2-17-2016

State v. McGarvin Respondent's Brief Dckt. 43587

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. RYAN NICHOLAS MCGARVIN, Defendant-Appellant.	)	NO. 43587 Ada County Case No. CR-2015-5054 RESPONDENT'S BRIEF

Issue

Has McGarvin failed to establish that the district court abused its discretion by denying his Rule 35 motion for a reduction of his unified sentence of seven years, with two years fixed, imposed upon his guilty plea to possession of heroin?

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

McGarvin pled guilty to possession of heroin and the district court imposed a unified sentence of seven years, with two years fixed. (R., pp.22-23, 30-34.) McGarvin filed a timely Rule 35 motion for a reduction of sentence, which the district court denied.

(R., pp.37-46, 49-52.) McGarvin filed a notice of appeal timely only from the district court's order denying his Rule 35 motion for a reduction of sentence. (R., pp.53-56.)

McGarvin asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence in light of his claims that he "had been 'a model inmate,'" that there was a "lack of meaningful treatment available to him because of the length of his sentence," and that his family continued to need him. (Appellant's brief, pp.3-4.) McGarvin 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).

McGarvin did not appeal the judgment of conviction in this case. On appeal, he merely argues that his sentence was excessive because his family continued to need him, because he still wanted to participate in the Rehabilitation Drug and Alcohol Program (R-DAP), which he claims was unavailable to him due to the length of his sentence, and because, he claims, he "had been 'a model inmate.'" (Appellant's brief, pp.3-4.) As the district court concluded in its order denying McGarvin's Rule 35 motion,

none of this was new information. (R., p.50.) McGarvin's unsupported claim that he was a "model inmate" is not new information that entitled him to a reduction of sentence, as good behavior is what is expected of inmates. The district court was aware, at the time of sentencing, of McGarvin's claim that his family needed him, and of McGarvin's desire for the court to impose only one year fixed so he could participate in the R-DAP program. (R., p.50; PSI, p.261.[1]) That McGarvin feels he cannot obtain meaningful treatment in the programs that *are* available to him is not new information. Further, "alleged deprivation of rehabilitative treatment is an issue more properly framed for review either through a writ of habeas corpus or under the Uniform Post-Conviction Procedure Act." State v. Sommerfeld, 116 Idaho 518, 520, 777 P.2d 740, 742 (Ct. App. 1989) (affirming district court's denial of defendant's I.C.R. 35 motion). Because McGarvin 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 McGarvin's claim, McGarvin has still failed to establish an abuse of discretion. McGarvin has an extremely lengthy history of criminal offending that includes at least 54 misdemeanor convictions and three prior felony convictions. (PSI, pp.4-16.) His record also contains numerous failures to appear, sanctions for contempt of court, and probation/parole violations, demonstrating

[1] PSI page numbers correspond with the page numbers of the electronic file "McGarvin 43587 psi.pdf."

McGarvin's ongoing disregard for the law and court orders. (PSI, pp.4-16.) He completed the Therapeutic Community program and was granted parole in December 2014, and committed the instant offense just four months later. (PSI, p.16.) In the instant offense, McGarvin used heroin and drove while intoxicated, "'swerving all over the road' and 'nearly hit[ting] two cars.'" (PSI, pp.3-4.) After he was arrested, officers found heroin, a hypodermic needle, a metal spoon with a brown tar residue, and a digital scale in McGarvin's vehicle, and McGarvin subsequently tested positive for methamphetamine and methadone. (PSI, p.3; Tr., p.7, Ls.24-25.) At sentencing, the district court stated:

> One of the difficulties I have with your criminal record is it doesn't just show addiction. It's not just possession charges. It includes crimes of violence. And that's crimes of violence, plural. You have more than one conviction for a crime of violence. You also have a conviction, as you know, for delivery of a controlled substance.
>
> So although you do have a record for being an addict, you also have a record for putting the community at risk. And that's not even to mention that this is your fourth lifetime DUI.

(Tr., p.15, Ls.12-24.) The presentence investigator reported that McGarvin scored in the "high risk category" for re-offense. (PSI, p.23.)

The district court considered all of the relevant information and imposed a reasonable sentence, stating, "I have got to protect the community. At this point, I have got to do something for the community." (Tr., p.17, Ls.22-24.) McGarvin has not shown that he was entitled to a reduction of his sentence, particularly in light of his incessant criminal offending, abysmal performance on community supervision, failure to rehabilitate or be deterred despite numerous prior legal sanctions and treatment opportunities, and the risk he presents to the community. Given any reasonable view of

the facts, McGarvin has 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 McGarvin's Rule 35 motion for a reduction of sentence.

DATED this 17th day of February, 2016.

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

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of February, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

ANDREA W. REYNOLDS
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