2-26-2013

State v. Vaughn Respondent's Brief Dckt. 39526

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO, Plaintiff-Respondent, vs. CHARLES ALLEN VAUGHN, JR., Defendant-Appellant.	)	No. 39526, 40237 Ada Co. Case No. CR-2009-14391

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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STATEMENT OF THE CASE

Nature Of The Case

Charles Allen Vaughn appeals from the denial of his motion to amend a no-contact order and the denial of his motion to reduce his sentence.

Statement Of The Facts And Course Of The Proceedings

Vaughn pushed his wife, Tiffany, down on the bed and strangled her with his hands. (#38862 PSI, p. 2.[1]) Tiffany "kicked him off" and Vaughn chased her out of the bedroom, grabbed her by her hair, and punched her in the face, head, and stomach. (#38862 PSI, pp. 2, 42.) Vaughn began strangling Tiffany again when Tiffany's eight-year-old son "saw the fight and came to his mother's aid." (#38862 PSI, p. 2.) Vaughn dragged the boy by the arm and the back of the neck and threw him onto the bed. (#38862 PSI, p. 2.) Vaughn picked up a pillow case, and told the child, "'I'm going to fucking kill you.'" (#38862 PSI, p. 2.) Vaughn "said that he was done, that he had nothing else to live for and he was going to kill [them]" and "rush[ed] after" Tiffany and her son with the pillow case. (#38862 PSI, pp. 36, 43.) Tiffany was able to flee the residence with two of her children. (#38862 PSI, p. 36.) When officers arrived, they noted Tiffany had swelling over her left eye and marks on her neck, and her son was "shaking uncontrollably" and had "some reddened areas around the front and back of his neck and a deep red spot under his right ear." (#38862 PSI, pp. 2, 35.) Vaughn

[1] The Idaho Supreme Court took judicial notice of the prior appeal in docket number 38862. (#39526 R., p. 2.) PSI page numbers correspond with the page numbers of the electronic file "VAUGHN PSI.pdf."

resisted arrest and attempted to avoid being handcuffed. (#38862 PSI, p. 32.) When officers searched the residence, they located a canister containing methamphetamine, oxycontin, and drug paraphernalia. (#38862 PSI, pp. 40-41.)

The state charged Vaughn with attempted strangulation, domestic violence in the presence of children, possession of methamphetamine, possession of oxycodone, injury to a child, and resisting and obstructing officers. (#38862 R., pp. 30-31, 43-44.) Pursuant to a plea agreement, Vaughn pled guilty to domestic violence in the presence of children and the state dismissed the remaining charges and agreed not to file charges for witness intimidation. (#38862 R., pp. 53-54.) The district court entered judgment on December 31, 2009, imposing a unified sentence of 20 years, with five years fixed. (#38862 R., pp. 74-76.) The court also entered a no-contact order prohibiting Vaughn from contacting "Tiffany Vaughn, W.V., J.O., K.R., C.R., C.V." (#38862 R., p. 72.[2]) The district court denied a motion to modify the no-contact order filed a few months later. (#38862 R., p. 78.)

Pursuant to a petition for post conviction relief, the district court entered an Order Re-Imposing Judgment of Conviction and Commitment on May 25, 2011. (#38862 R., pp. 88-90, 95-98.) Vaughn filed a notice of appeal timely from the Order Re-Imposing Judgment of Conviction and Commitment. (#38862 R., pp. 92-94.) The Idaho Court of Appeals affirmed the re-entered judgment. State v.

[2] The initials correspond to Tiffany Vaughn's children; only W.V. is both Tiffany and the defendant's biological child. (#38862 PSI, pp. 8-9.)

Vaughn, 2011 Unpublished Opinion No. 713, Docket No. 38862 (Idaho App., November 21, 2011).

While the appeal was pending, Vaughn filed a Rule 35 motion for reconsideration of his sentence. (#40237 R, p. 10.) The district court denied the motion. (#40237 R., pp. 111-15.) Vaughn timely appealed the denial. (#40237 R., pp. 117-19.)

Shortly before the Idaho Court of Appeals issued its decision affirming Vaughn's sentence, Vaughn moved to modify the no-contact order to "allow telephone and written contact" with his "five-year-old daughter [W.V.]." (#39526 R., pp. 8-9.) He acknowledged that W.V. was in foster care pursuant to a child protective action, "# CV-CP-1005502." (#39526 R., pp. 10-11.) His grounds for seeking the modification included that (1) he was already in phone or letter contact with W.V.'s half-siblings by Vaughn's prior marriage, and W.V. was therefore "left out" of such communications, and (2) that he had taken "classes." (#39526 R., pp. 10-14.) The district court reiterated the horrific facts of the criminal case and denied the motion. (#39526 Tr., p. 13, L. 11 – p. 17, L. 14; #39526 R., p. 32.) Vaughn timely appealed the denial of his motion to modify the no-contact order. (#39526 R., pp. 33-35.)

On March 21, 2012, about three months after the appeal was filed, the district court entered another amended no-contact order prohibiting all contact with "Vaughn, Tiffany L.; W.V.; J.O.; K.R.; C.R.; C.V." (#39526 R., p. 41.)

The Idaho Supreme Court consolidated the appeal from the denial of the motion for reduction of sentence (Docket No. 39526) and the appeal from the denial of the motion to modify the no-contact order (Docket No. 40237). (#40237 R., p. 4.)

ISSUES

Vaughn states the issues on appeal as:

1. Did the district court abuse its discretion in denying the Rule 35 motion for reduction of sentence?

2. Did the district court abuse its discretion in denying the motion to modify the NCO?

(Appellant's brief, p. 17.)

ARGUMENT

I.
Vaughn Has Failed To Show The District Court Abused Its Discretion By Denying The Motion For Reduction Of Sentence

A. Introduction

The district court denied Vaughn's motion to reduce his sentence. (#40237 R., pp. 111-116 (copy attached as Appendix).) Vaughn claims the district court abused its discretion because it "fail[ed] to consider [his] background and character and the new information he presented." (Appellant's brief, pp. 20-21.) This argument is not supported by any reasonable view of the record.

B. Standard Of Review

A motion for reduction of sentence under I.C.R. 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); State v. Steelsmith, 153 Idaho 577, ___, 288 P.3d 132, 139 (Ct. App. 2012).

C. Vaughn's Claim Of An Abuse Of Discretion Is Meritless

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 our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply 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).

The district court specifically articulated and applied the correct legal criteria in its determination of the Rule 35 motion. (#40237 R., p. 112.) The district court concluded its "five-year fixed sentence for Domestic Violence in the presence of children, Felony is lenient considering the facts of this crime and is well within the statutory sentence guidelines." (#40237 R., pp. 112-13.) The district court considered the "particularly disturbing" facts of the case; Vaughn's arrest and conviction record; the original charges and the plea agreement; the mental health evaluations presented at sentencing that included a finding of an "an extremely high risk of violence" and lack of empathy; Vaughn's behavior while incarcerated; and Vaughn's violations of the court's no-contact orders. (#40237 R., pp. 113-14.) After review of all this, the court concluded its "assessment at the time of sentencing was correct." (#40237 R., p. 114.) The district court found that Vaughn's "sentence fulfills the objectives of protecting society and achieves deterrence, rehabilitation and retribution and therefore denies Vaughn's Motion for Reconsideration." (#40237 R., p. 115.)

On appeal Vaughn disputes none of this. Rather, he claims that the district court failed to consider his "background and character and the new information he presented" in support of his motion. (Appellant's brief, pp. 20-21.) This argument is specious. The district court specifically stated it "considered all the things [Vaughn] ... argued in his Rule 35." (#40237 R., p. 113.) The district court also specifically referenced some of the materials Vaughn submitted with

his motion. (Compare #40237 R., p. 114 (discussing C-notes) with pp. 68-76 (C-Notes included with materials submitted).) The record shows that the district court considered Vaughn's motion and materials, but merely found they did not demonstrate that the district court incorrectly appraised the crime, Vaughn's character, or his rehabilitation potential when originally imposing sentence. (#40237 R., pp. 111-16.) Vaughn's claim that the district court did not consider all his materials or applied an incorrect legal standard is without support in the record.

The Idaho Court of Appeals concluded that Vaughn's sentence was reasonable. State v. Vaughn, 2011 Unpublished Opinion No. 713, Docket No. 38862 (Idaho App., November 21, 2011). The new information he submitted in support of his Rule 35 motion were his own letter (#40237 R., pp. 20-28), support letters from various persons (#40237 R., pp. 29-60), information about programming and performance while incarcerated (#40237 R., pp. 61-86, 94-108), and information about his arrest record (#40237 R., pp. 87-93). The materials he submitted are unremarkable and fail to show that the sentence imposed for Vaughn's crime is excessive. Vaughn has failed to show an abuse of discretion.

II.
Vaughn Has Failed To Show The District Court Abused Its Discretion By Denying The Motion To Modify The No-Contact Order

A. Introduction

The district court denied Vaughn's motion to modify the no-contact order to allow telephone and letter contact with his daughter, W.V. (#39526 R., pp. 8-

9, 32; #39526 Tr., p. 13, L. 11 – p. 17, L. 14.) Vaughn contends on appeal that the district court abused its discretion because it "misunderstood the record before it, failed to recognize the fundamental right of a parent to parent his/her children, and failed to recognize ... that modification of the no contact order would be in the best interest of W.[V.]" (Appellant's brief, pp. 21-22.) Review shows these contentions are without merit.

B. Standard Of Review

"The decision whether to modify a no contact order is within the sound discretion of the district court." State v. Cobler, 148 Idaho 769, 771, 229 P.3d 374, 376 (2010). In evaluating whether the trial court abused its discretion, the appellate court considers (1) whether the trial court perceived the issue as discretionary; (2) whether the trial court acted within the boundaries of its discretion and consistent with any applicable legal standards; and (3) whether the trial court exercised reason in reaching its decision. Id. (citation omitted).

C. The Record Supports The District Court's Exercise Of Discretion

Because Vaughn was convicted of a qualifying offense, the district court had discretion to enter a no-contact order if it found such an order was "appropriate." I.C. § 18-920(1). The district court entered an order prohibiting contact with the victim of Vaughn's crime, Tiffany Vaughn, and her children, including W.V., a child in common with Vaughn. (#38862 R., p. 72.)

In rejecting Vaughn's motion to modify the no-contact order the district court first relied on the facts of the underlying crime. Vaughn brutally beat and

choked his wife, Tiffany, and threatened to "fucking kill" her eight-year-old son when he tried to intervene on his mother's behalf. (#39526 Tr., p. 14, Ls. 2-25; c.f. #38862 PSI, p. 2.) Arresting officers found that Vaughn had a knife, rope, duct tape, a recorder, a digital camera, drug tests, Oxycontin and methamphetamine, and a spoon and syringe, and he stated he had those things "to help him prove what he believed his wife was doing." (#39526 Tr., p. 15, Ls. 1-9; c.f. #38862 PSI, pp. 2-3.)

The court also recited Vaughn's "long and troubled" criminal history. (#39526 Tr., p. 15, L. 15 – p. 16, L. 3; c.f. #38862 PSI, pp. 4-6.) The mental health evaluation contained a diagnosis of polysubstance abuse, and Vaughn told the evaluator he was "mad as hell that he cannot get back with his wife." (#39526 Tr., p. 16, Ls. 4-11; c.f. #38862 PSI, pp. 16, 18.) The domestic violence evaluation found Vaughn posed an "extremely high risk for violence" and that Vaughn had "no empathy." (#39526 Tr., p. 16, L. 12-19; c.f. #38862 PSI, p. 153.) The documentation he presented with his Rule 35 motion showed "continued poor behavior while incarcerated." (#39526 Tr., p. 16, Ls. 20-25; c.f. #40237 R., pp. 68-77.) The material provided in relation to the motion for reconsideration showed he "continued to violate no-contact orders" while incarcerated. (#39526 Tr., p. 17, Ls. 1-5; c.f. #39526 R, p. 25.) "So the bottom line here, the children are the victims as well" and therefore, the district court concluded, there would be no changes to the no-contact order. (#39526 Tr., p. 17, L. 9-24.)

If anything, the district court may have downplayed the seriousness of the crime. The record shows that Tiffany moved to Idaho with her five children in

May 2009, reportedly to escape from Vaughn's violence. (#38862 PSI, pp. 8-9, 39, 148.) Vaughn followed Tiffany to Idaho, arriving just four days prior to the crime. (#38862 PSI, p. 7.) Tiffany stated Vaughn "arrived at her apartment from Florida with suitcases containing knives, rope, camera, duct tape, and a video camera." (#38862 PSI, p. 46.) Tiffany stated Vaughn "had been pacing and was argumentative, thus she knew 'it' was coming." (#38862 PSI, p. 36.) On the day of the crime Vaughn accused Tiffany of removing window "stoppers" from her son's window "to let people into the house to have sex with her and the kids." (#38862 PSI, p. 44.) He subsequently began strangling Tiffany and punched her in the head, stomach, and face. (#38862 PSI, p. 42.) Vaughn repeatedly demanded that Tiffany and the children "tell him the truth about the missing window stoppers" and "about letting men in." (#38862 PSI, p. 45.) When Tiffany's eight-year-old son, C.S., attempted to intervene, Vaughn grabbed the boy by the neck and arm, dragged him to his bedroom, and threw the boy on the bed. (#38862 PSI, p. 40.) Vaughn then "grabbed a pillow case [as if he was going to use it to suffocate them]" and threatened to kill Tiffany and C.S. "if they did not tell . . . the truth about her relationships with other men." (PSI, p. 35 (brackets original).) C.S. later told police that "he knew what [Vaughn] would do with the pillowcase," stating Vaughn "'was gonna [sic] tie it around my momma's neck tight so she would die. ... He done did it [sic] before, but she didn't die.'" (#38862 PSI, p. 40.) Tiffany's seven-year-old daughter also spontaneously remarked on Vaughn's history of violence, telling police Vaughn used a dog's

leash for "'choking people'" and had threatened to "'kill all of [them].'" (#38862 PSI, pp. 35, 39.)

Following his arrest Vaughn repeatedly attempted to call and write letters to Tiffany via third parties and received numerous disciplinary write-ups and two convictions for violating the no-contact order. (#38862 R., pp. 39-42, 48-50; #38862 PSI, pp. 6, 11-12, 92-135.) He asked his parents to "try and convince Tiffany to move back to Florida so she could 'get away from this case where the state couldn't make any of them testafy [sic].'" (#38862 PSI, p. 52.) During a recorded jail phone call to his parents, Vaughn again discussed "trying to get Tiffany to move back to Florida," stating, "'Y'all need to make her do it. Y'all need to talk her into it. Whatever you got to do. ... They're gonna [sic] scare the hell out of her and if she testifies, I'm gonna [sic] go to prison.'" (#38862 PSI, p. 52.) Prior to sentencing Vaughn threatened to kidnap W.V., stating to his parents, "Maybe if I get out and they make me stay here [in Idaho], [Tiffany] will let me see [W.V.] some and maybe I'll get the chance to take her and run maybe. I will if I can." (#38862 PSI, p. 64.) The trial court specifically articulated at sentencing that the grounds for the protective order included that Vaughn was a significant risk to Tiffany and her children, that he was not the biological father of most of the children involved, and that Vaughn had threatened to kidnap his biological daughter, W.V. (#38862 12/30/09 Tr., p. 31, Ls. 12-18; p. 34, L. 22 – p. 35, L. 18.)

The record supports the district court's exercise of discretion. Vaughn's history of domestic violence, especially against W.V.'s mother, his prior threat to

kidnap W.V., his violence against Tiffany Vaughn's other children, his high risk for domestic violence, and his obvious determination to harm W.V.'s mother in the future all support the district court's exercise of discretion.

Vaughn contends the district court abused its discretion. (Appellant's brief, pp. 21-22.) He contends the district court made four factual errors: that Vaughn threatened to kill W.V., that he had multiple convictions for domestic violence, and that he asked the court to order his wife to reconcile with him (Appellant's brief, p. 22), and that contact was not in W.V.'s best interests (Appellant's brief, p. 24). He also contends that the district court failed to consider Vaughn's constitutional right to parent. (Appellant's brief, pp. 22-24.)

Although Vaughn asserts the district court made four factual errors, he supports none of those arguments with citation to the correct legal standard or to the record. (Appellant's brief, p. 22 (asserting errors in factual findings without any citation to legal authority or the record).) When an appellant challenges a district court's factual findings the appellate court must "accept the trial court's factual findings unless they are clearly erroneous." State v. Schwab, 153 Idaho 325, ___, 281 P.3d 1103, 1107 (Ct. App. 2012) (citing State v. Hooper, 145 Idaho 139, 142, 176 P.3d 911, 914 (2007)). "Findings of fact are not clearly erroneous if they are supported by substantial and competent evidence." State v. Danney, 153 Idaho 405, ___, 283 P.3d 722, 725 (2012). In addition, "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." I.C.R. 52.

Applying this legal standard to Vaughn's claims of erroneous factual findings shows no error. Vaughn first claims that the district court erroneously found that he threatened to kill W.V. (Appellant's brief, p. 22.) The record, however, shows that Vaughn did threaten to kill all the children. (#38862 PSI, p. 39 (one child reported Vaughn threatened to "kill all of us").) The court later focused on the uncontested factual finding that Vaughn assaulted and directly threatened to kill Tiffany's eight-year-old son. (#39526 Tr., p. 14, Ls. 13-24.) Vaughn has failed to show the district court's factual finding was clearly erroneous. Even if the record supported a claim that the district court erred in stating which child Vaughn directly threatened to kill, its later statements clarifying its understanding show any possible error is clearly harmless.

Vaughn next claims the district court "did not properly understand [his] prior record which did not include multiple convictions for prior crimes against intimate partners." (Appellant's brief, p. 22.) This claim misrepresents the district court's findings. Although far from clear in the brief, Vaughn is apparently referring to the district court's statement that Vaughn "has a long history of violence against intimate partners." (#39526 Tr., p. 11, Ls. 6-8 (cited Appellant's brief, p. 16).) Because Vaughn has pointed to no part of the record where the district court found "multiple convictions for prior crimes against intimate partners" (Appellant's brief, p. 22), his claim that such factual finding is clear error is specious.

Vaughn next asserts the district court "expressed an incorrect recollection that Mr. Vaughn had previously asked the court to order him and his wife to

reconcile." (Appellant's brief, p. 22.) The district court did state, "In fact, if I remember correctly, he wanted me to order that he get back with [the victim]." (#39526 Tr., p. 16, Ls. 9-11.) Although Vaughn claims that no such request appears in the transcripts of his guilty plea and sentencing or the PSI (Appellant's brief, p. 16), such does not prove the district court's recollection faulty. Even if Vaughn had merely asked for the opportunity for reconciliation with the victim (who had come to Idaho in the first place in an attempt to flee from Vaughn (PSI, pp. 3, 12)), the district court's disclaimer ("if I remember correctly") and the nature of this fact in light of the rest of the record show that any error was harmless. I.C.R. 52 (errors not affecting substantial rights must be disregarded).

The final factual error Vaughn claims is that the district court should have found that contact between Vaughn and W.V. was in the child's best interests. (Appellant's brief, p. 25.) This claim is meritless. The district court set out a myriad of reasons why allowing Vaughn to contact W.V. was not in her best interests, including the horrendous facts of the present case, Vaughn's history of domestic violence, and his history of violating no-contact orders to manipulate or harm W.V.'s mother. Vaughn's claim that the district court failed to consider whether contact was in W.V.'s best interests is without legal or factual basis.

Vaughn also claims the district court "did not even acknowledge ... Mr. Vaughn's fundamental constitutional right to parent W.[V.]" (Appellant's brief, p. 24.) The reason the district court did not "acknowledge" any claim of a violation of constitutional rights is because Vaughn never asserted in his motion that the no-contact order was violating any of his constitutional rights. (#39526 R., pp. 8-

25; #39526 Tr., p. 5, L. 2 – p. 8, L. 12; p. 11, L. 16 – p. 12, L. 7; p. 12, L. 25 – p. 13, L. 10.) This claim, that the September 3, 2010 no-contact order has to be amended because it removed his parenting rights without due process of law, cannot be addressed because it is raised for the first time on appeal. State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000) ("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.").

The no-contact order was appropriate when entered. The district court gave more than ample justification for not modifying that order. Vaughn's claims of error are without merit or not preserved. He has therefore failed to show an abuse of discretion.

CONCLUSION

The state respectfully requests this Court to affirm the district court's denials of Vaughn's motions to reduce his sentence and to modify the no-contact order.

DATED this 26th day of February, 2013.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of February, 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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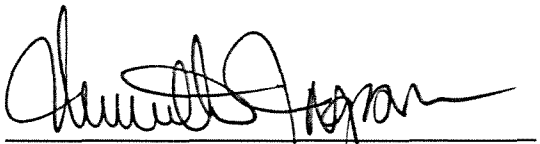

KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm

APPENDIX

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,

Plaintiff,

vs.

CHARLES A. VAUGHN,

Defendant.

Case No. CR-FE-2009-00014391

MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR REDUCTION OF SENTENCE

The Defendant, Charles A. Vaughn, entered a guilty plea on October 28, 2009, to the crime(s) of Count II. Domestic Violence In The Presence Of Children, Felony, I.C. §§ 18-903, 18-918(2), 18-918(4), committed on or about June 25, 2009. As part of a plea agreement, the State dismissed Count I. Attempted Strangulation, Felony, I.C. § 18-923, Count III. Possession of a Controlled Substance, Felony, I.C. § 37-2732(c), Count IV. Possession of a Controlled Substance, Felony, I.C. § 37-2732(c), V. Injury to Children, Misd., I.C. § 18-1501(2), and VI. Resisting and Obstructing Officers, Misd., I.C. § 18-705. The State also agreed to not have him charged as a Persistent Violator.

The Court sentenced Vaughn on December 30, 2009, for the offense of Count II. Domestic Violence In The Presence Of Children, Felony, I.C. §§ 18-903, 18-918(2), 18-918(4). The Court imposed a sentence of five (5) years fixed and fifteen (15) years indeterminate for an aggregate term of twenty (20) years. Vaughn filed for post-conviction relief on December 2, 2010, and the Court granted post-conviction relief on May 24, 2011. As a result, the Court re-imposed its judgment on May 25, 2011,[1] allowing Vaughn to file an appeal and this Rule 35.

[1] While Vaughn argues in footnote 1 of his Rule 35 that there is some problem with the Court's credit for time served, arguing he was entitled to 700 days credit as of the date the Court re-imposed its judgment, the fact is that the Court clearly gave him credit for 700 days. *See* **CORRECTED ORDER *RE-IMPOSING* JUDGMENT OF CONVICTION,** pp. 2-3 filed on June 6, 2011.

Vaughn's counsel, Michael Lojek, timely filed a Motion for Reconsideration of Sentence pursuant to Rule 35, I.C.R., on September 14, 2011, and requests the Court to reduce the fixed portion of his sentence to three (3) years fixed to allow him to enter programs. Vaughn filed supporting documentation with the Motion.

ANALYSIS

Vaughn requests reduction of the fixed portion of his sentence because he wants programming and he has a lot of support and his children needs him. The Court rejects his arguments. Rule 35, I.C.R., provides in pertinent part as follows:

> (M)otions to correct or modify sentences under this rule must be filed within 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction and shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise ordered by the Court in its discretion; . . . .

The determination of whether to grant the relief requested by Vaughn is a matter committed to the Court's discretion and the Court's decision is governed by the same standard as the original sentence. *See State v. Gardiner*, 127 Idaho 156, 164, 989 P.2d 615 (Ct. App. 1995); *State v. Ricks*, 120 Idaho 875 (Ct. App. 1991). In this review, this Court has employed the standards set forth in *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

The Court understood that this was a matter of discretion and considered several factors both in the original sentencing and in deciding this Motion For Reconsideration.

A sentence has several objectives: (1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment for wrongdoing. The primary consideration is, and should be, "the good order and protection of society." *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

In any sentencing, the primary focus begins with a concern for protection of the public. In this case, pursuant to a plea agreement Vaughn pled guilty to Domestic Violence In The Presence Of Children, Felony, I.C. §§ 18-903, 18-918(2), 18-918(4). The maximum penalty for this offense is twenty (20) years. The fixed portion of a sentence imposed under the Unified Sentencing Act is treated as the term of confinement for sentence review purposes. *State v. Hayes*, 123 Idaho 26, 27, 843 P.2d 675, 676 (Ct. App. 1992). The Court finds that a five-year fixed sentence for Domestic

Violence In The Presence Of Children, Felony is lenient considering the facts of this crime and is well within the statutory sentence guidelines. It is also important that this plea agreement spared Vaughn from a potential life sentence.

In arriving at this sentence, the Court considered Vaughn's character and any mitigating or aggravating factors. In mitigation, the Court considered all the things he has argued in his Rule 35. The Court, however, found there were several aggravating factors in this case – suggesting the need for this sentence.

The facts in this case are particularly disturbing. On June 25, 2009, in the early morning hours, officers responded to a domestic violence report. The 911 call was recorded and this Court listened to it as a part of the sentencing. Vaughn pushed his wife down on the bed and began strangling her with his hands. He grabbed her by the hair and hit her in the head with a closed fist. He continued to strangle her. His eight year-old son saw the fight and came to his mother's aid. Vaughn dragged his son by the arm and back of the neck and threw him on the bed. Vaughn picked up a pillow case and told his son, "I'm going to fucking kill you." Officers observed swelling over Vaughn's wife's eye, marks on her neck and later a bruise on her left thigh. Vaughn's son had some reddened areas around the front and back of his neck and a deep red spot under his right ear. Much of the confrontation could be clearly heard on the 911 call.

When he was taken into custody, Vaughn struggled and grabbed the officer's hands. Officers located a pocket knife in his pocket. More ominously officers located a rope, duct tape, a recorder, digital camera and drug test. When asked about the items Vaughn stated they were to help him prove what he believed his wife was doing. Officers also found oxycontin, methamphetamine and a spoon and syringe. Later Vaughn admitted he pulled his wife's hair, pushing her into a wall and hitting her in the face "one or two times." He also admitted to grabbing his son by the arm but did not recall what he said to him.

Vaughn had a long and troubled history, including a large number of cases in Florida: Possession of Liquor by a Minor (no information) (1997); Battery/Domestic Violence (2002, 2007[1]); Resisting Officer with Violence amended to Without Violence (2002), Damage Property/Criminal

[1] No action.

Mischief over $200 (2002), Felony Possession of a Controlled Substance (2003),[1] Possession of a Controlled Substance (2003),[2] Felony Grand Larceny (2003),[3] Expose Sexual Organs Vulgar Indecent Manner (2009), Disorderly Intoxication (2009),[4] Disturbing the Peace (2009), Violation of a No Contact Order (2009, 2009,[5] 2009), and Felony Intimidating a Witness (2009).[6]

On October 28, 2009, Vaughn pled guilty to Domestic Violence in the Presence of Children, Felony, I.C. §§18-903, -918(2), -918(4) pursuant to a plea agreement in which the State dismissed Count I. Attempted Strangulation, Felony, I.C. § 18-923, Count III. Possession of a Controlled Substance, Felony, I.C. § 37-2732(c), Count IV. Possession of a Controlled Substance, Felony, I.C. § 37-2732(c), V. Injury to Children, Misd., I.C. § 18-1501(2), and VI. Resisting and Obstructing Officers, Misd., I.C. § 18-705. The State also agreed to not have him charged as a Persistent Violator. Before sentencing the Court ordered a I.C. § 19-2524 mental health assessment and the evaluator found that Vaughn has an anger problem with a primary diagnosis of Polysubstance Abuse with a Depressive Disorder. He told the evaluator that "he is 'mad as hell' that he cannot get back with his wife." The Court also ordered a domestic violence evaluation and that evaluator found that he had an extremely high risk of violence against his spouse and other members of the community at large. He opined that Vaughn suffered from Narcissistic Personality Disorder which increased his risk for violence against others and that Vaughn had no empathy.

The supporting documentation also included his C-Notes showing his continued poor behavior while incarcerated. He has received corrective actions for altering his possessions, missing classes, harassment and stealing. While incarcerated, he has continued to violate no contact orders and has been warned. Clearly the Court's assessment at the time of sentencing was correct.

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[1] Dismissed.

[2] No information.

[3] Dismissed.

[4] Dismissed.

[5] Dismissed.

[6] Dismissed.

The Court also weighed the necessity to protect society from future similar crimes. The Court found that in order to deter future such crimes by Vaughn, this sentence was necessary. There is a need to deter Vaughn from such behavior.

The Court found that the magnitude of this crime outweighed Vaughn's character and background. Therefore, the Court found that this sentence would promote rehabilitation; there is a need for some punishment that fits the crime before real rehabilitation will be effective. Finally, the Court finds that the crime itself simply deserves this punishment. It is a serious crime. The Court finds that this sentence fulfills the objectives of protecting society and achieves deterrence, rehabilitation and retribution and therefore denies Vaughn's Motion for Reconsideration.

The Court also denies his Motion to modify his no contact order. If he cannot obey the one in place, the Court is not modifying it.

IT IS SO ORDERED.

DATED this 22nd day of September 2011.

Cheri C. Copsey
District Judge

The undersigned authority does hereby certify that on September 22, 2011, I mailed one copy of the: **MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR REDUCTION OF SENTENCE PURSUANT TO I.C.R. 35** to each of the parties listed addressed as follows:

ADA COUNTY PROSECUTING ATTORNEY
WHITNEY WELSH
VIA E-MAIL

ADA COUNTY PUBLIC DEFENDER
MICHAEL LOJEK
VIA E-MAIL

DEPARTMENT OF CORRECTIONS
CENTRAL RECORDS
VIA E-MAIL

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

Date: 9/22/11

By _____
Deputy Clerk