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State v. Leytham Respondent's Brief Dckt. 43225

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	Nos. 43225 & 43226
Plaintiff-Respondent,)	
)	Ada County Case Nos.
v.)	CR-2014-3478 &
)	CR-2014-5269
JIMMY DALE LEYTHAM,)	
)	
Defendant-Appellant.)	RESPONDENT'S BRIEF
_____)	

Issue

Has Leytham failed to establish that the district court abused its discretion by denying his Rule 35 motions for reduction of his consecutive sentences of 10 years, with five years fixed, for forgery, and five years indeterminate for criminal possession of a financial transaction card?

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

Leytham pled guilty to forgery and criminal possession of a financial transaction card, and the district court imposed a unified sentence of 10 years, with five years fixed, for forgery, and a consecutive five-year indeterminate sentence for criminal possession

of a financial transaction card. (R., pp.77-80, 352-55.) Leytham filed timely Rule 35 motions for reduction of his sentences, which the district court denied. (R., pp.85, 273-78, 360, 549-54.) Leytham filed notices of appeal timely only from the district court's orders denying his Rule 35 motions. (R., pp.279-81, 555-57.)

Leytham asserts that the district court abused its discretion by denying his Rule 35 motions for reduction of his sentences in light of his medical problems, community support, and because, he claims, he was "silenced by counsel when he wanted to raise issues at the sentencing hearing," he was "misinformed about the amount of restitution that could be awarded," and he "also believed that there was a plea bargain involving probation, which he acknowledged was contradicted by the record." (Appellant's brief, pp.2-4.) Leytham has failed to establish an abuse of discretion.

In State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007), the Idaho Supreme Court observed that a Rule 35 motion "does not function as an appeal of a sentence." The Court noted that where a sentence is within statutory limits, a Rule 35 motion is merely a request for leniency, which is reviewed for an abuse of discretion. Id. Thus, "[w]hen presenting a Rule 35 motion, the 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 Rule 35 motion." Id. Absent the presentation of new evidence, "[a]n appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence." Id. Accord State v. Adair, 145 Idaho 514, 516, 181 P.3d 440, 442 (2008).

Leytham did not appeal the judgments of conviction in these cases. As Leytham acknowledges on appeal, the plea agreement did not involve a recommendation for

probation, and the district court advised Leytham that it was not required to follow the recommendations of either counsel and that it could impose up to 19 years in prison for the two charges. (Tr., p.25, Ls.3-12.) Additionally, as part of the plea agreement, Leytham agreed to pay restitution for the instant cases, for the dismissed charges related to the instant cases, and for an unfiled case related to police report DR-2014-411861. (Tr., p.6, Ls.3-15, p.8, Ls.19-23.) At sentencing, the district court specified the requested amounts of restitution that it intended to order, and Leytham's counsel agreed to the amounts and stipulated that there was a sufficient basis to impose the specified amounts. (Tr., p.37, L.14 – p.38, L.16.) As such, Leytham's claim that he was misinformed about the amount of restitution that could be awarded or that he misunderstood the terms of the plea agreement is neither supported by the record, nor is it a basis to reduce his sentences. Although Leytham claims he was "silenced by counsel when he wanted to raise issues at the sentencing hearing," this claim is also not supported by the record. (Appellant's brief, p.3.) At sentencing, the district court afforded Leytham the opportunity to raise any issues he wished to raise when it asked, "Mr. Leytham, do you wish to make a statement or present any information regarding sentence today?" (Tr., p.58, Ls.3-5), to which Leytham responded, "No, ma'am" (Tr., p.58, L.6). Any issues Leytham may have had with his trial counsel are likewise not a basis to reduce his sentences.

In support of his Rule 35 motions for sentence reduction, Leytham attached medical records with respect to his health problems and letters of support from individuals in the community. (R., pp.86-272, 361-548.) This information was before the district court at the time of sentencing and was not, therefore, new information

supporting a reduction of Leytham's sentences. (PSI, pp.10-15, 112-22, 126-27.¹) Because Leytham presented no new evidence in support of his Rule 35 motions, he failed to demonstrate in the motions that his sentences were excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court's orders denying his Rule 35 motions.

Even if this Court addresses the merits of Leytham's claim, Leytham has still failed to establish an abuse of discretion, for reasons more fully set forth in the district court's Order Denying Rule 35 Motion, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm the district court's orders denying Leytham's Rule 35 motions for reduction of his sentences.

DATED this 27th day of November, 2015.

/s/ _____
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

¹ PSI page numbers correspond with the page numbers of the electronic file "Leytham 43225 psi.pdf."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of November, 2015, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ _____
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

NO. 11:48 FILED
A.M. P.M.

APR 30 2015

CHRISTOPHER D. RICH, Clerk
By LUCILLE DANSEREAU
DEPUTY

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

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THE STATE OF IDAHO,

Plaintiff,

vs.

JIMMY D. LEYTHAM,

Defendant.

CASE NO. CR-FE-2014-3478
CR-FE-2014-5269

ORDER DENYING RULE 35 MOTION

On December 31, 2014, the Court sentenced Jimmy D. Leytham in CR-FE-2014-3478 on Count II. Forgery, Felony, I.C. § 18-3601, to an aggregate term of ten (10) years, with a minimum period of confinement of five (5) years, followed by a subsequent indeterminate period of custody not to exceed five (5) years. The State dismissed Counts I and III, Forgery, as part of a plea agreement and the Court ordered restitution in the amount of \$55,331.92.

That same date, the Court sentenced Leytham in CR-FE-2014-5269 on Count II. Criminal Possession of a Financial Transaction Card, Felony, I.C. § 18-3125 to an aggregate term of five (5) years, with a minimum period of confinement of zero (0) years, followed by a subsequent indeterminate period of custody not to exceed five (5) years. The State dismissed Count I. Grand Theft and agreed to not have him charged a persistent violator. The Court ordered that this case run consecutively to CR-FE-2014-3478. The Court further ordered restitution in the amount of \$202.75.

Leytham's counsel, Lance Fuisting, timely filed a Motion for Reconsideration of Sentence pursuant to Rule 35, I.C.R., on April 28, 2015. In support of this motion, Leytham filed medical records further documenting his physical health and letters in support. The Court did consider his physical health, and the letters had been included with his presentence report. He also contends that

ORDER DENYING RULE 35 MOTION
CASE NOS. CR-FE-2014-3478/5269

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1 he did not understand the amount of restitution he would be ordered to pay. He requests leniency and
2 requests that the Court place him on probation. He contends this would allow him to program earlier.

3 Leytham requests a hearing and the Court denies his request. Idaho Criminal Rule 35
4 provides in part, as follows: "Motions to correct or modify sentences under this rule . . . shall be
5 considered and determined by the court without the admission of additional testimony and without
6 oral argument, unless otherwise ordered by the court in its discretion; . . ."

7 The burden is on a defendant to prove a sentence is unreasonable. *State v. Burnight*, 132
8 Idaho 654, 978 P.2d 214, 219 (1999). Furthermore, a motion for reconsideration MUST be supported
9 by new or additional information. It is not appropriate to simply reargue the sentence. That is not the
10 purpose of a motion for reconsideration.

11 A motion for reduction of a sentence under I.C.R. 35 is essentially a plea for leniency,
12 addressed to the sound discretion of the court. *State v. Copenhaver*, 129 Idaho 494,
13 496, 927 P.2d 884, 886 (1996); *State v. Book*, 127 Idaho 352, 355, 900 P.2d 1363,
14 1366 (1995); *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v.*
15 *Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct.App.1989). Nevertheless, as
16 discussed above, our Supreme Court has held that a defendant presenting a Rule 35
17 motion must submit new or additional information in support of the motion, and
18 an appeal from the denial of a Rule 35 motion "cannot be used as a vehicle to
19 review the underlying sentence absent the presentation of new evidence."
20 *Huffman*, 144 Idaho at 203, 159 P.3d at 840. Accordingly, because Shumway
21 presented no new or additional evidence in support of his motion, we will not review
22 the reasonableness of the sentence nor disturb the district court's order denying
23 the motion.

24 *State v. Shumway*, 144 Idaho 580, 583, 165 P.3d 294, 297 (Ct. App. 2007) (emphasis added). The
25 Idaho Supreme Court has made this clear.

26 However, **Rule 35 does not function as an appeal of a sentence.** Instead, it is a
narrow rule allowing a trial court to correct an illegal sentence (at any time) or to
correct a sentence imposed in an illegal manner (within 120 days). . . . When
presenting a Rule 35 motion, **the 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 Rule 35 motion.** *Knighton*, 143 Idaho at 320, 144
P.3d at 25; *State v. Sheahan*, 139 Idaho 267, 285, 77 P.3d 956, 974 (2003); *State v.*
Strand, 137 Idaho 457, 463, 50 P.3d 472, 478 (2002); *see also State v. Wright*, 134
Idaho 73, 79, 996 P.2d 292, 298 (2000). An appeal from the denial of a Rule 35
motion cannot be used as a vehicle to review the underlying sentence absent the
presentation of new information. . . .

State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007)(emphasis added).

1 To the extent Leytham supports his request by arguing he wants access to Department of
2 Corrections programming and a lesser sentence would make him eligible for programming at an
3 earlier point, it is not new information to observe that an inmate may not be immediately eligible for
4 the work center or that the sentence impacts his eligibility for specific programs. The Court was and
is aware its sentence impacts Department of Correction programming decisions.

5 ANALYSIS

6 Leytham requests leniency because he wants to program. The Court rejects his request. Rule
7 35, I.C.R., provides in pertinent part as follows:

8 Motions to correct or modify sentences under this rule must be filed within 120 days
9 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
10 additional testimony and without oral argument, unless otherwise ordered by the court
in its discretion; . . .

11 The determination of whether to grant the relief requested by Leytham is a matter committed to the
12 Court's discretion and the Court's decision is governed by the same standard as the original sentence.
13 See *State v. Gardiner*, 127 Idaho 156, 164, 989 P.2d 615 (Ct. App. 1995); *State v. Ricks*, 120 Idaho
14 875 (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).

15 The Court understood that this was a matter of discretion and considered several factors both
16 in the original sentencing and in deciding this Motion For Reconsideration. A sentence has several
17 objectives: (1) protection of society, (2) deterrence of the individual and the public generally, (3)
18 possibility of rehabilitation, and (4) punishment for wrongdoing. The primary consideration is, and
19 should be, "the good order and protection of society." *State v. Toohill*, 103 Idaho 565, 650 P.2d 707
(Ct. App. 1982).

20 In any sentencing, the primary focus begins with a concern for protection of the public. In this
21 case, Leytham pled guilty and the Court sentenced him in CR-FE-2014-3478 on Count II. Forgery,
22 Felony, I.C. § 18-3601, to an aggregate term of ten (10) years, with a minimum period of
23 confinement of five (5) years, followed by a subsequent indeterminate period of custody not to
24 exceed five (5) years. The maximum penalty for this offense is fourteen (14) years. The fixed portion
25 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

1 Court finds that a five-year fixed sentence for Forgery is lenient considering the facts of this crime
2 and is well within the statutory sentence guidelines.

3 That same date, the Court sentenced Leytham in CR-FE-2014-5269 on Count II. Criminal
4 Possession of a Financial Transaction Card, Felony, I.C. § 18-3125 to an aggregate term of five (5)
5 years, with a minimum period of confinement of zero (0) years, followed by a subsequent
6 indeterminate period of custody not to exceed five (5) years. The maximum penalty for this offense
7 is five (5) years. The fixed portion of a sentence imposed under the Unified Sentencing Act is treated
8 as the term of confinement for sentence review purposes. *State v. Hayes*, 123 Idaho 26, 27, 843 P.2d
9 675, 676 (Ct. App. 1992). The Court finds that a zero-year fixed sentence for Criminal Possession of
a Financial Transaction Card is lenient considering the facts of this crime and is well within the
statutory sentence guidelines.

10 Furthermore, with respect to both cases, the Court considered the entirety of the sentence,
11 including any indeterminate time.

12 Further, the decision to impose the sentences consecutively is a matter of discretion and the
13 Court was aware when it sentenced Leytham that, in effect, Leytham would serve a total of five (5)
14 years before he again could be released on parole and that he would be under supervision for fifteen
15 (15) years. *State v. Ricks*, 120 Idaho 875, 878, 820 P.2d 1232, 1233 (Ct. App. 1991); *State v.*
16 *Lawrence*, 98 Idaho 399, 400-01, 565 P.2d 989, 990-91 (1977); *State v. Lloyd*, 104 Idaho 397, 401,
17 659 P.2d 151, 155 (Ct. App. 1983). The Court found that this lengthy period was necessary in order
to protect society from Leytham's demonstrated inability to conform his conduct to society's rules.

18 In arriving at this sentence, the Court considered Leytham's character and any mitigating or
19 aggravating factors. The Court, however, found there were several aggravating factors in this case –
20 suggesting the need for this sentence. In particular, it is clear that Leytham needs incarceration. The
21 Court's decision focused on protection of society. The facts of this crime and his criminal history
suggested the need for this sentence in order to properly rehabilitate him.

22 This was at least his 8th felony conviction which includes Burglary (1978¹, 1979), Issuing a
23 Check Without Funds (1978), Disposing of Stolen Property (1979) Escape from a Penitentiary

24
25 ¹ Amended from Embezzlement.

1 (1979), and Grand Theft (1982). While the Court recognized that his last criminal felony conviction
2 was in 1982, the facts in case, CR-FE-2014-3478, Leytham was a handyman hired over several years
3 by the victim, a very elderly man, and repeatedly altered the checks written to him. For example, he
4 altered a check from \$25 to \$2500, another from \$96.50 to \$960.50, and another from \$400 to
5 \$2400. Evidence was presented at sentencing that he had even accompanied the victim to the bank
6 and tried to get him to withdraw \$10,000 and the teller, being suspicious, would only allow the
elderly man to withdraw \$5,000.

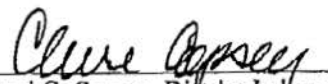
7 In CR-FE-2014-5269, he stole a woman's purse in a Walmart and then was caught trying to
8 withdraw \$300 from her ATM.

9 At sentencing, he claimed he "found" her purse and was trying to simply "deposit" the credit
10 card in the ATM. However, he is actually seen on video stealing her purse and seen trying to
11 withdraw \$300. While awaiting sentencing, the State received more reports of potential stealing from
another elderly man for whom he worked as a handyman.

12 The Court found that this sentence would promote rehabilitation; there is a need for some
13 punishment that fits the crime before real rehabilitation will be effective. The Court finds that this
14 sentence fulfills the objectives of protecting society and achieves deterrence, rehabilitation, and
retribution, and therefore denies Leytham's Motion for Reconsideration.

15 **IT IS SO ORDERED.**

16 DATED this 30th day of April 2015.

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18 
19 Cheri C. Copsey, District Judge
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