11-20-2012

State v. Askew Respondent's Brief Dckt. 39749

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39749
	)	
vs.	)	
	)	
MATTHEW CHARLES ASKEW,	)	
	)	
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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STATEMENT OF THE CASE

Nature Of The Case

Matthew Charles Askew appeals from the district court's order relinquishing jurisdiction following a period of probation.

Statement Of Facts And Course Of Proceedings

In 2006, Askew pled guilty to grand theft by possession of stolen property and was given a suspended seven-year sentence with two years fixed, and placed on probation for seven years. (R., pp.61-64, 67-70.) Over three years later, the state filed a motion for a probation violation, alleging Askew violated his probation by (1) driving under the influence, (2) consuming/possessing alcohol, (3) frequenting an establishment where alcohol is the main source of revenue, and (4) consuming/possessing alcohol (on a different date than alleged in the second allegation). (R., pp.92-94.) Askew admitted allegations two, three, and four, but before his disposition hearing, he was arrested for possessing HGH (human growth hormone). (R., pp.99-100, 107-108.)

The state filed a second motion for a probation violation based on the HGH that was seized from Askew's residence during a probation search. (R., pp.122-124.) However, that allegation was dismissed on the state's motion at the outset of the dispositional hearing on Askew's first set of probation violations. (R., pp.127-131.) On August 26, 2010, the district court reinstated Askew's probation and ordered him to follow any treatment recommendations made by his probation officer. (Id.)

On November 22, 2010, Askew was arrested on an agent's warrant and subsequently alleged to have violated his probation by (1) committing the crime of delivering a controlled substance, (2) committing a second crime of delivering a controlled substance, and (3) committing the crime of manufacturing a controlled substance. (R., pp.132-138, 143-145.) Askew admitted the first and second allegations, and the third allegation was dismissed at the state's request. (R., pp.158-159.) The district court revoked Askew's probation, imposed his original sentence, and retained jurisdiction for one year. (R., pp.162-166.) The court also ordered Askew to successfully complete the one-year Therapeutic Program, and informed him that if he failed to do so, he would be sent to prison. (R., p.163.)

On December 20, 2011, after receiving a recommendation by the North Idaho Correctional Institution that the court relinquish jurisdiction (Addendum to the PSI ("APSI")), the district court signed an order relinquishing jurisdiction over Askew and remanding him to the custody of the Idaho State Board of Corrections for execution of judgment. (R., pp.167-168.) Askew filed a *pro se* Rule 35 motion for reduction or correction of his sentence (R., pp.169-173), and the state filed an objection to that motion (R., pp.191-193). The district court appointed counsel to represent Askew in his Rule 35 proceeding (R., p.187), and counsel filed another Rule 35 motion for reduction of sentence with a supporting brief (R., pp.194-199). On February 29, 2012, the district court entered an order denying Askew's Rule 35 motion. (R., pp.205-207.) Askew timely appealed. (R., pp.208-210.)

ISSUES

Askew states the issues on appeal as:

1. Did the Idaho Supreme Court deny Mr. Askew due process and equal protection when it denied his motion to augment the appellate record with the requested transcripts?

2. Did the district court abuse its discretion when it relinquished jurisdiction?

3. Did the district court abuse its discretion when it denied Mr. Askew's Rule 35 motion requesting leniency in light of the mitigating factors present in this matter?

(Appellant's Brief, p.3.)

The state rephrases the issues on appeal as:

1. Has Askew failed to establish the Idaho Supreme Court violated his due process and equal protection rights by denying his motion to augment the appellate record with irrelevant transcripts?

2. Has Askew failed to establish the district court abused its discretion in relinquishing jurisdiction?

3. Has Askew failed to establish the district court abused its discretion by denying his Rule 35 motion for reduction or correction of sentence?

ARGUMENT

I.
Askew Has Failed To Establish The Idaho Supreme Court Violated His Due Process And Equal Protection Rights By Denying His Motion To Augment The Appellate Record With Irrelevant Transcripts

A. Introduction

After the appellate record was settled, Askew filed a motion to augment with four as-yet unprepared transcripts consisting of two probation violation admit/deny hearings, and two probation violation dispositional hearings. (Motion To Augment And To Suspend The Briefing Schedule And Statement In Support Thereof, filed July 31, 2012 (hereinafter "Motion").) After the state filed an objection to the Motion (8/3/12 Objection to "Motion to Augment [etc.]"), the Idaho Supreme Court denied Askew's Motion. (Order, filed 8/13/12.)

Askew now contends that, by denying his motion to augment the appellate record with the requested transcripts, the Idaho Supreme Court has violated his constitutional rights to due process and equal protection and has effectively denied him effective assistance of counsel on appeal. (Appellant's Brief, pp.5-15.) Askew has failed to establish a violation of his constitutional rights, however, because he has failed to show that the requested transcripts are even relevant to, much less necessary for resolution of, the only issue over which this Court has jurisdiction on appeal.

B. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free

review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

C. Askew Has Failed To Show Any Constitutional Entitlement To The Requested Augmentation

A defendant in a criminal case has a right to "a record on appeal that is sufficient for adequate appellate review of the errors alleged regarding the proceedings below." State v. Strand, 137 Idaho 457, 462, 50 P.3d 472, 477 (2002) (citing Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Eskridge v. Washington State Bd. Of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956)). The state, however, "will not be required to expend its funds unnecessarily" to provide transcripts or other items that "will not be germane to consideration of the appeal." Draper, 372 U.S. at 495; see also M.L.B. v. S.L.J., 519 U.S. 102, 112 n.5 (1996) ("an indigent defendant is entitled only to those parts of the trial record that are germane to consideration of the appeal" (internal citations omitted)); Lane, 372 U.S. 477; Griffin, 351 U.S. 12. To demonstrate that the record is not sufficient, the defendant must show that any omissions from the record prejudiced his ability to pursue the appeal. State v. Polson, 92 Idaho 615, 620-21, 448 P.2d 229, 234-35 (1968) (distinguishing Martinez v. State, 92 Idaho 148, 438 P.2d 893 (1968)). See also United States v. Smith, 292 F.3d 90, 93 (1st Cir. 2002). To show prejudice, Askew "must present something more than gross speculation

that the transcripts were requisite to a fair appeal." Scott v. Elo, 302 F.3d 598, 605 (6th Cir. 2002). Askew has failed to carry this burden.

Because Askew did not file his Rule 35 motion (filed January 20, 2012) within 14 days of entry of the district court's December 20, 2011 Order Relinquishing Jurisdiction (see R., pp.67-70; I.C.R. 54.3(a)), his March 2, 2012 notice of appeal is timely only from the court's February 29, 2012 "Order Denying Motion to Reduce Sentence and Order Correcting Credit for Time Served" (R., pp.205-207). Inasmuch as Askew's appeal is timely only from the order denying his Rule 35 motion, that is the only issue over which the appellate court has jurisdiction. See, e.g., State v. Payan, 128 Idaho 866, 867, 920 P.2d 82, 83 (Ct. App. 1996) (a timely filed notice of appeal is a prerequisite to appellate jurisdiction); State v. Fuller, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983) (same).

Nevertheless, Askew sought to augment the appellate record with (1) a transcript of the probation violation admit/deny hearing held on June 10, 2010, (2) a transcript of the probation violation dispositional hearing held on August 26, 2010, (3) a transcript of the probation violation admit/deny hearing held on January 20, 2011, and (4) a transcript of the probation violation dispositional hearing held on March 24, 2011. (Motion, pp.1-2.) Askew argues that the Idaho Supreme Court denied him due process and equal protection by denying his motion to augment the appellate record with the as-yet unprepared transcripts, however, he has failed to adequately explain, much less demonstrate, how transcripts of probation violation hearings relate to the only issue on appeal -- his Rule 35 motion for reduction of sentence.

Askew contends "the requested transcripts are relevant to the issues of whether the district court abused its discretion in relinquishing jurisdiction and denied his I.C.R. 35 motion because the district court could rely on its memory of the probation revocation hearings when it decided to relinquish jurisdiction." (Appellant's Brief, p.5.) Despite Askew's argument, because the as-yet unprepared probation violation transcripts were never presented to the district court in relation to the Rule 35 motion at issue in this case, they were never part of the record before the district court and are not properly considered for the first time on appeal. See State v. Mitchell, 124 Idaho 374, 376 n.1, 859 P.2d 972, 974 n.1 (Ct. App. 1993) (in rendering a decision on the issues raised on appeal, the appellate court is "limited to review of the record made below" and "will not consider new evidence that was never before the trial court"); see also Huerta v. Huerta, 127 Idaho 77, 80, 896 P.2d 985, 988 (Ct. App. 1995) ("It is not the role of this Court to entertain new allegations of fact and consider new evidence.").

Moreover, because Askew's appeal is untimely from the district court's Order Relinquishing Jurisdiction, that order cannot be challenged on appeal. To the extent Askew's request for transcripts relates to such a non-cognizable issue, it is misplaced. As to the remaining contention that the district court's memory of the probation revocation proceedings may have affected its decision to deny Askew's Rule 35 motion, Askew does not explain where the record gives any indication that the court in fact relied on its memory of specific aspects of those proceedings in denying his Rule 35 motion. Before Askew filed his Rule 35 motion, the court relinquished jurisdiction over him "[b]ased upon the Report from

the Department of Corrections[.]" (R., p.167-168.) In that same vein, when the court denied Askew's Rule 35 motion, it stressed, as it had promised (see R., p.163), Askew's failure to succeed in the retained jurisdiction program, explaining:

> Defendant has been given numerous opportunities to rehabilitate. Yet he continues to commit serious violations of law. In spite of his substantial criminal history the court gave him the benefit of a retained jurisdiction. During that program he was unable to exhibit a change in his thinking, attitude, or behavior. At a time when he should have been on his best behavior, he failed the rider. During probation on this case, he committed another felony. The court will not reduce the sentence.

(R., p.206.) Although the district court noted that Askew had committed another felony during probation, it gave no hint that it was considering anything specific that occurred during the probation violation hearings as supportive of its decision to deny the Rule 35 motion. Askew has failed to provide any cogent reason the requested transcripts may have been relevant or necessary for reviewing the district court's decision denying his Rule 35 motion for reduction of sentence following the court's order relinquishing jurisdiction and executing sentence.

Askew further contends, citing State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 8 (Ct. App. 2009), that "the transcripts of the hearings at issue are relevant because Idaho appellate courts review all proceedings following sentencing when determining whether the court made appropriate sentencing determinations."[1] (Appellant's Brief, p.13.) The state recognizes the Idaho Court of Appeals' statement in Hanington, 148 Idaho at 28, 218 P.3d at 8, that

[1] For purposes of this argument, the state assumes, *arguendo*, that a Rule 35 motion for reduction of sentence is a "sentencing determination."

appellate "review [of] a sentence that is ordered into execution following a period of probation" is based "upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." Contrary to Askew's assertions, however, Hanington does not stand for the proposition that a merits-based review of a decision to relinquish jurisdiction and order a sentence executed requires preparation and inclusion in the appellate record of transcripts of every hearing over which the trial court presided. To the contrary, the law is well established that, absent a showing that evidence was presented at prior hearings *and* that the district court relied on such evidence in reaching its decision to revoke probation, an appellant is not entitled to transcription at public expense of every hearing conducted before the date probation was finally revoked.[2] Mayer v. City of Chicago, 404 U.S. 189, 194 (1971) (state is not "required to expend its funds unnecessarily" where "part or all of the stenographic transcript ... will not be germane to consideration of the

[2] In the recently decided (non-final, yet to be released for publication) decision by the Idaho Court of Appeals in State v. Morgan, --- P.3d ----, 2012 WL 2782599 *3 (Idaho App. 2012), relied upon here as instructive, the Court explained:

> Morgan asserts that this Court's decision in *State v. Hanington*, 148 Idaho 26, 218 P.3d 5 (Ct. App. 2009), requires a review of the entire record of proceedings in the trial court up to and including the revocation of probation. Morgan reads *Hanington* too broadly. As stated in *Hanington*, in reviewing the propriety of a probation revocation, we will not arbitrarily confine ourselves to only those facts which arise after sentencing to the time of the revocation of probation. *Id.* at 28, 218 P.3d at 8. However, that does not mean that all proceedings in the trial court up to and including sentencing are germane. The focus of the inquiry is the conduct underlying the trial court's decision to revoke probation. Thus, this Court will consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal.

appeal" (citation and internal quotations omitted)); Draper, 372 U.S. at 496 ("[T]he fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcripts does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review.").

Although there may be some circumstances that require inclusion in the appellate record of transcripts of prior probation violation hearings to fully review the denial of a Rule 35 motion, Askew has failed to show that any such circumstances apply here. There is nothing provided by Askew that would indicate that what happened at the prior hearings, held between 11 and 20 months before the issuance of the decision that is at issue on appeal, was considered or played any role in the district court's decision to deny Askew's Rule 35 motion for a reduction of sentence. Accordingly, Askew has failed to show such transcripts are necessary to complete an adequate record on this appeal.

Citing Mayer v. City of Chicago, 404 U.S. 189 (1971), Askew claims he is only required to make a "colorable argument" that he "needs items to complete a record on appeal" before the burden transfers to the state "to prove that the requested items are not necessary for the appeal." (Appellant's Brief, p.10.) He also argues, with no citation whatsoever, that "to meet the constitutional mandates of due process and equal protection," the state must provide him (and all indigent defendants) "with an appellate record unless the State can that [sic] some or all of the requested materials are unnecessary or frivolous." (Appellant's

Brief, p.7; see also p.5 ("[T]he only way a court can constitutionally preclude an indigent defendant from obtaining that transcript is if the State can prove that the transcript is irrelevant to the issues raised on appeal.").) No reading of Mayer supports these legal arguments.

Mayer was convicted on non-felony charges punishable only by a fine and he appealed, challenging the sufficiency of evidence and asserting a claim of prosecutorial misconduct. Id. at 190. The appellate court denied his request for a trial transcript at government expense on the basis of a local rule providing that verbatim transcripts of trial proceedings would be provided at government expense only for felonies. Id. at 191-93. The issue was not whether Mayer was entitled to a record of his trial, but whether he was entitled to a verbatim transcript of his trial. Id. at 193. The Court noted it had addressed a similar issue in Draper v. Washington, 372 U.S. 487 (1963), where the Court held that the government need not provide transcripts that were not "'germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances.'" Mayer, 404 U.S. at 194 (quoting Draper, 372 U.S. at 495-96). However, "the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way." Id. at 195. "Moreover, where the grounds of appeal, as in this case, make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds." Id.

Thus, if it is not clear on the existing record, an indigent appellant must establish that a record of certain "proceedings" is germane to the appeal. Id. at 194. Only after the germaneness of the requested record of the proceedings is established and a colorable need for a verbatim record is shown by the appellant will the burden shift to the state to demonstrate that a partial transcript or some record other than a verbatim transcript will be adequate. Id. at 194-95. See also Britt v. North Carolina, 404 U.S. 226, 227-28 (1971) (in deciding whether requested record necessary court should consider the "value of the transcript to the defendant in connection with the appeal," but standard does not require "a showing of need tailored to the facts of the particular case" and the court may take notice of the importance of a transcript).

Here the only proceeding challengeable on appeal is Askew's Rule 35 motion for reduction of sentence. The record related to the district court's decision is already complete because all of the evidence considered by the district court for that motion is before the appellate court. It is Askew's appellate burden to establish that the requested transcripts are necessary to create an adequate appellate record to review the order denying his Rule 35 motion. The augmentation he sought, however, was of never before prepared transcripts hearings held 11 and 20 months before the district court rendered the decisions at issue in this case. Nothing in the record even suggests that the requested transcripts (or anything contained therein) were before the district court in relation to the Rule 35 motion. Because Askew failed to make a showing of germaneness and colorable need for the requested transcripts, there is no

burden on the state. Because all of the evidence before the district court is in the appellate record, that record is adequate for appellate review, and Askew has failed to establish a violation of his due process rights.[3] Strand, 137 Idaho at 463, 50 P.3d at 478.

Askew has also failed to establish that denial of his request to augment the record on appeal with irrelevant transcripts denied him equal protection. Askew cites to several cases where criminal defendants were denied appellate records *because of their indigence.* (See Appellant's Brief, pp.7-11 (citing, e.g., Griffin v. Illinois, 351 U.S. 12 (1956); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963)).) However, there is nothing in the record that in any way indicates that the Idaho Supreme Court denied Askew's request for transcripts solely because he is indigent. In fact, Askew's motion would have properly been denied even if he had the funds to pay for the transcripts. The Idaho Appellate Rules require *any* party seeking augmentation to set forth a ground sufficient to justify the augmentation requested. I.A.R. 30. Askew's motion to augment failed because he failed to meet this minimal burden, imposed upon all parties, of showing that the transcripts were necessary or even helpful in addressing appellate issues. The Idaho Supreme Court's order properly denied the motion to augment because Askew failed to make a showing that any

[3] As a component of his due process claim, Askew argues that the denial of his motion to augment the record with the requested transcripts has deprived him of effective assistance of counsel on appeal. (Appellant's Brief, pp.15-17.) Because Askew has failed to show that the requested transcripts are necessary, or even relevant, for appellate review of the district court's order denying his Rule 35 motion, there is no possibility that the denial of the motion to augment has deprived Askew of effective assistance of counsel on this appeal.

appellant – indigent or otherwise – would be entitled to augment the record as requested. There is no reason to believe that the motion to augment would have been granted had Askew been paying for the requested transcripts; the rule applies to all parties, not just the indigent.

Askew has failed to show that the denial of his motion to augment was in any way influenced or decided by his indigence, nor has he demonstrated that the requested transcripts are necessary to complete a record adequate to review any issue over which this Court has jurisdiction on appeal. To the contrary, the record amply demonstrates that Askew's motion to augment with the requested transcripts was properly denied because he failed to show that the transcripts were necessary for adequate review of the district court's decision deny his Rule 35 motion. Because Askew has failed to show his due process and equal protection rights were implicated, much less violated, by the denial of his motion to augment, he has failed to show any basis for relief.

II.
This Court Lacks Jurisdiction To Consider The District Court's Order Relinquishing Jurisdiction

Askew argues that "the district court abused its discretion when it relinquished its jurisdiction." (Appellant's Brief, p.18.) However, because Askew did not file his appeal within 42 days after entry of the district court's Order Relinquishing Jurisdiction (R., pp.167-168), and because the filing of his Rule 35 motion for reduction of sentence did not extend the time to appeal, his appeal is untimely from the relinquishment order and this Court lacks jurisdiction to consider an appellate challenge to that order.

An appeal as a matter of right may be perfected "only by physically filing a notice of appeal ... within 42 days from the date evidenced by the filing stamp ... on any judgment, order or decree of the district court appealable as a matter of right ...." I.A.R. 14(a) (emphasis added); see also I.C.R. 54.3. However, if a Rule 35 motion for reduction of sentence is filed within 14 days after the entry of a judgment, the time to appeal "commences to run upon the date of the clerk's filing stamp on the order deciding such motion." I.C.R. 54.3(a). The district court's Order Relinquishing Jurisdiction was filed on December 20, 2011. (See R., pp.67-70.) Therefore, unless Askew extended his appeal time by filing his Rule 35 motion by January 3, 2012, he had until January 31, 2012 to file an appeal from the relinquishment order. However, Askew's January 31, 2012 appeal deadline was not extended because he waited until January 20, 2012 to file his Rule 35 motion – well beyond the 14 day period required by I.C.R. 54.3(a). Askew filed his notice of appeal on March 2, 2012 (R., pp.208-210), over one month after his January 31, 2012 appeal period expired; therefore, it was untimely.

Inasmuch as Askew's appeal is not timely from the district court's Order Relinquishing Jurisdiction, this Court does not have jurisdiction to consider an appellate challenge to that order. See Payan, 128 Idaho at 867, 920 P.2d at 83; Fuller, 104 Idaho 891, 665 P.2d 190. Therefore, Askew's second issue on appeal (see Appellant's Brief, pp.18-19) must be dismissed.

III.
Askew Failed To Show That The District Court Abused Its Discretion By Denying His Rule 35 Motion For Reduction Of His Sentence

A. Introduction

After Askew was placed in the retained jurisdiction program, the district court relinquished jurisdiction and ordered his sentence executed because he failed to complete the Therapeutic Community program as ordered. (R., pp.167-168.) Askew filed a Rule 35 motion for reduction of sentence, which the district court denied. (R., pp.169-173, 194-195, 205-207.) On appeal, Askew contends the district court abused its discretion by denying his motion. (Appellant's Brief, pp.19-22.) A review of the record shows otherwise.

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, Askew 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. Askew Has Failed To Show Any Abuse Of Discretion In Light Of The Marginal New Information Provided In His Rule 35 Motion

Askew asserts that the district court abused its discretion when it denied his Rule 35 motion for reduction of sentence. (Appellant's Brief, pp.19-22.) Askew has failed to establish an abuse of discretion.

A court's decision not to reduce a sentence is reviewed for an abuse of discretion subject to the well-established standards governing whether a sentence is excessive. Hanington, 148 Idaho at 27, 218 P.3d at 7. Those standards require an appellant to "establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment." State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). Those objectives are: "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrong doing." State v. Wolfe, 99 Idaho 382, 384, 582, P.2d 728, 730 (1978). The reviewing court "will examine the entire record encompassing events before and after the original judgment," i.e., "facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." Hanington, 148 Idaho at 28, 218 P.3d at 8.

Askew specifically argues that the information provided by his Rule 35 motion was mitigating because it demonstrated: (a) he has a job opportunity available to him after his release, (b) he was in a 12-step (substance abuse) program, (c) his fiancé was pregnant and needed his emotional and financial support, (d) he learned a lot on his rider and gained insight into his criminal behavior, (e) he provided the court with a treatment plan and treatment course for his issues with anxiety, (f) he had strong support from his family, and (g) he suffers from ADD, bi-polar disorder, and suicidal thoughts. (Appellant's Brief, p.21.) Askew also contends that he made some progress during his retained

jurisdiction period, and was not considered a disciplinary problem. (Appellant's Brief, pp.18-19, 20 (Section II mitigating information incorporated into Section III argument).) Askew has failed to satisfy his burden of showing an abuse of discretion in light of the information provided by his Rule 35 motion. Review of the record shows Askew's Rule 35 motion contained little, if any, actually new information, and what information was provided was entirely consistent with the evidence already considered and merely reinforced the district court's sentencing rationale.

Askew pled guilty to grand theft by possession of stolen property for possession of stolen checks, which crime was described in the presentence report ("PSI") as follows:

> According to the appended police reports, on December 26, 2005, Boise Police were dispatched to a break in at Lush Salon, 109 North 17th, Boise. The front window was shattered and the salon ransacked. It initially appeared the suspect stole one bottle of Bud Light beer from the refrigerator and exited the back door. A witness provided information that led police to Matthew Charles Askew.
>
> Contacted by police, Mr. Askew admitted wearing a black coat the night of the burglary. Inside the pocket was a book of checks belonging to the Lush Salon. Broken glass was found in the tread of the shoes Mr. Askew said he wore that night and around the bottom cuff of a pair of pants.

(PSI, p.2; see R., pp.61-64; Tr., p.1, L.19 – p.2, L.7.) At sentencing, after considering both the aggravating circumstances and the mitigating evidence, the district court gave Askew the opportunity to succeed on probation. (Tr., p.16, L.1 – p.23, L.14; R., pp.67-70.) Askew twice failed to abide by the terms of his probation (R., pp.99-100, 158-159), yet the court still gave him the opportunity to successfully complete a period of retained jurisdiction, emphasizing that he

complete the one-year Therapeutic Community program (R., pp.162-166). However, Askew failed to complete that program due to his own recalcitrance, as explained by the Department of Correction's updated report and recommendation to the district court:

> After review of his institutional performance, program participation, probation plan, and central file, Mr. Askew is recommended for Relinquish Jurisdiction. This recommendation was based on the following information: Mr. Askew was not a significant disciplinary problem; however he continually violated the smaller rules of the TC and was unwilling or able [sic] to change his thinking, attitude, or behavior. Mr. Askew has not adequately demonstrated a desire to stop his harmful behavior or thinking. Staff used numerous interventions in the TC and in his assigned group to help him change his behavior and thinking; to include several staffings with and without Mr. Askew present; however, all of these attempts failed. Mr. Askew did not complete his assigned programs. He also did not submit what appeared to be a reasonable probation plan with a confirmed living arrangement, and his efforts in the program did not appear to be sincere regarding his willingness to change his criminal thinking and behavior.

(APSI, p.4.) Askew's failure to make an appropriate effort to complete the Therapeutic Community program during his retained jurisdiction period was the last straw for the district court -- Askew failed at each of the three opportunities given him to continue on probation.

The information provided in the Rule 35 motion, even taken as true, does not change the court's analysis. (See R., pp.169-173, 194-195.) There is nothing changed or new about Askew having a job opportunity at the time of his Rule 35 motion (vis-à-vis his sentencing hearing), because he had been actively employed in one job for about a year-and-a-half at the time of sentencing, and his employer was present at that hearing to show his support. (Tr., p.19, L.24 – p.20, L.3; PSI, pp.7-8.) Askew's supportive family, as well as his bi-polar,

anxiety, and ADD issues were also considered during his sentencing hearing and do not constitute new information. (Tr., p.17, L.16 – p.23, L.2; PSI, pp.5-6, 9-11.) Admittedly, the pregnancy of Askew's fiancé and her need for financial and emotional support, his recent involvement in a 12-step program, his new treatment plan to address anxiety, and the things he learned from his "rider," was all new information at the time of his Rule 35 motion. However, none of that information would have had any meaningful impact on the court's decision to deny the motion because they do not change the balance of community protection, deterrence, and rehabilitation from that employed by the court. As the court concluded in denying Askew's Rule 35 motion:

> Defendant has been given numerous opportunities to rehabilitate. Yet he continues to commit serious violations of law. In spite of his substantial criminal history the court gave him the benefit of a retained jurisdiction. During that program he was unable to exhibit a change in his thinking, attitude, or behavior. At a time when he should have been on his best behavior, he failed the rider. During probation on this case, he committed another felony. The court will not reduce the sentence. . . .
>
> The sentence imposed will provide an appropriate punishment and deterrent to the defendant and to the community.

(R., p.206.)

Askew has failed to show any abuse of discretion. The district court had already given significant weight to the mitigating evidence at the time of sentencing and determined it appropriate to initially place Askew on probation, and despite his failure to comply with the terms of his probation on two successive grants of probation, the court gave him one last chance to continue on probation by placing him in the rider program to complete the Therapeutic

Community program. Given Askew's history of failing to succeed when given the opportunity of probation, the district court did not abuse its discretion by ordering his original sentence of seven years with two years fixed executed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Askew's Rule 35 motion for reduction of sentence.

DATED this 20th day of November, 2012.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of November, 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.

John C. McKinney
Deputy Attorney General

JCM/pm