1-7-2014

State v. Moore Respondent's Brief Dckt. 40525

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 40525
Plaintiff-Respondent,	)	
	)	Ada Co. Case No.
vs.	)	CR-2009-11603
	)	
MICHAEL FRANCIS MOORE,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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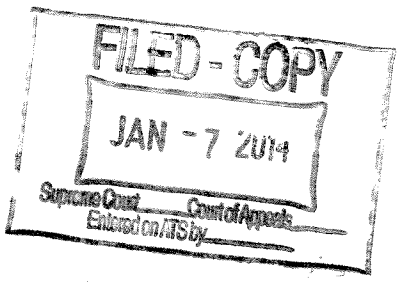

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STATEMENT OF THE CASE

Nature of the Case

Michael Francis Moore appeals from the judgment entered upon his guilty plea to burglary. On appeal, Moore argues the district court erred by denying his request for a mental health evaluation. He also argues the district court abused its discretion by denying his Rule 35 motion for reduction of sentence.

Statement of Facts and Course of Proceedings

Moore entered a Rite-Aid store, took a six-pack of Mike's Hard Lemonade from the shelf, concealed it under his shirt, and attempted to leave the store without paying for the merchandise. (PSI, pp.2, 35.) When a loss prevention officer stopped him, Moore punched her in the face and fled the store. (PSI, pp.2, 35.)

The state charged Moore with burglary, petit theft and battery. (R., pp.24-25.) Pursuant to a plea agreement, Moore pled guilty to burglary and the state dismissed the remaining charges. (R., pp.39-48.) Moore failed to appear for his first scheduled sentencing hearing, and the court issued a bench warrant for his arrest. (R., pp.48-50.) After he was arrested on the warrant, Moore requested and received two additional continuances of the sentencing hearing to allow him review the PSI. (3/16/10 Tr., p.5, L.14 – p.6, L.23; 3/23/10 Tr., p.8, L.25 – p.10, L.22, p.12, L.4 – p.14, L.11.)

At the hearing where Moore requested a second continuance of his sentencing hearing, Moore also requested a mental health evaluation pursuant

to I.C. § 19-2524. (3/23/10 Tr., p.10, Ls.4-16.) Specifically, Moore's attorney advised the court:

> [I]t's come to my attention that at the time of this incident, Mr. Moore was experiencing hallucinations, symptoms of his schizophrenia. He is also bipolar and is not on his medication. And it has come to my attention that his mental health issues probably played a very big role in this incident.
>
> I know the Court and the State is [sic] not in support of his mental health court screening, and I think it's also because the crime is burglary, and they probably won't accept him because of that. But I think it would be a beneficial – if he had a 19-2524 mental health evaluation, I think that information would be beneficial to this Court prior to his sentencing.

(3/23/10 Tr., p.10, Ls.4-16.) The state inquired about the utility of ordering an I.C. § 19-2524 mental health evaluation, noting that Moore's schizophrenia was "documented in the materials" already available to the court, and stating, "I just don't know what [an evaluation is] going to tell us that we don't already know with regards to his mental health issues." (3/23/10 Tr., p.10, L.24 – p.11, L.7.) The court agreed that Moore's mental health issues were well documented in the materials already before it, explaining:

> Well, a pure evaluation – I have the benefit of the report from Intermountain hospital of February 28th of '05, the discharge, which lays out the diagnosis on Axis I with schizoaffective disorder with alcohol and polysubstance abuse, along with some other things.
>
> And then we have a psychiatric evaluation that was done by Saint Alphonsus ... in August of '08. There is a – it doesn't read the same, necessarily, as a court-ordered evaluation, but I think it tells me what I'm going to find out from a court-ordered evaluation, that the defendant does have [a] history of schizophrenic-type mental illness.
>
> So I'm not inclined to continue this for mental health – I mean, the records go back ... clear to 2002. I'm looking at one in

> January of '04 where he presents at the emergency department with histories of hearing voices and definitely psychotic state.

(3/23/10 Tr., p.11, L.8 – p.12, L.2.) The court thus declined Moore's request for an I.C. § 19-2524 mental health evaluation. (3/23/10 Tr., p.12, L.3.)

At the final continued sentencing hearing on March 30, 2010, the district court imposed a unified sentence of five years, with one year fixed. (3/30/10 Tr., p.11, L.25 – p.12, L.17; R., pp.59-64, 72-75.) Moore filed a timely Rule 35 motion for reduction of his sentence, which the district court denied. (R., pp.70-71, 78-83, 86-89.) Moore timely appealed. (R., pp.90-95.)

ISSUES

Moore states the issues on appeal as:

1. Did the district court err when it denied Mr. Moore's motion for a mental health evaluation?

2. Did the district court abuse its discretion when it denied Mr. Moore's Idaho Criminal Rule 35 Motion for a Reduction of Sentence in light of the new information offered by Mr. Moore?

(Appellant's brief, p.4.)

The state rephrases the issues as:

1. At his third scheduled sentencing hearing, Moore requested the court to order an I.C. § 19-2524 mental health evaluation, and the district court denied that request. For the first time on appeal, Moore argues the district court erred by not ordering an I.C. § 19-2522 psychological evaluation. Must this Court decline to consider Moore's appellate argument – that the district court erred by declining to order an evaluation he never requested – because it was not preserved below and is not reviewable as fundamental error?

2. Has Moore failed to show the district court abused its discretion in denying his Rule 35 motion for reduction of his already lenient sentence?

ARGUMENT

I.
Moore's Claim That The District Court Erred By Not Ordering An I.C. § 19-2522 Psychological Evaluation Never Requested By Moore Below Is Not Properly Before This Court For The First Time On Appeal

A. Introduction

At the third scheduled sentencing hearing in this case, Moore's attorney advised the court that Moore was experiencing symptoms of his previously diagnosed mental illnesses when he committed the crimes in this case, and she suggested that "a 19-2524 mental health evaluation" might be "beneficial to [the] Court prior to [Moore's] sentencing." (3/23/10 Tr., p.10, Ls.4-16.) The district court denied the request, finding a further continuance of the sentencing hearing for the purpose of ordering the requested mental health evaluation unwarranted because Moore's "history of schizophrenic-type mental illness" was already well documented in the existing sentencing materials.[1] (3/23/10 Tr., p.11, L.8 – p.12, L.3.)

On appeal, Moore does not challenge the district court's decision to deny his request for a mental health evaluation pursuant to I.C. § 19-2524. Instead he argues, for the first time on appeal, that the court should have ordered a psychological evaluation pursuant to I.C. § *19-2522*. (Appellant's brief, pp.5-12.) This Court must decline to consider the merits of Moore's appellate argument because Moore never requested an I.C. § 19-2522 evaluation below, and his

[1] The court did, however, grant Moore an additional one-week continuance to enable him to fully review the PSI. (3/23/10 Tr., p.12, L.4 – p.14, L.11.)

unpreserved claim that the district court erred by not ordering such an evaluation is not reviewable as fundamental error.

B. Standard Of Review

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 227-28, 245 P.3d 961, 979-80 (2010).

C. Moore's Claim That The District Court Erred By Not Ordering An I.C. § 19-2522 Psychological Evaluation Is Unpreserved And Not Reviewable As Fundamental Error

It is well-settled that "Idaho's appellate courts will not consider error not preserved for appeal through an objection at trial." State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010) (citing State v. Johnson, 126 Idaho 892, 896, 894 P.2d 125, 129 (1995)); accord State v. Carter, 115 Idaho 170, ___, 307 P.3d 187, 190 (2013). An exception to this rule exists if the alleged error constitutes fundamental error. Perry, 150 Idaho at 224, 245 P.3d at 976; Carter, 155 Idaho at ___, 307 P.3d at 190. However, the burden of demonstrating fundamental error rests squarely with the defendant asserting the error for the first time on appeal. Perry, 150 Idaho at 228, 245 P.3d at 980; Carter, 155 Idaho at ___, 307 P.3d at 190. To carry that burden, a defendant asserting an unpreserved error must demonstrate that the error he alleges "(1) violates one or

more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Perry, 150 Idaho at 228, 245 P.3d at 980, quoted in Carter, 155 Idaho at ___, 307 P.3d at 190. Because a claim that a trial court erred by failing to *sua sponte* order a psychological evaluation in compliance with I.C. § 19-2522 asserts a statutory violation, not a constitutional violation, it fails to satisfy even the threshold requirement of Perry and is not reviewable as fundamental error. State v. Clinton, 155 Idaho 271, ___, 311 P.3d 283, 285 (2013); Carter, 155 Idaho at ___, 307 P.3d at 191.

Citing exclusively to the standards applicable to a district court's decision to order a psychological evaluation pursuant to I.C. § 19-2522, Moore argues "the district court erred when it denied [his] request and refused to order a mental health evaluation pursuant to I.C. § 19-2522." (Appellant's brief, pp.5-12.) Moore apparently believes he preserved this issue for appeal because he also represents that defense counsel below "requested a mental health evaluation pursuant to I.C. § 19-2522." (Appellant's brief, p.8 (citing 3/23/10 Tr., p.10, Ls.13-16).) Moore is clearly mistaken. A review of the cited transcript shows defense counsel below actually requested "a *19-2524* mental health evaluation" (3/23/10 Tr., p.10, Ls.4-16 (emphasis added)), not an I.C. § 19-2522 psychological evaluation as Moore contends on appeal. Because Moore never requested an I.C. § 19-2522 psychological evaluation below, his claim on appeal that the district erred by not ordering such an evaluation is not preserved and this

Court must decline to consider it. Clinton, 155 Idaho at ___, 311 P.3d at 285; Carter, 155 Idaho at ___, 307 P.3d at 191.

To the extent Moore believes there is no meaningful distinction between a mental health evaluation pursuant to I.C. § 19-2524 and a psychological evaluation pursuant to I.C. § 19-2522 – such that a request for one preserves a claim of error as to a failure to order the other – he is incorrect. At the time of Moore's sentencing, I.C. § 19-2524 provided, in part:

> **Substance abuse and mental health treatment.** – (1) When a defendant has pled guilty to or been found guilty of a felony, or when a defendant who has been convicted of a felony has admitted to or been found to have committed a violation of a condition of probation, the court, prior to the sentencing hearing or the hearing on revocation of probation, may order the defendant to undergo a substance abuse assessment and/or a mental health examination.

I.C. § 19-2524(1) (2010).[2] Idaho Code § 19-2522, on the other hand, provides:

> **Examination of defendant for evidence of mental condition – Appointment of psychiatrists or licensed psychologists – Hospitalization – Reports.** – (1) If there is reason to believe the mental condition of the defendant will be a significant factor at sentencing and for good cause shown, the court shall appoint at least one (1) psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant. ...

I.C. § 19-2522(1). The obvious overriding purpose of both statutes is to assist the sentencing court "in determining whether to recommend psychological treatment ... during a defendant's confinement or probation." State v. Hanson,

[2] A 2012 amendment largely rewrote I.C. § 19-2524. See 2012 Idaho Sess. Laws, ch. 225, § 3, p.611. The amendment, which was effective March 1, 2013, has no application to this case. Therefore, all further citations to I.C. § 19-2524 will be to the 2010 version.

152 Idaho 314, 323, 271 P.3d 712, 721 (2012) (citing State v. Harper, 129 Idaho 86, 91, 922 P.2d 383, 388 (1996)); State v. Hanson, 150 Idaho 729, 732, 249 P.3d 1184, 1187 (Ct. App. 2011) (I.C. § 19-2524 "broadens a court's sentencing options related to treatment for substance abuse or mental health issues"). But the differences between the two statutes are equally obvious, particularly as they relate to the legal standards applicable to a court's decision to grant or deny a request to order one evaluation or the other.

Both the plain language of I.C. § 19-2522 and Idaho case law make clear that, when requested, a district court must order an I.C. § 19-2522 psychological evaluation if there is reason to believe the mental condition of the defendant will be a significant factor at sentencing. Hanson, 152 Idaho at 319, 271 P.3d at 717 (and cases cited therein, holding that language of I.C. § 19-2522(1) is mandatory and requires court to order a psychological evaluation when "there is reason to believe the mental condition of the defendant will be a significant factor at sentencing"); Clinton, 155 Idaho at ___, 311 P.3d at 285 (failure of sentencing court to *sua sponte* order an I.C. § 19-2522 psychological evaluation is not a fundamental error reviewable for the first time on appeal); Carter, 155 Idaho at ___, 307 P.3d at 191 (same). The decision to grant or deny a request for an I.C. § 19-2524 mental health evaluation, on the other hand, is purely discretionary. Hanson, 150 Idaho at 732, 249 P.3d at 1187 ("The word 'may' [in I.C. § 19-2524(1)] is permissive and denotes an exercise of discretion. Thus, a court possesses discretion to order or decline to order a mental health examination prior to sentencing or at disposition pursuant to I.C. § 19-2524." (internal citation

omitted)). In other words, when faced with a request for an I.C. § 19-2524 mental health evaluation, a sentencing court may decline such request so long as it (1) perceives the issue is one of discretion, (2) acts within the outer boundaries of its discretion and consistently with applicable legal standards; and (3) reaches its decision by an exercise of reason. Hanson, 152 Idaho at 318-19, 271 P.3d at 716-17 (citations omitted).

That nothing in I.C. § 19-2524 mandates a district court to order a mental health evaluation under any particular set of circumstances is particularly significant in the context of this case. Below, Moore's attorney suggested only that "a 19-2524 mental health evaluation" "would be beneficial to [the] Court prior to [Moore's] sentencing." (3/23/10 Tr., p.10, Ls.13-16.) In so suggesting, Moore asked the court to make a purely discretionary decision to order the requested evaluation. Moore now argues the court was *required* to order a psychological evaluation under an entirely different statute – I.C. § 19-2522 – because, he claims, there was reason to believe his mental condition would be a significant factor at sentencing. (Appellant's brief, pp.5-12.) Even assuming the truth of this latter assertion, Moore never requested the I.C. § 19-2522 psychological evaluation he now claims the district court should have ordered and, as such, never gave the district court the opportunity to consider the request in light of the legal standards applicable to that particular statute. Having failed to do so, and having never obtained an adverse ruling in relation to any request for an I.C. § 19-2522 psychological evaluation, Moore failed to preserve the issue for appeal. Clinton, 155 Idaho at ___, 311 P.3d at 285; Carter, 155 Idaho at ___, 307 P.3d

at 191; see also State v. Thumm, 153 Idaho 533, 537, 285 P.3d 348, 352 (Ct. App. 2012) (citations omitted) (appellate court "will not review a trial court's alleged error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error").

In addition to the distinction between the legal standards that inform a court's decision to grant or deny a request for an I.C. § 19-2524 mental health evaluation versus an I.C. § 19-2522 psychological evaluation, the requirements of the two statutes are also substantively different, such that a request for an evaluation under one statute is not the same as a request for an evaluation under the other. Idaho Code § 19-2524 contains no explicit requirements for the qualifications of the person conducting the mental health examination (or substance abuse assessment) described therein.[3] Idaho Code § 19-2522, in contrast, specifically requires that a psychological evaluation ordered pursuant to that statute be conducted by a "psychiatrist or licensed psychologist." I.C. § 19-2522(1). Thus, by their very language, the statutory requirements for a psychological evaluation under I.C. § 19-2522 are more stringent than those for a mental health examination under I.C. § 19-2524 – and for good reason.

As evidenced by the title of I.C. § 19-2522, one of the express purposes of a psychological evaluation under that statute is to "examin[e]" the defendant

[3] Idaho Code § 19-2524(3)(b) provides that if, *after* receiving the mental health evaluation ordered pursuant to subsection (1), the court determines additional information is necessary, the court may order a second evaluation "to be furnished by a psychiatrist, licensed physician or licensed psychologist." There is, however, no requirement that the person conducting the initial examination pursuant to I.C. § 19-2524(1) possess any particular qualifications.

"for evidence of mental condition." Id. (capitalization altered). It is manifest that only a psychiatrist or licensed psychologist would be qualified to conduct such an examination and actually render a diagnosis of mental illness and, as such, those are the only individuals authorized to conduct a psychological evaluation pursuant to I.C. § 19-2522. As suggested by the title of I.C. § 19-2524, however, the aim of that statute is not necessarily to diagnose mental illness in the first instance, but to instead assess a defendant's need for and amenability to "mental health treatment." Id. See also I.C. § 19-2524(3)(a)(vii) (requiring report of mental health examination to include a "plan of treatment" if certain conditions are met), (c)(permitting court to order mental health treatment as condition of probation). Given the differences between both the substantive requirements of the statutes and the specific purposes thereof there can be no question that the evaluations contemplated under each statute are not interchangeable and, therefore, a request for one does not preserve a claim that a trial court erred by not ordering the other.

While it is clear Moore's appellate attorney now believes the district court should have ordered an I.C. § 19-2522 psychological evaluation for use at sentencing, it is unsurprising that Moore's trial attorney did not request such an evaluation – and instead suggested the court order a mental health examination pursuant to I.C. § 19-2524 – in light of the facts of this case. By the time Moore's trial attorney made the request for an I.C. § 19-2524 mental health evaluation, there was no question that Moore had a long history of mental illness. In fact, as Moore himself recognizes on appeal, "[t]he district court had before it well over

100 pages of records that reflected a diagnosis of schizophrenia with delusions and hallucinations and which also documented depression and suicidal ideations." (Appellant's brief, p.10; see also PSI, pp.12, 14-15, 19, 22, 25-26, 71-81, 93-152, 156-58, 163-97.) It is likely because the information already before the court made clear that Moore suffered from schizophrenia and other mental illnesses or defects that Moore's trial attorney did not suggest that a psychological evaluation needed to be conducted to look for "evidence of" a mental condition, see I.C. § 19-2522; instead, she represented that Moore was experiencing symptoms of his previously diagnosed mental illnesses and suggested that the information that could be gleaned from "a 19-2524 mental health evaluation ... would be beneficial to [the] Court." (3/23/10 Tr., p.10, Ls.4-16.) Both the prosecutor and the trial court recognized Moore's history of schizophrenic-type illness. (3/23/10 Tr., p.10, L.24 – p.12, L.2.) Exercising the discretion vested to it under I.C. § 19-2524, the district court determined that a prolonged continuance of the sentencing hearing for purpose of obtaining the requested mental health evaluation was unnecessary because the existing sentencing materials already contained sufficient information about Moore's mental illnesses to enable it to make an informed sentencing decision. (3/23/10 Tr., p.11, L.8 – p.12, L.2.)

Again, Moore does not actually argue the court abused its discretion in declining to order the only evaluation he requested. Nor could he show such an abuse of discretion under the facts of this case. Pursuant to I.C. § 19-2524(3)(a), a report of mental health examination is required to include, *inter alia*,

a "diagnosis, evaluation or prognosis" of the defendant's mental condition, a "consideration of whether treatment is available," an "analysis of the relative risks and benefits of treatment or nontreatment," a "consideration of the risk of danger the defendant poses to the public, and, under some circumstances, a "plan of treatment." I.C. § 19-2524(3)(a)(i-vii). Although Moore argues otherwise (albeit in reference to the requirements of I.C. § 19-2522) (see Appellant's brief, pp.9-12), even a cursory review of the information already available to the court at the time of sentencing shows it was more than sufficient to comply with the requirements of I.C. § 19-2524(3)(a).

As noted by the district court at the March 23, 2010 hearing where it denied Moore's request for an I.C. § 19-2524 mental health evaluation, the sentencing materials contain a number of records relating to Moore's mental condition(s), including an August 2008 Psychiatric Evaluation prepared by St. Alphonsus Hospital, a February 2005 discharge summary from Intermountain Hospital, and numerous medical and institutional records, dating back to 2002.[4] (See 3/23/10 Tr., p.11, L.8 – p.12, L.2; PSI, pp.93-197.) Together, those records show Moore had been consistently diagnosed with schizophrenia – with reports of auditory hallucinations occurring since he was an adolescent – and at least intermittently diagnosed with antisocial personality disorder, bipolar disorder and

[4] The records pertaining to Moore's mental condition actually go back as far as January 1983, when Moore underwent a psychiatric evaluation while in the custody of the Juvenile Diagnostic Unit at State Hospital North in Orofino. (PSI, pp.71-79.) At that time, Moore was diagnosed as being depressed and undersocialized and having an "aggressive reaction to adolescence." (PSI, pp.74-75, 78.)

depression. (PSI, pp.102-03, 105-08, 110-151, 156-58, 163-95.) Those records also show Moore received treatment for his mental illnesses in the form of psychiatric hospitalizations, psychiatric counseling and prescribed medication. (Id.) While the records themselves do not specifically speak to the "risks and benefits of treatment or nontreatment" or the "risk of danger" Moore poses to the community, they, along with other information in the presentence materials and his trial counsel's own representations, do show that Moore's tendency to commit crimes – including the burglary of which he was convicted in this case – are often the result of his failure to comply with prescribed medications and attempts to self-medicate with alcohol and illicit substances. (PSI, pp.15, 19, 93, 95, 102-04, 108, 144-53, 163-69, 175-82; 3/23/10 Tr., p.10, Ls.4-7; 3/30/10 Tr., p.6, Ls.18-22.) In short, the materials before the court demonstrated that Moore had one or more diagnosed mental illnesses for which treatment in the form of prescribed medication was not only available, but required, both for the purpose of stabilizing his mental condition(s) and to reduce the risk of danger he presented to the community.[5] Because any evaluation ordered pursuant to I.C. § 19-2524 would likely only have duplicated this information, the district court did not abuse its discretion in denying Moore's belated request for "a 19-2524 mental health evaluation."

[5] The trial court expressly recognized this and fashioned Moore's sentence, at least in part, to ensure he would "get stabilized on [his] medication and get some structure." (3/30/10 Tr., p.11, L.25 – p.12, L.6; see also 3/30/10 Tr., p.13, Ls.24-25 (instructing Moore to "[g]et on [his] meds and stay on them.").)

The district court had discretion to decline Moore's request for an I.C. § 19-2524 mental health examination, and Moore does not challenge that exercise of discretion on appeal. That Moore now believes the court was required to order a psychological evaluation pursuant to I.C. § 19-2522 – an entirely different statute with different legal standards and substantive requirements than those imposed by I.C. § 19-2524 – does not show any basis for reversal. For all the reasons stated above, Moore's request for an I.C. § 19-2524 mental health evaluation was not sufficient to preserve for appeal his claim that the district court erred by not ordering an I.C. § 19-2522 psychological evaluation. As the only claim Moore raises on appeal was not preserved and does not constitute fundamental error, this Court must decline to review it. Clinton, 155 Idaho at ___, 311 P.3d at 285; Carter, 155 Idaho at ___, 307 P.3d at 191.

II.
Moore Has Failed To Establish An Abuse Of Discretion In The Denial Of His Rule 35 Motion For Reduction Of His Already Lenient Sentence

A. Introduction

Citing primarily to the same information that was available to and specifically considered by the court at sentencing, Moore argues the district court abused its discretion by denying his Rule 35 motion for reduction of the unified sentence of five years, with one year fixed, imposed upon his guilty plea to burglary. (Appellant's brief, pp.13-17.) Moore, however, has failed to show his sentence was excessive, either as originally imposed or in light of any new information; he has therefore failed to show an abuse of discretion.

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 this 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).

C. Moore Has Failed To Show An Abuse Of Discretion In The Denial Of His Rule 35 Motion

A motion for reduction of sentence under Rule 35 is essentially a plea for leniency, addressed to the sound discretion of the court. State v. Knighton, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006). To prevail on a Rule 35 motion, a defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. State v. Adamcik, 152 Idaho 445, 484-85, 272 P.3d 417, 456-57 (2012); State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). "In conducting [its] review of the grant or denial of a Rule 35 motion, [the appellate court] consider[s] the entire record and appl[ies] the same criteria used for determining the reasonableness of the original sentence." State v. Mendoza, 151 Idaho 623, 629, 262 P.3d 266, 272 (Ct. App. 2011). Specifically, the Court considers whether the sentence is reasonable to achieve the protection of society or any of the related sentencing goals of deterrence, rehabilitation and retribution. State v. Strand, 137 Idaho 457, 460-61, 50 P.3d 472, 475-75 (2002). Application of these standards to the record in this case shows Moore has failed to establish an abuse of discretion in the denial of his Rule 35 motion.

Moore is a danger to society. His criminal record occupies seven pages of the PSI and includes two juvenile adjudications, at least 51 misdemeanor convictions and two prior felony convictions (both for burglary). (PSI, pp.3-9.) The majority of his convictions have resulted from alcohol and theft related offenses, as well as from crimes of violence. (PSI, pp.3-9.) He has served seven years in prison, has had the benefit of two periods of retained jurisdiction, and has been afforded numerous opportunities on probation and parole. (PSI, pp.3-11.) In fact, Moore was on probation for unlawful entry when he committed the burglary of which he was convicted in this case. (PSI, pp.9-11.)

There is no doubt, as Moore argues on appeal, that Moore has experienced a number of difficulties in his life. (Appellant's brief, pp.13-15; PSI, pp.13-19.) He was abused by alcoholic parents, was placed in foster care, has at times been homeless and has lived the majority of his life addicted to alcohol and drugs. (PSI, pp.13-19.) The district court recognized as much, however, and specifically factored what it characterized as the "insurmountable obstacles" Moore had faced into its sentencing decision. (3/30/10 Tr., p.9, Ls.18-25, p.12, Ls.11-15.) The court was also well aware that Moore was plagued by mental health issues, but it also noted what is apparent from the record – that Moore had been repeatedly treated for his mental conditions but never stayed on his prescribed medications, choosing instead to self-medicate with alcohol and illicit substances. (3/30/10 Tr., p.6, Ls.18-22, p.11, Ls.9-13; PSI, pp.15, 19, 93, 95, 102-04, 108, 144-53, 163-69, 175-82.) Considering Moore's "lengthy criminal history" in conjunction with his mental health issues and history of drug and

alcohol use, the district court determined that a sentence of incarceration was not only warranted, but necessary to allow Moore to get stabilized on his mental health medication in a structured environment. (3/30/10 Tr., p.11, L.7 – p.12, L.15.) Although the court believed a sentence of five years fixed would be entirely justified given Moore's criminal record, it showed leniency by ordering only the first year of Moore's five-year sentence to be fixed, and it did so in specific recognition of the nature of the crime, Moore's background, and his need to get "stabilized on appropriate medicines" and be given "some tools to stay that way." (3/30/10 Tr., p.11, L.7 – p.12, L.20.)

The district court imposed a lenient sentence, and one that specifically took into account the nature of the offense, Moore's character, and his need for mental health treatment. Moore nevertheless contends the court should have reduced his already lenient sentence pursuant to his Rule 35 motion because the documents he submitted in support of that motion showed he "has used his time in prison to better himself." (Appellant's brief, p.17.) As noted by the district court, however, the additional information Moore submitted in support of his motion – which consisted only of documents showing Moore had enrolled in rehabilitative programming while incarcerated (see R., pp.78-83) – did not show Moore's sentence was excessive; it only showed Moore was taking the steps necessary to participate in his own rehabilitation and potentially "hasten the day he [would be] found eligible for release from custody by the Commission [of] Pardons and Parole" (R., p.88). Moore's rehabilitative efforts were laudable, but

they did not alone justify a reduction of Moore's already lenient sentence. Moore has failed to show an abuse of discretion in the denial of his Rule 35 motion.

CONCLUSION

The state respectfully requests this Court to affirm the judgment and sentence and the district court's order denying Moore's Rule 35 motion.

DATED this 7th day of January 2014.

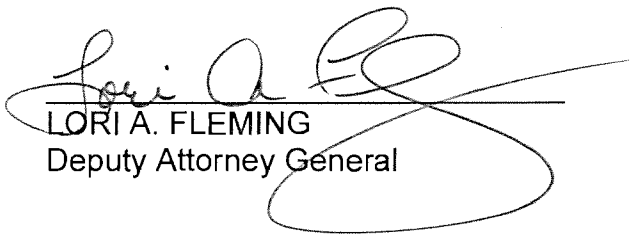
LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of January 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY
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.



LORI A. FLEMING
Deputy Attorney General

LAF/pm