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### State v. Whitaker Respondent's Brief Dckt. 48413

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 48413-2020
Plaintiff-Respondent,	)	
	)	Ada County Case No.
v.	)	CR01-20-25180
	)	
BRIAN JAMES WHITAKER,	)	RESPONDENT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

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Has Whitaker failed to demonstrate that the district court abused its sentencing discretion when it imposed an aggregate unified seven-year sentence with two years fixed upon Whitaker's guilty pleas to possession of methamphetamine and felony eluding?

## ARGUMENT

### Whitaker Has Failed To Demonstrate That The District Court Abused Its Sentencing Discretion

#### A. Introduction

In May 2020, an Ada County Sherriff's Office Deputy effectuated a traffic stop on Whitaker's vehicle. (PSI, p.6.) The officer conducted a records check and learned that Whitaker's driving privileges were suspended. (PSI, pp.6, 208.) Whitaker acknowledged to the officer that his license was invalid, and was also unable to provide proof of insurance or a valid registration. (PSI, p.6.) As the officer directed Whitaker to exit the vehicle, Whitaker instead put his vehicle into drive and accelerated away at a high speed. (PSI, pp.6, 209.) The officer returned to his patrol vehicle and initially pursued Whitaker into downtown Boise, but then discontinued the pursuit. (PSI, p.209.)

Several witnesses then called the police to report that Whitaker was driving recklessly through downtown Boise. (Id.) One witness told police that he saw Whitaker driving approximately 80 miles per hour, and through a red light. (PSI, p.210, 212.) Other witnesses saw Whitaker drive onto the pedestrian-only Boise Greenbelt trail, park his car there, run from the vehicle, return to the vehicle to retrieve a backpack, and then run away again. (PSI, pp.209-210.) Officers located Whittaker's parked vehicle on the Greenbelt. (PSI, pp.6, 209.) The vehicle contained a small baggie of methamphetamine. (PSI, pp.210-211.) The backpack Whitaker was seen taking from the vehicle was found nearby and contained an unused syringe. (PSI, p.209.) Whitaker was arrested approximately a month later. (PSI, p.6.)

The state charged Whittaker with methamphetamine possession, felony eluding, and driving without privileges. (R., pp.21-22.) Pursuant to an agreement with the state, Whittaker pled guilty to methamphetamine possession and felony eluding, and to two misdemeanor

domestic battery charges (reduced from felonies) in a separate case (Aca County Case No. CR01-20-16609); the state agreed to dismiss the driving without privileges charge and to recommend an aggregate unified seven-year sentence with three years fixed on the methamphetamine and eluding charges. (R., pp.33-34; 8/19/20 Tr., p.5, L.15 – p.18, L.2.) The district court imposed an aggregate seven-year unified sentence with two years fixed. (R., pp.39-43; 10/21/20 Tr., p.19, L.1 – p.24, L.9.) Whitaker timely appealed. (R., pp.48-50.)

B. Standard Of Review

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant’s entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)).

Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). The abuse of discretion test looks to whether the district 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, 421 P.3d 187, 194 (2018).

C. The District Court Acted Well Within Its Sentencing Discretion

To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive. State v. Farwell, 144

Idaho 732, 736, 170 P.3d 397, 401 (2007). To establish that the sentence was excessive, the appellant must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Id. at 736, 170 P.3d at 401. 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. Bailey, 161 Idaho 887, 895-96, 392 P.3d 1228, 1236-37 (2017) (quoting State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2015)). It is well established that the primary sentencing consideration is protection of society, and that all other factors must be subservient to that end. State v. Hunnel, 125 Idaho 623, 627, 873 P.2d 877, 881 (1994).

Prior to imposing sentence in this case, the district court cited the applicable sentencing factors and I.C. § 19-2521, which requires the sentencing court to first consider community placement before imposing a term of incarceration. (10/21/20 Tr., p.19, Ls.1-10.) After acknowledging mitigating factors, and discussing the dangerousness of Whitaker’s conduct in this case and his extensive criminal history, the district court imposed a unified aggregate seven-year sentence with two years fixed. (10/21/20 Tr., p.19, L.11 - p.24, L.9.) A review of the record supports the court’s sentencing determination.

The district court was appropriately concerned with the severe danger to the community created by Whitaker’s conduct in this case. The officer who initially pulled Whittaker over noted that the portion of the Greenbelt that Whitaker drove onto was popular with pedestrians, and that he personally observed dozens of pedestrians, including children, walking along this portion of the Greenbelt during the hour following the discovery of Whitaker’s vehicle. (PSI, p.210.) This occurred after witnesses saw Whitaker driving at a high rate of speed and running a red light in

downtown Boise. (PSI, p.210, 212.) Whitaker later told the presentence investigator that he fled in this manner because he was “strung out,” and because the officer was taking too long to process the traffic stop. (PSI, p.7.) The district court correctly recognized that Whitaker’s substance abuse endangers the community.

A review of Whitaker’s criminal history further supports the sentences imposed. Whitaker has prior felony convictions for escape, distributing methamphetamine (for which an 84-month federal prison sentence was imposed), possession of a controlled substance with intent to manufacture/deliver (for which an eight-year state prison sentence was imposed), theft by receiving stolen property, grand theft, and two prior felony convictions for eluding or evading. (PSI, pp.17-19.) At least eight other felony charges against Whitaker were ultimately dismissed or reduced. (Id.) Just weeks before the incident in the present case, Whitaker was charged with two counts of felony domestic battery.<sup>1</sup> (PSI, p.19.) Another domestic assault charge, in Utah, was ultimately amended to simple assault. (PSI, p.17.) Whitaker sells drugs to support his \$400/per week drug addiction. (PSI, p.11.) Through his extensive criminal history, Whitaker has received many previous opportunities for community supervision and treatment. (PSI, pp.11-20, 23.) Whitaker has been unsuccessful in these previous attempts at community supervision, in that his record reflects at least three probation violations and four parole violations. (PSI, p.20.)

The district court specifically noted Whittaker’s LSI-R score of 32 (10/21/20 Tr., p.21, Ls.17-19), which places him in the high-risk to re-offend category (PSI, p.20). The presentence investigator, noting Whitaker’s lack of expressed remorse, his prior rehabilitative opportunities,

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<sup>1</sup> The PSI does not identify these two charges as felonies (See PSI, p.19), but the attorney comments at the sentencing hearing (10/21/20 Tr., p.5, L.22 – p.6, L.2; p.6, L.23 – p.7, L.3), and the iCourt Portal, (Mycourts.idaho.gov portal, State v. Whitaker, Ada County District Court Case No. CR01-20-16609), reveal that these charges were amended from felonies to misdemeanors in conjunction with the plea agreement in this case.

and his inability to support himself in the community, recommended a term of incarceration. (PSI, pp.21-22.)

On appeal, Whitaker does not take issue with any of the stated analyses as set forth by the district court, but instead simply asserts the existence of certain mitigating factors – including his troubled childhood, history of substance abuse issues, mental health issues, family support, and asserted willingness to be rehabilitated. (Appellant’s brief, pp.4-9.) However, nothing in the record indicates that the district court failed to consider any of these things, or chose to disregard the ample information about these factors presented in the presentence investigation report and Whitaker’s sentencing argument. Instead, the court specifically referenced Whitaker’s mental health and substance abuse issues, as well as Whitaker’s statements made at sentencing asserting his desire to change his life, and his submitted letters regarding his acceptance into certain treatment programs. (10/21/20 Tr., p.19, Ls.11-20; p.21, Ls.4-12.) The district court also recommended that during his incarceration, the Idaho Department of Correction provide Whitaker substance abuse, mental health, and thinking errors counseling – programming which, the court noted, would be the same programming that Whitaker would have received on a rider (which was Whitaker’s sentencing recommendation). (10/21/20 Tr., p.17, Ls.1-2; p.22, L.10 – p.23, L.9.)

Ultimately, the district court imposed an aggregate sentence that was one fixed year shorter than the sentence recommended by the state, and which contained a fixed term of incarceration only modestly longer than the minimum period of incarceration Whitaker would have faced if the court retained jurisdiction. This was entirely reasonable in light of the danger Whitaker poses to the community, and Whitaker’s many prior failures to abide by the terms of community supervision.

In light of all of the factors discussed above, the district court acted well within its discretion to impose an aggregate unified seven-year sentence with two years fixed upon Whitaker's guilty pleas to possession of methamphetamine and felony eluding. Whitaker has therefore failed to demonstrate that the district court abused its sentencing discretion. This Court should affirm the judgment of conviction.

CONCLUSION

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

DATED this 5th day of May, 2021.

/s/ Mark W. Olson  
MARK W. OLSON  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of May, 2021, served a true and correct copy of the foregoing RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

KILEY A. HEFFNER  
DEPUTY STATE APPELLATE PUBLIC DEFENDER  
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/s/ Mark W. Olson  
MARK W. OLSON  
Deputy Attorney General

MWO/dd