

4-19-2016

## State v. Lashchuk Respondent's Brief Dckt. 43637

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	Nos. 43637 & 43638
Plaintiff-Respondent,	)	
	)	Twin Falls County Case Nos.
v.	)	CR-2014-5626 & CR-2015-977
	)	
LARRY MARK LASHCHUK,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Lashchuk failed to establish that the district court abused its discretion by denying his Rule 35 motions for reduction of his concurrent unified sentences of eight years, with three years fixed, for grand theft and for grand theft by possession of stolen property and seven years, with three years fixed, for possession of methamphetamine?

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

In case number 43637, pursuant to a plea agreement, Lashchuk pled guilty to grand theft and to grand theft by possession of stolen property; the state agreed to dismiss two remaining felony counts and to recommend the retained jurisdiction

program and underlying unified sentences of eight years, with three years fixed; and Lashchuk waived his rights to “file a Rule 35 motion regarding the initial Judgment (except as to an illegal sentence)” and to appeal his sentence unless the district court exceeded the three-year determinate portion of the state’s sentencing recommendation or the recommendation for the retained jurisdiction program. (R., pp.59, 63, 73.) The district court imposed concurrent unified sentences of eight years, with three years fixed, and retained jurisdiction. (R., pp.91-97.) Following the period of retained jurisdiction, the district court suspended Lashchuk’s sentences and placed him on supervised probation for four years. (R., pp.106-27.)

Lashchuk violated his probation less than two months later (in part by committing the new crime in case number 43638), and the district court subsequently revoked his probation, ordered the underlying sentences executed, and retained jurisdiction a second time. (R., pp.152, 180-85, 255-57.) In case number 43638, pursuant to a plea agreement, Lashchuk pled guilty to possession of methamphetamine; the state agreed to recommend a concurrent unified sentence of seven years, with three years fixed; and Lashchuk waived his rights to “file a Rule 35 motion regarding the initial Judgment (except as to an illegal sentence)” and to appeal his sentence unless the district court exceeded the three-year determinate portion of the state’s sentencing recommendation. (R., pp.255-57, 263, 267, 282.) The district court imposed a concurrent unified sentence of seven years, with three years fixed, and retained jurisdiction. (R., pp.288-93.)

In both cases, following the period of retained jurisdiction, the district court relinquished jurisdiction. (R., pp.190-93, 301-04.) Lashchuk filed timely Rule 35

motions for reduction of sentence seeking reinstatement in the retained jurisdiction program or, alternatively, placement in drug court, which the district court denied. (R., pp.194-99, 305-07, 311-13.) Lashchuk filed notices of appeal timely only from the district court's orders denying his Rule 35 motions. (R., pp.200-03, 314-17.)

Lashchuk asserts that the district court abused its discretion by denying his Rule 35 motion for reinstatement in the retained jurisdiction program in light of his claim that he "recanted his statement that he wanted to quit the [rider] program within an hour of making that statement." (Appellant's brief, pp.5-6.) Lashchuk has 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, Lashchuk 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.

The only arguably "new" information Lashchuk provided with his Rule 35 motions was his unsupported claim that he recanted his statement that he wanted to quit the rider program within an hour of making that statement. (R., pp.195, 306.) There is no evidence in the record to corroborate this claim. (See PSI, pp.131-43.<sup>1</sup>) Lashchuk was advised of his opportunity to submit a written response to the APSI to the court and/or to bring his concerns to the attention of his attorney (PSI, p.140), and he failed do so. However, even if Lashchuk's claim is true, the district court correctly exercised its

discretion in concluding this information did not merit Lashchuk's reinstatement in the retained jurisdiction program.

Lashchuk previously completed a rider in this case in 2014, and therefore should have been very familiar with what was expected of him in the program. (PSI, p.76.) Despite this, he "engaged in numerous rule violations during the two months he was at NICI," including failing to have his bunk area inspection ready, giving medication to another offender, "horseplaying," drinking coffee he knew was stolen from another offender, sharing commissary regularly, "turning a blind-eye" to other offenders' rule-breaking, talking negatively about the program, "back-biting on staff and other offenders," having numerous negative contracts, "[w]arstorying," having "huge 'spreads' with Mr. Rivera," giving another offender a radio, giving another offender a tumbler, talking while on "tighthouse," eating commissary at unauthorized times, and possessing commissary while on "blackout" and "refusing to answer a staff member's questions regarding where he received the commissary," stating that he "doesn't tell on people." (PSI, pp.133, 141-42.) NICI staff reported that Lashchuk:

...was not actively using the accountability process or participating in the various aspects of the TC program. Mr. Lashchuk did not demonstrate internalization of the TC values or concepts. Mr. Lashchuk had only been in the TC family for approximately one month, but he demonstrated no improvement in his behavior since his arrival in the TC program. From the time Mr. Lashchuk arrived in the TC program, he demonstrated disregard for the rules. He consumed commissary while on "blackout," established numerous negative contracts, played with the TC process, and lied to staff. Mr. Lashchuk was confronted for his behavior while still in "blackout" and on several occasions once he had completed "blackout."

(PSI, p.134.) Lashchuk's TC group began the "tight house" process on July 27, 2015,

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<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file "Supreme

“because the standard of behavior had deteriorated to the point that the environment was no longer therapeutic.” (PSI, p.138.) Two days later, Lashchuk “requested to quit the program and was removed from the program and the facility.” (PSI, p.138.)

NICI recommended that the district court relinquish jurisdiction, advising that Lashchuk’s risk level remained “High,” that he “is not any more appropriate for probation than when he arrived at this facility,” and that he “does not appear motivated toward treatment at this time. At present, Mr. Lashchuk appears to have approximately the same criminal code he entered NICI with. He also appears to still be holding onto his criminal and addictive beliefs and continues to use highly distorted thinking.” (PSI, pp.131-32, 136, 139.) In its orders denying Lashchuk’s Rule 35 motions, the district court stated:

Defendant has stated several reasons in his motion to support the correction or reduction of the sentence / disposition. Among them, he wants to participate in drug court. The Court considered and rejected that option before sending defendant on the rider. The defendant quit the rider program and then according to his motion, changed his mind. Defendant does not raise any new issues nor present any new evidence not previously considered by the Court when sentence was imposed, except that he changed his mind. When the Court imposed the second rider in this case it stated that it would relinquish jurisdiction if defendant was not placed in the TC rider. The TC rider option was in the Court's view the defendant's last opportunity to show that he could complete probation. He immediately violated rules of the program and when confronted, quit it. Under these circumstances the defendant has not presented in conjunction with this motion any reason for the Court to grant leniency and alter the sentence previously imposed.

(R., pp.197, 311.)

The district court considered all of the relevant information and reasonably determined that Lashchuk was not entitled to a reduction of sentence or reinstatement

in the retained jurisdiction program, particularly in light of his ongoing criminal behavior, refusal to abide by the terms of community supervision or institutional rules, abysmal conduct in his second retained jurisdiction program, failure to take advantage of the rehabilitative opportunities granted him, and continued high risk to reoffend. Given any reasonable view of the facts, Lashchuk has failed to establish that the district court abused its discretion by denying his Rule 35 motions for reduction of sentence.

Conclusion

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

DATED this 19<sup>th</sup> 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 19th day of April, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BRIAN R. DICKSON  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ Lori A. Fleming  
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