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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 38678
)	
vs.)	
)	
LARRY EUGENE MORRIS,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

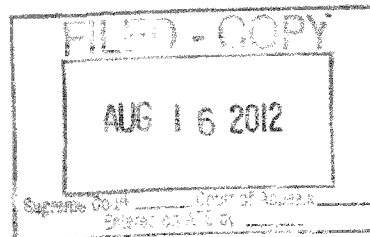
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STATEMENT OF THE CASE

Nature of the Case

Larry Eugene Morris appeals from the district court's order granting his Rule 35 motion for leniency and modifying his sentence and his motion for commutation of sentence pursuant to Rule 33(d).

Statement of Facts and Course of Proceedings

The district court in its memorandum decision and order denying Morris' motion for commutation of sentence described the facts and the proceedings in Morris' underlying criminal case as follows:

The State of Idaho (State) filed an Information on June 24, 2010, accusing Larry Eugene Morris (Morris) with [sic] the crimes of Possession of a Controlled Substance (Methamphetamine), Possession of Drug Paraphernalia and Resisting and/or Obstructing Law Enforcement. The State also alleged a Part II Habitual Offender sentence enhancement provision.

On July 23, 2010, Morris plead [sic] guilty to the Possession of Methamphetamine charge, and admitted the Habitual Offender provision. The State agreed to move for dismissal of the remaining charges, and Morris agreed that he waived his right to appeal the Court's sentence. The parties agreed to jointly recommend a ten (10) year unified sentence, consisting of five (5) years fixed followed by five (5) years indeterminate. The Court was not asked to be bound by this joint recommendation, and the State further agreed it would recommend suspension of the sentence and probation if Morris cooperated with law enforcement investigations prior to sentencing. Morris was also released on his own recognizance.

Sentencing was held on November 29, 2010. It was determined that Morris had not complied with the expectations of assisting law enforcement prior to sentencing. Morris's explanation was that he could not comply with law enforcement requests that would endanger a plan for Morris and his wife to regain custody of their child pursuant to a Child Protection Action. The Court

sentenced Morris to a ten (10) year unified sentence, with the first five (5) years fixed.

The Judgment, filed November 30, 2010, notified Morris of his right to appeal the sentence, notwithstanding his plea agreement to waive his right of appeal.

Morris filed a Motion to Reconsider Sentence pursuant to I.C.R. 35, on the basis of a plea for leniency. A hearing on this Motion was held February 8, 2011, and Morris appeared and testified telephonically. The Court exercised its discretion and modified Morris's sentence so that it remained a ten (10) year unified sentence, but consisting of four (4) years fixed followed by six (6) years indeterminate.

Morris filed his Notice of Appeal on March 18, 2011, appealing the Order Granting Rule 35 Motion and Modifying Sentence; on May 18, 2011, Morris, on his own, filed a Motion for Correction or Reduction of Sentence, I.C.R. 35. The Motion alleged an illegal sentence. Counsel for Morris filed a Motion for Commutation of Sentence, Suspension of Execution of Judgment and Placement on Supervised Probation on September 1, 2011. This Motion seemed to replace the "illegal sentence" motion that Morris had filed on May 18, 2011. The Motion for Commutation was filed pursuant to I.C.R. 33(d).

Morris was again allowed to appear and testify telephonically at the hearing on his Motion for Commutation held on October 21, 2011, and Morris also presented other evidence in support of his Motion. The Court allowed the parties to submit further briefing on the issue of whether the Court had jurisdiction to commute the sentence under these circumstances. At the conclusion of that briefing, the Court took the matter under advisement on November 4, 2011.

(Supp. R. pp.106-108.,¹) The district court denied Morris' motion for commutation having found it was without jurisdiction to grant such relief under

¹ Two separate clerk's records have been compiled in this case. The first, being prepared and certified following the initial notice of appeal from the denial of Morris' Rule 35 motion, will be referred to in the state's brief as "R." The subsequent court record, certified on January 27th, 2012, after the notice of appeal from the district court's denial of Morris' Rule 33(d) motion, will be cited as "Supp. R.,"

Rule 33(d). (Supp. R., p.110.) The court further found even if it had jurisdiction to commute the sentence, Morris' record before it did "not support probation or a commuted sentence." (Supp. R., p.109.)

Morris timely appealed. (R., pp.100-101, 102-105; Supp. R., pp.106-111, 185-188.)

ISSUES

Morris states the issues on appeal as:

1. Did the district court have jurisdiction to commute Mr. Morris' sentence pursuant to Idaho Criminal Rule 33(3) and Idaho Code Section 19-2601(4)?
2. Did the district court abuse its discretion when it denied Mr. Morris's request for probation, made pursuant to Idaho Criminal Rule 35?
3. Did the district court abuse its discretion when it denied Mr. Morris' Idaho Criminal Rule 33(d) motion on its merits?

(Appellant's brief, p.4.)

The state rephrases the issues on appeal as:

1. Has Morris failed to establish the district court abused its discretion in granting his Rule 35 motion?
2. Has Morris failed to show the district court had jurisdiction to consider a motion for commutation of sentence subsequent to his sentencing and the transfer of his jurisdiction to the department of corrections?
3. Has Morris failed to establish the district court abused its discretion in denying his motion for commutation pursuant to Rule 33(d) on the merits?

ARGUMENTS

I.

Morris Has Failed To Establish The District Court Abused Its Discretion In Granting His Rule 35 Motion For Leniency And Modifying Morris' Sentence By Reducing The Fixed Portion By One Year And Failing To Grant Probation

A. Introduction

Morris argues on appeal that the district court abused its discretion in denying his request for probation pursuant to I.C.R. 35. (Appellant's brief, pp.11-16.) Specifically, Morris argues there was "additional information present [sic] at sentencing which, when viewed in light of Mr. Morris' new information, supports either placement on probation or a reduction of his sentence." (Appellant's brief, p.14.) Morris has failed to establish an abuse of discretion. A review of the record supports the district court's determination, in light of his extension criminal history, that Morris was not an appropriate candidate for probation, and Morris failed to present any new evidence entitling him to a further reduction of his underlying sentence.

B. Standard Of Review

If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and the Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Morris 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." Id.

C. Morris Has Failed To Show The District Court Abused Its Discretion In Ruling On His Rule 35 Motion Requesting Leniency In His Sentence

If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. Huffman, 144 Idaho at 203, 159 P.3d at 840. Morris did not appeal his underlying sentence. Therefore, to prevail on his claim that the district court abused its discretion by denying his Rule 35 motion, Morris 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.” Id.; see also State v. Adair, 145 Idaho 514, 516, 181 P.3d 440, 442 (2008) (absent the presentation of new evidence, an appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence). Morris has failed to satisfy his burden.

In considering Morris’ request for reduction of his sentence pursuant to Rule 35, the district court noted it had learned of one factor it was unaware of at the time of sentencing: “that Mr. Morris had provided information to law enforcement regarding [unrelated] robbery charges before his arrest in this matter.” (2/8/11 Tr., p.101, Ls.11-15.) The court believed this information to be important because the state’s negotiated recommendation for probation was contingent upon Morris’ cooperation with law enforcement subsequent to his arrest for the current charges; the court reconsidered its “assessment that [Morris] just never intended to work for the Task Forces as he had made an agreement.” (See 2/8/11 Tr., p.101, L.15 – p.102, L.8.) However, this new piece of information did not override the court’s concerns to the point it believed Morris

was an appropriate candidate for probation. After considering this new factor, weighed against the previously evaluated aggravating circumstances of Morris' situation, the district court did grant his Rule 35 motion in part by reducing the fixed portion to be served by one year, but denying Morris' continued request for probation:

I'm going to modify the sentence in this case because it's hard to look back at a sentencing and say had I heard back at the sentencing date about Mr. Morris having provided information to the police, not in exchange for money or in a deal to get some lenient treatment on his own sentence but just because he had some information and wanted to give it to police, it's hard to know what sentence I would have given at that time. I firmly believe that the sentence would have been a prison sentence. Mr. Morris' record, the facts leading up to that, Mr. Morris' possession of meth charge and conviction, and the fact that he's a habitual offender means that probation was simply not in the cards for Mr. Morris. It's not in the cards today. It would be diminishing his criminal history. It would be diminishing the crime. It would not act as appropriate punishment at all. It would not act as appropriate deterrence to Mr. Morris or to any other person.

(2/8/11 Tr., p.103, L.9 – p.104, L.1.)

The district court considered all of the relevant information and reasonably determined that Morris failed to show through his new piece of information that he was a candidate for probation. Morris has failed to establish that the district court abused its discretion in denying his request pursuant to Rule 35 to be placed on probation.

II.

The District Court Correctly Determined It Was Without Jurisdiction To Consider Morris' Motion For Commutation Of His Sentence Following The Imposition Of His Sentence And Transfer Of Jurisdiction To The Department Of Corrections

A. Introduction

Morris asserts on appeal the district court erred in concluding it was without jurisdiction to commute Morris' sentence pursuant to Rule 33(d). Specifically, Morris argues the district court had jurisdiction to do so pursuant to Rule 33(d) when read in conjunction with Idaho Code § 19-2601(4). (Appellant's brief, pp.5-10.) Morris' argument fails.

B. Standard Of Review

The interpretation and construction of a statute present questions of law over which the appellate court exercises free review. State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004); State v. Dorn, 140 Idaho 404, 405, 94 P.3d 709, 710 (Ct. App. 2004).

"A question of jurisdiction is fundamental; it cannot be ignored when brought to [the appellate courts'] attention and should be addressed prior to considering the merits of an appeal." State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003) (quoting H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors, 113 Idaho 646, 648, 747 P.2d 55, 57 (1987)). Whether a court has jurisdiction is a question of law, given free review. Kavajecz, 139 Idaho at 483, 80 P.3d at 1084.

C. The District Court Was Without Jurisdiction To Rule On Morris' Request For Commutation Of His Sentence

Idaho Criminal Rule 33 governs the timing for the imposition of a sentence following a conviction:

[a]fter a plea or a verdict of guilty, if the judgment be not arrested nor a new trial granted, the court must appoint a time for pronouncing judgment and sentence, which, in cases of felony, must, unless waived by the defendant, be at least two (2) days after the verdict.

I.C.R. 33(a)(1). The Rule further provides the conditions required for the pronouncement of a sentence other than imposition:

For an offense not punishable by death, the district court or the magistrates division may commute the sentence, suspend the execution of the judgment, or withhold judgment, and place the defendant upon probation as provided by law and these rules.

I.C.R. 33(d). Subsequent to the granting of his Rule 35 motion and the reduction of the fixed portion of his sentence by one year, Morris moved the district court pursuant to Rule 33 to commute his sentence and place him on probation, relying on generally the same information presented to the court in his previously litigated Rule 35 motion.² The district court correctly denied the motion for commutation of sentence, finding “the rule and statute outline options for sentencing and seem applicable only at the time of sentencing.” (Supp.R., p.108.)

² In fact, the filing of Morris' Rule 33 motion for commutation of his sentence was preceded by and ultimately supported with Morris' *pro se* Rule 35 motion for the correction of an illegal sentence filed subsequent to the district court's granting of the Rule 35 motion for leniency. (Supp. R., pp.19-27.)

The Court of Appeals has previously addressed the issue of a petition to commute a sentence to probation filed from prison pursuant to I.C. § 19-2601 in State v. Starry, 130 Idaho 834, 835, 948 P.2d 1133, 1134 (Ct. App. 1997) (citations omitted):

As a preliminary matter, we clarify the nature of Starry's petition. He characterizes it as a request for commutation of his sentence. However, the district court has no authority to "commute" a sentence once it has been imposed and executed. Such authority is vested in the executive branch through the Board of Pardons, acting as the Commission of Pardons and Parole. In his petition, Starry requests that he be placed on probation in lieu of serving the remainder of his sentence in prison so that he may obtain meaningful rehabilitation for his substance abuse problems. In addition, he suggests that because this was his first violent offense, he is amenable to rehabilitation and should be given an opportunity to become a productive member of society. Because Starry essentially requests a reduction of sentence, his petition is more accurately characterized as a motion falling under I.C.R. 35.

The facts in Morris' case are analogous. Morris was granted a reduction of the fixed portion of his sentence pursuant to a motion for leniency filed under I.C.R. 35. Morris essentially filed a second Rule 35 motion requesting further leniency by placing him on probation. As in Starry, the district court was without jurisdiction to consider this untimely motion for leniency filed some nine months following the filing of Morris' judgment of conviction on November 30, 2010. (R., pp.76-78; Supp. R., pp.19-20.) Starry, 130 Idaho at 835, 948 P.2d at 1134. ("A trial court has jurisdiction to reduce a lawful sentence within 120 days after the filing of a judgment of conviction.")

The district court correctly determined it was without jurisdiction to consider Morris' motion for commutation of sentence following his original sentencing hearing and the resolution of his Rule 35 plea for leniency.

III.

Had The District Court Possessed The Jurisdiction To Rule On Morris' Motion To Commute His Sentence, Morris Has Failed To Carry His Appellate Burden In Establishing The District Court Abused Its Discretion In Determining Morris' Presentation To The Court Did Not Warrant Such A Request

In denying Morris' plea for commutation of his sentence pursuant to Rule 33, the district court analyzed Morris' circumstances as it had when presented with Morris' Rule 35 request for leniency:

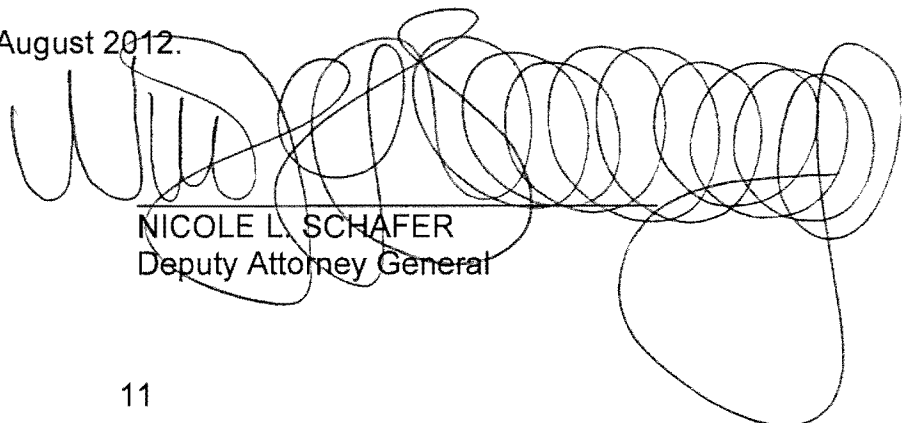
Even if this Court was possessed of jurisdiction to commute the sentence, it would not exercise its discretion (if it had any) to do so. The over-all record before this Court does not support probation or a commuted sentence. Such an action would not be appropriate to adequately protect society or deter Mr. Morris or others similarly situated. A suspended or commuted sentence would seriously depreciate the long and harmful criminal history of record. Any rehabilitation efforts for Mr. Morris are best addressed from within a secured facility until the parole board deems otherwise.

(Supp. R., pp.109-110.) As discussed in Section I of the state's brief, Morris has failed to carry his burden in establishing the district court erred in denying his request for probation.

CONCLUSION

The state respectfully requests this Court affirm the orders granting Morris' Rule 35 motion and modifying sentence and denying Morris' motion for commutation of sentence pursuant to Rule 33(d).

DATED this 16th day of August 2012.



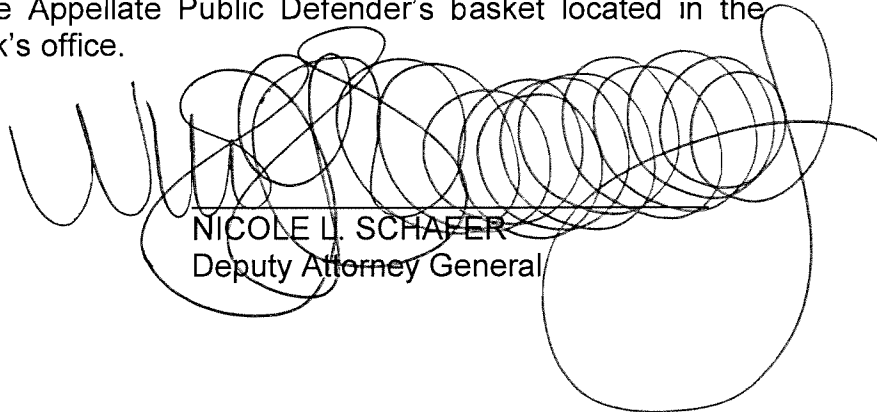
NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th day of August 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SHAWN F. WILKERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm