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### State v. Hennig Appellant's Brief Dckt. 48502

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 48502-2020
Plaintiff-Respondent,	)	
	)	KOOTENAI COUNTY NO. CR28-19-11962
v.	)	
	)	
BRANDON WILLIAM HENNIG,	)	APPELLANT’S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Brandon Hennig appeals, contending the district court abused its discretion by imposing an excessive sentence in this case, in particular by not retaining jurisdiction. He asserts the rationales it gave for imposing the sentence it did are actually contrary to the evidence and the applicable legal standards.

Statement of the Facts & Course of Proceedings

Pursuant to a plea agreement, Mr. Hennig pled guilty to one count of aggravated battery with a deadly weapon enhancement. (R., p.255.) Mr. Hennig expressed remorse and took responsibility for his conduct, specifically noting his intent to pay restitution to make sure that

the victim's injuries in this case were fully treated. (Tr., p.67, Ls.10-20; Conf. Docs., p.136.)<sup>1</sup> Defense counsel recommended that the district court retain jurisdiction in this case. (Tr., p.62, Ls.16-18.)

That recommendation was based on several facts. (*See, e.g.*, Tr., p.64, Ls.10-18.) For example, defense counsel noted Mr. Hennig had no other criminal history. (Tr., p.64, Ls.12-13; *accord* Conf. Docs., p.137 (the presentence investigator noting this was Mr. Hennig's first arrest).) He was still relatively young, as he was only [REDACTED] at the time of sentencing. (Conf. Docs., p.133.) His LSI-R score was only 18, which put him in the "Low" risk category, and he also had a protective score of 20. (Conf. Docs., p.136.)

Additionally, defense counsel noted Mr. Hennig's mental health issues had significantly contributed to his actions in this case. (Tr., p.64, Ls.13-14.) Specifically, Dr. John Wolfe, who had begun treating Mr. Hennig about a month after the battery occurred (*see* Tr., p.34, L.17 - p.35, L.9; R., p.18), conducted a psychological evaluation on Mr. Hennig and concluded his mental health issues "may have clouded his understanding and interpretation of the circumstances of the night in question." (Conf. Docs., p.78.)

On the night in question, Mr. Hennig explained that he had gone to his friend, Joe Coby's house to print some copies of his resume, as he had done on prior occasions. (Conf. Docs., p.72.) Mr. Hennig told the presentence investigator that he arrived at Mr. Coby's house before Mr. Coby got there and waited for him. (Conf. Docs., p.135.) He said he had called out when he saw Mr. Coby arrive home, and though he thought Mr. Coby had heard him, but that he brushed past Mr. Hennig, grumbling something. (Conf. Docs., p.135.) Mr. Hennig followed Mr. Coby to the door, where he thought he saw Mr. Coby holding a knife. (Conf. Docs., pp.72, 135.) In fact,

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<sup>1</sup> While both transcripts in this case are provided in a single electronic document, they are individually paginated. As such, citations herein will use the electronic page number.

Mr. Coby was holding his keys. (Conf. Docs., p.72.) Mr. Hennig explained he panicked and reacted to what he thought he saw by attacking Mr. Coby with the bat. (Conf. Docs., p.135.) Mr. Coby told police he thought that Mr. Hennig had been lying in wait, wearing a ski mask, and had attacked without provocation. (See, e.g., Conf. Docs., p.146.) At any rate, the confrontation ended with both men fleeing the scene. (Conf. Docs., p.136.) Mr. Hennig noted that he seriously contemplated committing suicide before ultimately going back to his grandparents' house, where he was living, and police arrested him there. (Conf. Docs., pp.135-36.)

Dr. Wolfe explained that Mr. Hennig's reactions that night were consistent with his mental health issues, particularly his Post-Traumatic Stress Disorder (PTSD).<sup>2</sup> (Conf. Docs., p.78.) The doctor explained the brain rewires itself following severe trauma and can cause a person to see and respond to threats that are not actually present. (Tr., p.38, Ls.10-15.) It is a subconscious or unconscious reaction. (Tr., p.38, Ls.16-24.)

At the sentencing hearing, Dr. Wolfe testified Mr. Hennig's PTSD was caused by many traumas in his life, the three principle ones being: his father's death, being sexually assaulted at ██████ by the father of one of his friends, and being mugged while homeless in Tennessee. (Tr., p.36, Ls.7-10.) The death of his father was a particularly traumatic event for Mr. Hennig because he blamed himself for letting it happen. (Tr., p.37, Ls.2-6.) His father died as the result of a problematic reaction to some medications. (Conf. Docs., p.418.) Mr. Hennig had seen his father lying down but did not think much of it at first. (Tr., p.36, Ls.22-23.) After a while, when his father still did not get up, he became worried and called for help. (Tr., p.36, L.23 - p.37,

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<sup>2</sup> Dr. Wolfe also diagnosed Mr. Hennig with Major Depressive Disorder, Persistent Depressive Disorder (Dysthymia), and an unspecified anxiety disorder. (Conf. Docs., p.77.) The prosecutor's evaluator agreed with the PTSD diagnosis, but not with the depression or anxiety disorders. (Conf. Docs., p.131.) Rather, that evaluator believed Mr. Hennig suffered from Schizotypal Personality Disorder. (Conf. Docs., p.131.)

L.1.) He believed that, had he checked on his father earlier, his father would have survived. (Tr., p.37, Ls.2-6; Conf. Docs., p.443.)

This was actually not the first family death Mr. Hennig had witnessed. When living with his mother in Las Vegas, Mr. Hennig's aunt was shot and killed. (Conf. Docs., p.458.) Mr. Hennig witnessed the immediate aftermath of her shooting. (Conf. Docs., p.458.) He felt particular guilt over her death because the last things he said to his aunt had been mean and hurtful. (Conf. Docs., pp.458-59.)

Mr. Hennig's mother explained that Mr. Hennig had always wanted to be the family protector, but no longer felt capable of doing so after his aunt died. (Tr., p.33, Ls.22-25.) Then, after his father died, she explained that Mr. Hennig had essentially lost all hope. (Tr., p.48, Ls.1-4.)

After his father's death, Mr. Hennig moved back with his mother, who subsequently moved the family to Tennessee. (Conf. Docs., p.459.) Mr. Hennig moved back to Idaho a few years later,<sup>3</sup> but after another few years, returned to Tennessee. (*See* Conf. Docs., pp.459-60.) During this second period of time in Tennessee, Mr. Hennig was mugged. (Conf. Docs., p.460 (noting Mr. Hennig moved back to Tennessee in 2012); Conf. Docs., p.443 (noting Mr. Hennig was mugged in 2014).) Dr. Wolfe testified this trauma "probably was the most altering for him." (Tr., p.37, Ls.7-9.) The doctor explained Mr. Hennig became "hypervigilant, easily startled," and as a result, felt fear and anxiety that someone else was going to attack him. (Conf. Docs., p.64.) As a result, he began carrying some type of weapon for his own protection. (Conf. Docs., p.64; *accord* Conf. Docs., p.466 (Mr. Hennig's grandmother explaining she observed the same

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<sup>3</sup> During his time in Idaho, he was able to earn his GED. (Conf. Docs., p.460.)

changes); Tr., p.32, Ls.11-18 (one of Mr. Hennig's friends, Nathan Gray, testifying he was also aware Mr. Hennig carried a weapon for self-defense).)

Mr. Hennig had never sought any type of treatment to help him deal with these traumatic issues prior to the charges in this case. (Conf. Docs., p.433; *accord* Tr., p.36, Ls.10-13 (Dr. Wolfe noting it did not appear Mr. Hennig had even opened up about the sexual assault at all until recently).) However, when he finally moved back with his grandparents in 2015, he was able to get himself sober. (Conf. Docs., pp.444, 459-60.) His grandfather, a former drug counselor, confirmed that Mr. Hennig has remained clean since moving back in with his grandparents. (Conf. Docs., p.466; *see also* Conf. Docs., pp.149 & 156 (the GAIN-I evaluation agreeing Mr. Hennig's substance abuse issues were in sustained remission and no additional substance abuse treatment was needed).)

Dr. Wolfe also noted Mr. Hennig had made "wonderful progress" in his PTSD treatment, and he was amenable to continue that treatment. (Tr., p.42, Ls.1-2; Conf. Docs., p.144.) Mr. Hennig added that, since being incarcerated, he had been able to get the symptoms of his PTSD back under control. (Conf. Docs., p.462.) However, Dr. Wolfe noted the absence of symptoms is not the same thing as the presence of health. (Tr., p.462, Ls.22-23.) Rather, he testified, Mr. Hennig still needed treatment to help rebuild adaptive skills, social interaction skills, and the like. (Tr., p.43, Ls.13-20.) Dr. Wolfe was confident that treatment would continue if Mr. Hennig were placed in a community setting, but was not sure how or if it would progress in a prison setting. (Tr., p.43, L.23 - p.44, L.5 ("I know how it would work in a civilian world out in the regular community. It's a little hard to know how that would work inside a prison setting or a prison system. But we've talked about it, but I don't know that there's -- that's got good [sic] resolution right now.")) Several of Mr. Hennig's family members and

friends voiced their continuing support for him in his rehabilitation efforts. (Tr., p.33, Ls.5-15, p.50, Ls.10-18; Conf. Docs., pp.905-17.)

As such, defense counsel recommended the district court retain jurisdiction, as that would be the best option to allow Mr. Hennig to continue his treatment and build the tools as identified by Dr. Wolfe. (Tr., p.63, Ls.12-21.) However, the district court rejected that recommendation, instead imposing and executing a unified sentence of twenty-five years, with ten years fixed. (Tr., p.75, Ls.18-24.) In doing so, the court acknowledged several of the mitigating issues. (Tr., p.73, L.1 - p.74, L.3.) However, it decided to impose and execute his sentence because that would not “caus[e] any risk to society.” (Tr., p.75, Ls.15-18.) Additionally, while the district court acknowledged Mr. Hennig’s PTSD could have triggered his response, it still did not understand why Mr. Hennig’s initial reaction was to go for the bat instead of greeting Mr. Coby, since Mr. Hennig knew he was at Mr. Coby’s house. (Tr., p.74, L.20 - p.75, L.4.)

Mr. Hennig filed a notice of appeal timely from the resulting judgment of conviction. (R., pp.321, 326.)

### ISSUE

Whether the district court abused its discretion by imposing and executing an excessive sentence in Mr. Hennig’s case.

### ARGUMENT

#### The District Court Abused Its Discretion By Imposing And Executing An Excessive Sentence In Mr. Hennig’s Case

Sentencing decisions are committed to the district court’s discretion. *State v. Reinke*, 103 Idaho 771, 771 (Ct. App. 1982). 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 id.* at 772. Accordingly, in order to show an abuse of discretion in the district court's sentencing decision, he must show that, in light of the governing criteria, the sentence is excessive considering any view of the facts. *State v. Jackson*, 130 Idaho 293, 294 (1997); *see Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64 (2018) (articulating the standard for reviewing whether the district court abused its discretion). The governing criteria, or sentencing objectives, 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. *State v. Charboneau*, 124 Idaho 497, 500 (1993).

The protection of society is the primary objective the court should consider. *Id.* The Idaho Supreme Court has indicated that rehabilitation is usually the first means the district court should consider to achieve that goal. *See State v. McCoy*, 94 Idaho 236, 240 (1971), *superseded on other grounds as stated in State v. Theil*, 158 Idaho 103 (2015); *accord State v. Bickhart*, 164 Idaho 204, 206 (Ct. App. 2018) (noting the preference identified in *McCoy* does not preclude a sentence of incarceration, if that is ultimately the best method to achieve the goals of sentencing). In other words, while the district court may place significant weight on one of the goals of sentencing, that does not mean it can ignore mitigating factors speaking to one of the other goals as being insignificant or unimportant. *See State v. Knighton*, 143 Idaho 318, 320 (2006) (noting that the failure to sufficiently consider various mitigating factors has resulted in abuses of sentencing discretion in several cases).

In this case, the district court's sentencing decision is inconsistent with the Supreme Court's decision in *McCoy*, as it fails to promote rehabilitation as the first means to achieve the protection of society. In fact, it did precisely the opposite – executing his sentence because that

was the only way there would be no risk to society. (Tr., p.75, Ls.15-18) Since the district court's explanation of its decision runs directly contrary to the applicable legal standard, it is an abuse of the district court's discretion. *Compare State v. Van Komen*, 160 Idaho 534, 540 (holding the district court erred because, while it could have reached the same sentencing decision in a permissible way, its actual explanation of its sentencing decision demonstrated it had acted contrary to the applicable legal standards).

Moreover, that analysis was flatly contradicted by the other evidence in the record. Notably, the LSI-R concluded, based on all the relevant factors, that Mr. Hennig presented a Low risk to society. (Conf. Docs., pp.136-37.) In fact, his protective score of 20 was higher than his risk score of 18. (Conf. Docs., p.136.) As such, Mr. Hennig did not actually present a risk to society even if he were sentenced to a period of retained jurisdiction and subsequently (assuming he completed the rider program satisfactorily) released on probation. As such, the district court's other rationale is not supported by the evidence.

The district court's other explanation for its decision – that it did not make sense for Mr. Hennig to simply attack the person coming into the house when he should have known it was his friend returning home (Tr., p.74, L.20 - p.75, L.4) – is also contrary to the facts in the record. The presentence investigator specifically noted that Mr. Hennig said he did, in fact, try to hail Mr. Coby when he arrived home. (Conf. Docs., p.135.)

More importantly, that analysis fails to consider the impacts of Mr. Hennig's PTSD, as explained by Dr. Wolfe. Specifically, Dr. Wolfe explained that PTSD causes the brain to perceive and react to threats which are not actually present at a subconscious or unconscious level. (Tr., p.38, Ls.10-24.) That is, in fact, exactly what the evidence shows in this case – despite knowing it was Mr. Coby, Mr. Hennig subconsciously or unconsciously perceived a non-

existent threat (that he was holding a knife, as opposed to car keys), and he reacted to that perceived, but non-existent threat. Therefore, to impose Mr. Hennig's sentence based on the idea that he did not react rationally when he was not in a rational state of mind represents a failure to exercise reason, and thus, an abuse of discretion. In other words, that rationale reveals the district court failed to properly consider the role Mr. Hennig's mental health issues played in the offense, which should have weighed in mitigation. *See Hollon v. State*, 132 Idaho 573, 581 (1999); *compare State v. Williams*, 135 Idaho 618, 620 (Ct. App. 2001) (weighing the defendant's traumatic childhood, which served a precursor to his substance abuse issues, and thus, played a role in the charged offense in that case, against the offense itself).

Moreover, the district court's decision is inconsistent with the applicable legal standards, which call for a more lenient sentence in cases such as this. Notably, this was Mr. Hennig's first felony conviction, and indeed, his first arrest. (Conf. Docs., p.137.) As the Idaho Supreme Court has made clear: "We recognize that rehabilitation, particularly of first offenders, should usually be the initial consideration in the imposition of the criminal sanction." *McCoy*, 94 Idaho at 240. This is because such a person does not yet have a fixed character for crime and so rehabilitation at this point is more likely. *State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971). Therefore, "the first offender should be accorded more lenient treatment than the habitual criminal." *State v. Shideler*, 103 Idaho 593, 595 (1982) (quoting *Owen*, 73 Idaho at 402).

Likewise, the fact that a defendant is still young speaks significantly to his rehabilitative potential. *Id.*; *Cook v. State*, 145 Idaho 482, 489-90 (Ct. App. 2008); *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988). In other words, a younger offender should be treated more leniently because he is still maturing, and still able to become a productive member of society. *See, e.g.,*

*State v. Dunnagan*, 101 Idaho 125, 126 (1980). Since this is Mr. Hennig's first felony, and, indeed, his first arrest of any kind, and he is still relatively young at [REDACTED] a more lenient sentence, such as a period of retained jurisdiction, which provides such a rehabilitative opportunity, should have been imposed.

In fact, the evidence in the record shows that Mr. Hennig had begun successfully working toward that goal of rehabilitation. As Dr. Wolfe noted, he had been making "wonderful progress" in his mental health treatment. (Tr., p.42, Ls.1-2.) Mr. Hennig also expressed remorse and accepted responsibility for his actions in this case. (Tr., p.67, Ls.10-20; Conf. Docs., p.136.) Acknowledgment of guilt and acceptance of responsibility by the defendant are critical first steps toward rehabilitation. See *State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010). Indeed, Mr. Hennig's willingness to pay restitution to make sure Mr. Coby's injuries were fully treated (Tr., p.67, Ls.10-20) demonstrates the progress he has begun to make in that regard. See *State v. Hall*, 114 Idaho 887, 889 (Ct. App. 1988) (explaining willingness to pay restitution is a factor that the district court is to consider in mitigation). As such, the evidence in the record shows that he has begun the rehabilitation process and is making good progress thus far.

Moreover, Mr. Hennig's history shows that he is capable of continuing to be successful with such rehabilitative efforts. For example, he has also been able to get himself sober and earn his GED upon doing so. (Conf. Docs., pp.459-60.) He was also a model prisoner during his initial incarceration, with no disciplinary issues. (Conf. Docs., p.461.) "The [United States Supreme Court has] emphasized that 'a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.'" *Sivak v. State*, 112 Idaho 197, 201-02 (1986) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986)). As such, his demonstrated successes

in the past, coupled with his current progress and expressed amenability to continue with such treatment (Conf. Docs., p.144) demonstrates that his sentence should have fostered such treatment opportunities. *See, e.g., State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991) (recognizing amenability to treatment is a mitigating factor worthy of consideration in mitigation).

Furthermore, Mr. Hennig had a support network in place, as several family members and friend expressed their ongoing support of Mr. Hennig. (Tr., p.33, Ls.5-15, p.50, Ls.10-18; Conf. Docs., pp.905-17.) As the Court of Appeals has indicated, that sort of support network is worth consideration in mitigation because it indicates an increased ability to be successful in rehabilitative efforts. *See Kellis*, 148 Idaho at 817 (indicating that familial support offered in consideration of rehabilitation would be a mitigating factor worthy of consideration).

All these factors demonstrate that rehabilitation is not only possible, but likely, if pursued at this point in time. *See, e.g., Dunnagan*, 101 Idaho at 126 (recognizing timing of rehabilitation is an important consideration); *Cook*, 145 Idaho at 489-90 (same). Of course, nothing about ordering a period of retained jurisdiction at the initial sentencing hearing prevents the district court from imposing a significant underlying sentence if such a sentence is necessary to promote the other goals of sentencing, such as deterrence of others. *See generally* I.C. § 19-2601(4). Nor would it prevent the district court from imposing a long term of probation (should Mr. Hennig successfully complete the period of retained jurisdiction) to make sure he stayed under state supervision for a long period to serve those same goals. *See generally id.* Rather, it is particularly the decision to execute such as sentence and forego those rehabilitative options for a young, first-time offender which further demonstrates the abuse of the district court's discretion in this case.

This is particularly true in Mr. Hennig's case, where the evidence indicated that a sentence with a straight prison term would actually be a detriment to his rehabilitation process. As Dr. Wolfe testified, Mr. Hennig would be able to continue his treatment for his mental health issues in the community, but he was unsure how that treatment would progress in a prison setting. (Tr., p.43, L.23 - p.44, L.5; *compare* Tr., p.75, Ls.15-18 (the district court indicating it believed Mr. Hennig might be able to continue his rehabilitation in prison).) As such, the straight prison sentence, such as the one imposed by the district court, actually risks more harm to society in the long run by delaying Mr. Hennig's rehabilitation. *See, e.g., Dunnagan*, 101 Idaho at 126; *Cook*, 145 Idaho at 489-90; *cf. Tapia v. United States*, 564 U.S. 319, 326 (2011) (interpreting U.S.C. § 3582(a) as prohibiting increasing a term of incarceration just to provide access to rehabilitative opportunities in prison)).

As such, even though this was a disturbing incident which caused significant injuries to Mr. Coby, a proper consideration of all the evidence before the district court reveals that executing a sentence with a long fixed term was not an exercise of reason nor consistent with the applicable legal standards. Simply put, the district court's sentence improperly focuses on the goals of retribution and deterrence while ignoring all the facts speaking to the goals of rehabilitation, which is contrary to the applicable legal standards. *See Knighton*, 143 Idaho at 320 (explaining that, while a court can put weight on one sentencing factor, it cannot ignore facts speaking to another sentencing factor). That is particularly problematic in this case, where the sentencing factor being ignored is the one which the Idaho Supreme Court has said should be the first consideration in terms of promoting the overall protection of society, particularly for young, first-time offenders like Mr. Hennig. *McCoy*, 94 Idaho at 240. As such, the sentencing decision, and particularly, the decision to not retain jurisdiction, an abuse of the district court's discretion.

CONCLUSION

Mr. Hennig 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.

DATED this 28<sup>th</sup> day of June, 2021.

/s/ Brian R. Dickson  
BRIAN R. DICKSON  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28<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

BRD/eas