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State v. Parmer Respondent's Brief Dckt. 43210

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43210
Plaintiff-Respondent,)	
)	Kootenai County Case No.
v.)	CR-2010-6509
)	
CODY WILLIAM PARMER,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Parmer failed to establish that the district court abused its discretion by denying his Rule 35 motion for reduction of his unified sentence of 16 years with six years fixed, imposed upon his conviction for battery with the intent to commit a serious felony, rape?

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

Parmer was convicted after a jury trial of battery with the intent to commit rape, and the district court imposed a unified sentence of 15 years, with six years fixed and retained jurisdiction for 365 days. (R., pp.2-12, 23.) Parmer timely appealed from the

district court's order retaining jurisdiction and the Idaho Court of Appeals affirmed his conviction. (R., pp.22-30.) While Parmer's appeal was pending, the district court held a jurisdictional review hearing, suspended Parmer's sentence and placed him on probation for five years. (R., pp.12-13.)

Parmer subsequently violated his probation, and the district court revoked Parmer's probation, ordered his underlying sentence executed, and retained jurisdiction for a second time. (R., pp.13-16.) Parmer timely appealed from the district court's order revoking his probation and executing his underlying sentence without reduction. (R., p.16.) The Idaho Court of Appeals subsequently affirmed the district court's order revoking Parmer's probation. (R., pp.74-76.) After Parmer's second period of retained jurisdiction, the district court suspended his sentence and placed Parmer back on probation for three years. (R., pp.42-46.)

Approximately eight months later, Parmer admitted he had violated his probation a second time. (R., pp.111-12.) The district court subsequently revoked Parmer's probation and ordered his underlying sentence executed without reduction. (R., pp.113-14.) Parmer timely filed a Rule 35 motion for sentence reduction, which the district court denied. (R., pp.115-16, 120-21, 141-42, 153-54.) Parmer timely appealed from the district court's denial of his Rule 35 motion. (R., pp.143-45.)

Parmer asserts the district court abused its discretion by denying his Rule 35 motion in light of his young age, substance abuse issues, acceptance of responsibility, and desire to be a father to his young son. (Appellant's brief, pp.4-5.) There are two reasons why Parmer's argument fails. First, the district court lacked jurisdiction, 250 days after the entry of the order revoking probation, to consider Parmer's Rule 35

motion. Second, even if this Court reviews the merits of Parmer's claims, he has failed to establish an abuse of discretion in the denial of his Rule 35 request for leniency.

Rule 35 provides both that a motion for reduction may be made within 120 days after judgment is entered and within 14 days after probation is revoked, and that a district court may reduce a sentence within 120 days of judgment and within 14 days of a probation revocation. I.C.R. 35. The Idaho Supreme Court has held that a trial court has jurisdiction to rule on a Rule 35 motion within a "reasonable time" after the jurisdictional time limit expires. State v. Chapman, 121 Idaho 351, 352, 825 P.2d 74, 75 (1992). If, however, the trial court fails to rule upon the motion "within a reasonable time after the expiration of the [time] period, the trial court loses jurisdiction." Chapman, 121 Idaho at 354, 825 P.2d at 77; State v. Tranmer, 135 Idaho 614, 616, 21 P.3d 936, 938 (Ct. App. 2001). In addition, it is the movant's responsibility to "precipitate action on the motion within a reasonable time frame, or otherwise provide an adequate record and justification for the delay." State v. Day, 131 Idaho 184, 186, 953 P.2d 624, 626 (Ct. App. 1998). On appeal, the defendant bears the burden of showing in the record the reason for, and the reasonableness of, any delay. Id.

The district court failed to rule on Parmer's Rule 35 motion for a reduction of sentence while it was vested with jurisdiction. The order revoking Parmer's was entered on July 16, 2014, and Parmer filed his Rule 35 motion 2 days later, on July 18, 2014. (R., pp.113-16.) On July 24, 2014, the district court entered a "Notice of Intent to Dismiss Defendant's I.C.R. 35 Motion for Failure to State a Basis for the Motion." (R., pp.117-19.) Parmer subsequently filed a *pro se* "Motion for I.C.R. 35 and Post Conviction [sic] Relief" on August 7, 2014 and the district court set it for hearing. (R., pp.

19, 120-22.) At the hearing, Parmer's attorney requested additional time to allow him to speak to Parmer, and the hearing was continued for 60 days. (R., p.122.) Per the register of actions, the hearing was continued a second time at the request of the state. (R., p. 19.) The hearing was then continued twice more before the district court verbally denied Parmer's motion on March 23, 2015. (R., pp.131, 136, 141.)

The district court had a "reasonable time" to rule on the motion, but did not rule on the motion until 250 days after the entry of the order revoking Parmer's probation, well past the 14-day jurisdictional limit. (R., p.141.) Although there is some indication in the record regarding the court's reasons for not ruling on the motion within 14 days, nothing in the record justifies the extension of the jurisdictional period for another 236 days. Because the motion was not ruled on within the jurisdictional limit, and there was no showing of necessity for ruling on the motion 236 days beyond the 14-day jurisdictional limit, the court lost jurisdiction to consider the motion. Because district court lost jurisdiction, due to the passage of time, to rule on Parmer's Rule 35 motion for a reduction of sentence, its order denying the motion should be affirmed.

Even if this Court finds that the district court had jurisdiction to rule on the Rule 35 motion, Parmer has still failed to establish an abuse of discretion. 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, Parmer 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. Parmer has failed to satisfy his burden.

The only “new” information Parmer provided in support of his Rule 35 motion was his desire to be parole eligible at the same time as in an unrelated case, his young age and desire to be a father to his son, as well as his desire for treatment for his substance abuse issues. (R., pp.120-21.) This was not new information before the district court, as Parmer’s young age, desire to be a better father to his son, and desire for additional substance abuse treatment were all facts known to the district court at the time it revoked Parmer’s probation. (07/09/2014 Tr., p.14, L.19–p.19, L.5; PSI, pp.5-6, 8.¹) The district court was also aware of Parmer’s desire to have the fixed portion of his sentence in this case reduced so he would be eligible for parole at the same time that he completed the fixed portion of his sentence in his other case. (07/09/2014 Tr., p.15, Ls.14-18.)

At the hearing on his Rule 35 motion, Parmer acknowledged he was not supporting his request for leniency with any new information, and when asked why the district court should be lenient upon him, Parmer stated, “I don’t think they should be. I’m just asking for the leniency.” (03/23/2015 Tr., p.6, L.11 – p.7, L.3.) Because Parmer 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 Parmer’s claim, the state submits that by failing to establish that his sentence was excessive as imposed, Parmer has

¹ Citations to the PSI are to the electronic file “CR10-6509 PARMER #43210 SEALED.pdf.”

also failed to establish that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence.

Conclusion

The state respectfully requests this Court to affirm the district court's order denying Parmer's Rule 35 motion.

DATED this 5th day of November, 2015.

/s/
LORI A. FLEMING
Deputy Attorney General

CATHERINE MINYARD
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of November, 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