court abused its discretion by imposing an excessive sentence under any reasonable view of the facts. Specifically, he contends the district court should have sentenced him to a lesser indeterminate term of imprisonment, in light of the mitigating factors, including his mental health issues, his substance abuse and its longstanding impact on his life, and his support from family and friends.

Mr. Bauer’s mental health issues weigh in favor of a more lenient sentence. “[T]he defendant’s mental condition is simply one of the factors that must be considered and weighed

by the court at sentencing.” *State v. Delling*, 152 Idaho 122, 132 (2011). Mr. Bauer indicated that he has been diagnosed with attention deficit disorder (“ADD”)/attention deficit hyperactivity disorder (“ADHD”), bipolar disorder, depression, and a learning disability. (PSI, pp.27, 39, 45.) He reported that he participated in special education or remedial classes in high school, and explained that he is largely illiterate. (PSI, pp.5, 26, 61.) The pre-sentence investigation (“PSI”) interviewer noted that when he was unable to read Mr. Bauer’s questionnaire and asked him to explain what he wrote, Mr. Bauer was unable to decipher the words he had written, or his overall meaning. (PSI, p.26.) Additionally, in a letter to the district court, Mr. Bauer’s sister stated that he suffers from Fetal Alcohol Syndrome, which impacts his behavior. (PSI, pp.23, 56.) Mr. Bauer reported that he was hospitalized for mental health issues when he was [REDACTED] and stated that he usually takes medications to treat his mental health symptoms. (PSI, pp.27, 45.) He indicated that he has often participated in regular weekly counseling, but he is currently not receiving treatment, and believes that he needs to get back into treatment. (PSI, pp.27, 31.) The Global Appraisal of Individual Needs (“GAIN”) evaluator diagnosed Mr. Bauer with major depressive disorder with psychotic features, and generalized anxiety disorder (PSI, pp.35, 38, 45, 48.)

Mr. Bauer has been abusing substances from a young age, and reported a history of using alcohol, marijuana, amphetamines, other stimulants, ecstasy, and MDMA. (PSI, pp.28, 36.) The impact of substance abuse on the defendant’s criminal conduct is “a proper consideration in mitigation of punishment upon sentencing.” *State v. Osborn*, 102 Idaho 405, 414 n.5 (1981). Mr. Bauer reported that he first began drinking alcohol around age [REDACTED] and said that he last consumed it in 1999. (PSI, p.28.) He stated that he first used marijuana and methamphetamine at age [REDACTED] but has not used marijuana since 2007. (PSI, pp.28, 36.) Mr. Bauer indicated that his

drug of choice is methamphetamine, and reported that he was using it regularly during the last year prior to his arrest. (PSI, pp.28, 36.) He reported that he experienced withdrawal symptoms from methamphetamine within the past month prior to the GAIN evaluation, and thinks that treatment is most needed for his methamphetamine use. (PSI, pp.36, 45.) The GAIN evaluator diagnosed Mr. Bauer with severe stimulant use disorder. (PSI, pp.35, 36.)

Mr. Bauer acknowledges that he has a drug problem and recognizes that he needs a drug treatment program. (PSI, pp.28, 31.) Idaho courts have previously recognized that substance abuse and a desire for treatment should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982). He admitted that his drug use has contributed to his criminal behavior, family problems, and difficulty at work. (PSI, p.28.) He explained that at the time of the instant offenses, he was getting high. (PSI, p.5.) Mr. Bauer stated, "I know I have a drug problem and I'm asking the court for help in getting treatment so I can become a good father and husband. And [positive] part of the [community]." (PSI, p.29.) When asked how he feels about his crimes, Mr. Bauer expressed that he was ashamed of himself for letting drugs run his life. (PSI, p.5.) The pre-sentence investigator recommended a period of retained jurisdiction so that Mr. Bauer can focus on his substance abuse and mental health issues, and recommended that he be placed in a specialty court upon his release. (PSI, pp.29, 31.)

Despite his mental health issues and serious substance abuse problem, Mr. Bauer still has support from his friends and family. (*See* PSI, pp.53-67.) Prior to his arrest, Mr. Bauer was living with his wife and their two children, and will continue living with them upon his release. (PSI, pp.24, 34.) Letters from Mr. Bauer's family and friends explain the detrimental impact that his mother's death and the loss of his job had on him, and describe him as a caring and hardworking person. (PSI, pp.23-23, 53-67.) The pre-sentence investigator noted that his support system was



one of his protective factors. (PSI, p.29.) The Idaho Supreme Court noted in *State v. Shideler*, 103 Idaho 593, 594 (1982), that family and friend support were factors that should be considered in the court's decision as to what is an appropriate sentence.

Notwithstanding Mr. Bauer's mental health issues and serious substance abuse, he has shown a willingness to try to overcome his addiction, and has recognized the detrimental effect it has had on his life. He accepted responsibility for his criminal behavior and acknowledged that he needs substance abuse and mental health treatment. Mr. Bauer has tremendous support from his friends and family, and will return living with his wife and their children upon his release. Proper consideration of these mitigating factors supported a more lenient indeterminate sentence. In light of these facts, Mr. Bauer submits that the district court did not exercise reason, and thus abused its discretion, by imposing an aggregate sentence of ten years, with two years fixed.

CONCLUSION

Mr. Bauer respectfully requests that this Court reduce the indeterminate portion of his sentence as it deems appropriate.

DATED this 4<sup>th</sup> day of June, 2021.

/s/ Kiley A. Heffner  
KILEY A. HEFFNER  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4<sup>th</sup> day of June, 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

KAH/eas