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State v. White Respondent's Brief Dckt. 43573

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43573
Plaintiff-Respondent,)	
)	Valley County Case No.
v.)	CR-2014-3076
)	
KENNETH ROBERT WHITE,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has White failed to establish that the district court abused its discretion by denying his Rule 35 motion for a reduction of his unified sentence of eight years, with one year fixed, imposed upon his guilty plea to sexual exploitation of a child by possession of sexually exploitative materials?

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

White pled guilty to sexual exploitation of a child by possession of sexually exploitative materials and the district court imposed a unified sentence of eight years, with one year fixed, and retained jurisdiction. (R., pp.48-51.) Following the period of

retained jurisdiction, the district court relinquished jurisdiction. (R., pp.61-64.) White filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.65-70.) White filed a notice of appeal timely only from the district court's order denying his Rule 35 motion. (R., pp.71-73.)

Mindful that he failed to provide any new or additional information in support of his Rule 35 motion, White nevertheless asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence in light of his age, health problems, risk to reoffend, probation recommendation from rider staff, lack of criminal history, and the nature of the offense. (Appellant's brief, pp.4-5.) White 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).

White did not appeal the judgment of conviction or the order relinquishing jurisdiction in this case. On appeal, he acknowledges that he failed to provide any new or additional information in support of his Rule 35 motion, as information with respect to

his age, health problems, risk to reoffend, probation recommendation from rider staff, lack of criminal history, and the nature of the offense was before the district court at the time that it relinquished jurisdiction. (Appellant's brief, p.5; R., p.69.) Because White 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.

Conclusion

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

DATED this 13th day of April, 2016.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of April, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BEN P. MCGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General