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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 42983
Plaintiff-Respondent,)	
)	Bonneville County Case No.
v.)	CR-2014-8190
)	
BENJAMIN THEODORE HINES JR.,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Hines failed to establish that the district court abused its discretion, either by imposing a unified sentence of seven years, with two years fixed, upon his guilty plea to possession of methamphetamine, or by denying his Rule 35 motion for a reduction of sentence?

Hines Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Hines pled guilty to possession of methamphetamine and the district court imposed a unified sentence of seven years, with two years fixed, and retained jurisdiction. (R., pp.144-48.) Hines filed a notice of appeal timely from the judgment of

conviction. (R., pp.154-57.) He also filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.149-51.)

Hines asserts his sentence is excessive in light of his childhood experiences, mental health issues, and substance abuse. (Appellant's brief, pp.4-9.) The record supports the sentence imposed.

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)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). 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)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The maximum prison sentence for possession of methamphetamine is seven years. I.C. § 37-2732(c)(1). The district court imposed a unified sentence of seven years, with two years fixed, which falls well within the statutory guidelines. (R., pp.144-48.) At sentencing, the state addressed Hines' ongoing criminal offending and substance abuse, his high risk to reoffend, his failure to rehabilitate or be deterred

despite prior legal sanctions and treatment opportunities, and the presentence investigator's recommendation for a prison sentence. (Tr., p.29, L.6 – p.30, L.7.) The district court subsequently articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Hines' sentence. (Tr., p.30, L.23 – p.31, L.25; p.32, Ls.13-20; p.33, L.9 – p.34, L.9.) The state submits that Hines has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Hines next asserts that the district court abused its discretion by denying his Rule 35 motion because he “had an opportunity to attend inpatient treatment at the Walker Center with funding from BPA.” (Appellant's brief, p.10.) 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). To prevail on appeal, Hines 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. Hines has failed to satisfy his burden.

Hines provided no new information in support of his Rule 35 motion. (R., pp.149-50.) He merely argued that the district court should reduce his sentence because he still desired probation with community-based treatment (possibly funded by BPA) instead of the rider program – an argument he previously made at the time of sentencing. (Tr., p.30, Ls.10-14; p.33, Ls.20-21; p.36, Ls.11-21.) Because Hines presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in

the motion that his sentence was excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion.

Even if this Court addresses the merits of Hines' claim, he has still failed to establish an abuse of discretion. At the hearing on Hines' Rule 35 motion, the district court expressed its concern that the BPA-funded 30-day inpatient program Hines requested may not be sufficient to address Hines' longstanding substance abuse issues, and stated that it preferred the more intensive rider program, followed by the Wood Court. (Tr., p.38, L.14 – p.39, L.1.) The district court's concern was well-founded, as it appears that Hines requires an extremely intensive, long-term residential treatment program, given his 34-year history of substance abuse and his numerous prior failed attempts at treatment. (PSI, pp.1, 14, 20-21.) Hines has previously participated in a 28-day inpatient treatment program at ARA; a 28-day inpatient treatment program at Pathways; a one-year outpatient treatment program at Easter Seals; a six-month inpatient treatment program in Montana, which was followed by one year of outpatient treatment; Drug Court; and three prior rider programs (in 1991, 2002, and 2011) – none of which curtailed his use of alcohol, marijuana, methamphetamine, or cocaine. (PSI, pp.14, 20-21.) As such, it was entirely reasonable for the district court to determine that a 30-day inpatient treatment program in the instant case was not adequate, either to protect the community or to meaningfully promote Hines' rehabilitation. Given any reasonable view of the facts, Hines has failed to establish that the district court abused its discretion by denying his Rule 35 motion.

Conclusion

The state respectfully requests this Court to affirm Hines' conviction and sentence and the district court's order denying Hines' Rule 35 motion for a reduction of sentence.

DATED this 7th day of October, 2015.

/s/ _____
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of October, 2015, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ _____
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

1 restitution. Thank you.
2 THE COURT: Mr. Crowther.
3 MR. CROWTHER: Your Honor, I have here an order
4 for restitution. There's no objection. I'd ask the Court to
5 enter that as part of sentencing.
6 I think that it's been argued that probation is
7 appropriate in this case. I don't think this is a probation
8 case. You look at Mr. Hines' record, it's extensive. There's
9 extensive drug use. His own comments to the PSI writer, he also
10 says he admits he's a heavy drug user and he says he needs help
11 for his addiction.
12 The PSI writer obviously recommends prison.
13 That's not the State's recommendation. We recommend that he take
14 a shot at problem-solving court. If that wasn't an option for
15 him, then to get the treatment in a Rider setting. He wasn't
16 accepted into problem-solving court based on his record and his
17 history. I can appreciate probably where they were coming from
18 in assessing his risk and the likelihood that he might comply and
19 complete that program. I think that a Rider is appropriate in
20 this case.
21 You look at everything he's done, he's been to
22 prison before. This wouldn't be the first time he's been to
23 prison if the Court were to order that. He's been there before.
24 He's essentially been in the system for quite some time. I think
25 that giving him a shot to do a retained jurisdiction, hopefully

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1 what might be an appropriate sentence. I also consider the
2 factors of protection of society, deterrence, punishment, and
3 rehabilitation. I think all of those factors apply. Pretty
4 significant prior record, Mr. Hines. I've got to tell you,
5 though, I like the fact that I didn't hear anything while you
6 were on Pretrial Services, no request for a warrant. I like
7 that. You talk about making a change, and then maybe that's a
8 pretty good sign that you're serious about it this time.
9 Would have liked to have seen perhaps something
10 different from the problem-solving court, but that is what it is.
11 Not much I can do with that, I think, at this time. And I
12 suspect that part of that denial was certainly based on the prior
13 record and what's gone on before and not necessarily what's
14 happened recently.
15 So I'm looking at all of those things. And
16 frankly, Mr. Hines -- and I'm probably the same as the State on
17 this case. Okay, what's going to be helpful to you? I don't
18 really have a lot of interest just putting you in prison. I'm
19 not terribly interested in that. I would like to know what's
20 going to help you make some changes, some permanent changes, to
21 let you get on with the rest of your life. Sometimes I wonder if
22 I put people on probation and that's just an invitation to fail
23 and create more problems. Sometimes it's not. So I don't know.
24 The sentence on this will be seven years, two
25 years fixed, five years indeterminate. You'll receive credit for

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1 treat there, hopefully something's different this time, something
2 changes, something clicks, give him that shot. We would be
3 asking for that.

4 As far as underlying goes, we'd be asking for one
5 more year essentially than Defendant -- we'd be asking for three
6 fixed, four indeterminate, to retain jurisdiction, and also for
7 the restitution that's ordered.

8 THE COURT: All right. Mr. Hines, you have the
9 right to make a statement. Anything you would like to say?

10 THE DEFENDANT: No, sir. I just -- I would like
11 the Court to consider giving me probation rather than putting me
12 on a Rider. I've been on a Rider before, and they just don't
13 work. I've got a good start out here now, I've got a lot going
14 on, and I would like to keep doing it.

15 MR. MALLARD: If I could kind of follow up, he's
16 actually -- I think --

17 Didn't you successfully complete the Rider?

18 THE DEFENDANT: Yeah. I done a CAPP Rider.

19 MR. MALLARD: How long ago was that?

20 THE DEFENDANT: In 2009 -- or 2011.

21 THE COURT: All right. Anything else, then?

22 MR. MALLARD: (Shaking head negatively).

23 THE COURT: All right. I appreciate the comments.

24 Again, I've reviewed the file, the presentence report. I looked
25 at the prior record. Those are all things I look at to consider

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1 time served. There'll be a fine of \$750 on this, reimbursement
2 of the public --

3 Are you here as a public defender, Mr. Mallard?
4 You are, aren't you?

5 MR. MALLARD: Yes.

6 THE COURT: Reimbursement of the public defender
7 in the amount of \$500. Court costs and Victims' Relief Fund will
8 be assessed at the standard amount. Restitution will be in the
9 amount of \$502.29.

10 All right. So you wanted to get into a
11 problem-solving court; is that correct, Mr. Hines?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: I -- here's my problem is, I don't --
14 I'm not really comfortable with you being on probation. I would
15 like to have seen some treatment whether it was in a
16 problem-solving court. We used to have inpatient treatment here
17 in the community. We don't have that anymore, so my options are
18 limited. I'm looking at doing a retained jurisdiction program,
19 possibly a CAPP Rider, with me perhaps throwing my weight around
20 at the end of that Rider to get you into the Wood Court. Are you
21 interested in that?

22 THE DEFENDANT: Yeah.

23 MR. MALLARD: That's someone that -- that would be
24 the best one.

25 THE DEFENDANT: Yeah. The problem is, if I go do

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1 more time and I have to get readjusted when I get back out,
 2 that's hard. I'd almost rather just go in and get it done.
 3 MR. MALLARD: I don't want you to.
 4 THE COURT: Well, that's --
 5 MR. MALLARD: I'd rather try what you're
 6 suggesting than what he's suggesting.
 7 THE DEFENDANT: It's going in and out that's hard.
 8 It's killing me.
 9 THE COURT: Well, I hear what you're saying.
 10 Stability's a good thing. And once you get settled, you want to
 11 stay that way. And getting uprooted is not a good experience.
 12 But that's probably where I'm going. I guess what I'm -- what
 13 I -- I feel like I need to do some inpatient treatment,
 14 Mr. Hines. That's what I feel like before you're ready -- before
 15 I feel comfortable putting you on probation, I want you to have a
 16 good start. I think it can help. And maybe not. I don't know.
 17 I like to think that the Rider programs do offer something that
 18 at least connect with some people. They obviously don't connect
 19 with everybody.
 20 THE DEFENDANT: Could I get ahold of BPA and see
 21 if they'll put me through treatment?
 22 MR. MALLARD: You can always try it.
 23 THE COURT: And then, I mean, if you -- if you're
 24 interested, I guess somehow you ought to let me know if you're
 25 interested in me trying to get you into the Wood Court after a

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1 my stuff moved.
 2 MR. MALLARD: Where's your stuff now?
 3 THE DEFENDANT: At my ex-wife's house.
 4 THE COURT: All right. Well, I guess I -- I guess
 5 you've developed a little bit of credit by doing well on Pretrial
 6 Services. I'll have you report -- how about Thursday by 10:00
 7 a.m.?
 8 MR. MALLARD: All right, Your Honor.
 9 THE COURT: All right. You do have the right to
 10 appeal this decision. If you want to appeal, you should do that
 11 within 42 days. You have the right to an attorney on appeal; and
 12 if you cannot afford an attorney, one would be appointed for you.
 13 Any questions on this at all, Mr. Hines?
 14 THE DEFENDANT: No.
 15 THE COURT: Mr. Mallard?
 16 MR. MALLARD: No.
 17 THE COURT: Mr. Crowther?
 18 MR. CROWTHER: No, Your Honor. Thank you.
 19 THE COURT: All right. Thank you. Good luck to
 20 you.
 21 (Proceedings concluded)

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1 Rider program. I'm going to give that a try. I suspect they'd
 2 be much more willing to look at you having -- once you've -- if
 3 you're coming off a Rider because they do that on a pretty
 4 regular basis. But, like I say, I've got no interest in just
 5 putting you in prison. I think you've shown me something by
 6 doing well on Pretrial Services, but I'm just not quite there yet
 7 and would like to see some more treatment under your belt with
 8 possibly a problem-solving court follow-up after a Rider. That's
 9 just what I'm looking at.
 10 All right. So any questions on that, Mr. Mallard?
 11 MR. MALLARD: No.
 12 THE COURT: Mr. Crowther?
 13 MR. CROWTHER: No, Your Honor.
 14 THE CLERK: You're recommending a CAPP; is that
 15 right?
 16 THE COURT: Yeah, a CAPP Rider.
 17 THE CLERK: Okay. Thank you.
 18 MR. MALLARD: Can he have a few days before he
 19 reports?
 20 THE COURT: Okay. What will you be doing in those
 21 few days, Mr. Hines?
 22 THE DEFENDANT: I've got an estate that I -- I've
 23 got my house. I need to try to get that taken care of. I've got
 24 people living in it. I need to get them out of there. I've got
 25 to get all my stuff. My mom's really sick. I've got to get all

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RULE 35 HEARING
JANUARY 26, 2015

1 THE COURT: Let's take up Case 2014-8190, State
 2 vs. Benjamin Hines. So is he in custody?
 3 MR. MALLARD: They transported him.
 4 THE COURT: Oh, all right. Go ahead. Kelly
 5 Mallard for the Defense. Dan Bevilacqua for the State.
 6 Go ahead, Mr. Mallard.
 7 MR. MALLARD: Thank you. Your Honor, Mr. Hines
 8 asked me to file this motion to ask the Court to take the -- this
 9 argument into consideration. Mr. Hines at his sentencing asked
 10 the Court to consider an inpatient program, and at the time of
 11 sentencing we weren't really aware of anything that he could do.
 12 He did call BPA. Or actually Mr. Hines didn't call BPA. I
 13 called BPA to see if there was funding. What I was told, there
 14 is funding; but they wouldn't commit the money to treatment
 15 unless there was an absolute guarantee that the Court was going
 16 to allow him to go. So BPA does have money for an inpatient
 17 program, which Mr. Hines is considering Walker Center, which is a
 18 30-day program; but again, they won't commit money unless the
 19 Court granted the motion.
 20 Mr. Hines has already moved. He's been over in
 21 RDU at least probably a week or more. So I'd just leave it to
 22 the Court's discretion. I'm not certain what benefit -- if he's
 23 already got started in a program there, if we pulled him back, of

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