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State v. Dick Respondent's Brief Dckt. 43667

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43667
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2014-5888
)	
KENNETH S. DICK,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Dick failed to establish the district court abused its discretion by denying his Rule 35 motion for reduction of his unified sentence of 10 years, with four years fixed, imposed upon his guilty plea to felony domestic violence?

Dick Has Failed To Establish The District Court Abused Its Sentencing Discretion

In April 2014, Dick battered his fiancée, Emily, who had been living with him for the past eight months. (PSI, p.3.¹) Dick “pushed her down twice in the driveway which

¹ PSI page numbers correspond with the page numbers of the electronic file “Dick 43667 psi.pdf.”

caused her to fall over the decorative half-wall and left an abrasion on her back.” (PSI, p.3.) Emily ran into the house and locked all of the doors, but Dick gained entry into the home through the garage door and “pushed her on to their bed, straddled her, and punched her in the face between eight (8) and ten (10) times with closed fists.” (PSI, p.3.) He also “encircled her neck with both of his hands three (3) times and cut off her airway for between three (3) to five (5) seconds each time. During the incident ... [Dick] called her names and she said she feared for her life.” (PSI, p.3.) Emily was able to get away from Dick and called the police, at which time Dick fled the residence. (PSI, p.3.) When officers responded, they noted Emily had “red marks” on both sides of her neck, abrasions under her jaw and on her back, and a swollen left eye. (PSI, p.3.) Shortly thereafter, Meridian police conducted a traffic stop on Dick’s vehicle and arrested him for DUI. (PSI, p.3.) Dick refused to participate in field sobriety tests, but submitted to breathalyzer testing, which returned results of .153/.143 BAC. (PSI, p.3.)

The state charged Dick with attempted strangulation, felony domestic violence, unlawful possession of a firearm, and misdemeanor DUI (second within 10 years). (R., pp.60-62.) Pursuant to a plea agreement, Dick pled guilty to felony domestic violence and the state dismissed the remaining charges. (R., p.70.) Approximately one week before his sentencing hearing, Dick was arrested for violating the no contact order with the victim and for DUI. (PSI, pp.112-113.)

At the sentencing hearing for the instant offense, the district court imposed a unified sentence of 10 years, with four years fixed. (R., pp.70-73.) Dick filed a timely Rule 35 motion for a reduction of sentence, which the district court denied on March 24, 2015. (R., pp.75-84, 106-111.) On October 13, 2015, Dick filed a Motion to Allow Late

Notice of Appeal Rule 35, together with a copy of his notice of appeal, asserting he delivered his notice of appeal to the Jefferson County Sheriff's Office for mailing on May 5, 2015. (R., pp.112-118.) On October 27, 2015, the district court entered an order directing the clerk to file Dick's notice of appeal, and the notice of appeal was filed the same day. (R., pp.123-128.) On November 9, 2015, this Court entered an order conditionally dismissing Dick's appeal. (Order Conditionally Dismissing Appeal.) Dick subsequently filed a response to the conditional dismissal and, on January 13, 2016, this Court entered an order withdrawing the conditional dismissal. (Response to Conditional Dismissal; Order Withdrawing Conditional Dismissal.) Dick's notice of appeal – if submitted to jail officials on May 5, 2015 – was timely, under the prison mailbox rule,² only from the district court's order denying his Rule 35 motion. (R., pp.125-128.)

Dick asserts the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence in light of his claim the court “did not exercise due caution when it considered, at sentencing, the facts of [his] arrest” for violation of a no contact order and DUI, which occurred after he pled guilty to the instant offense. (Appellant's Brief, pp.4-6; R., p.66.) Dick 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

² Under the “mailbox rule,” notices of appeal filed by inmates are deemed to be filed on the date they are delivered to prison officials for filing with the court. State v. Lee, 117 Idaho 203, 786 P.2d 594 (Ct. App. 1990), *cited with approval in* Munson v. State, 128 Idaho 639, 917 P.2d 796 (1996).

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).

Dick did not appeal the judgment of conviction in this case, and he provided no new information in support of his Rule 35 motion. He merely argued his sentence should be reduced because he felt he “was assumed guilty of the [violation of a no contact order and DUI] misdemeanors before [he] was allowed the opportunity of due process of [sic] the misdemeanors,” and his sentencing in this case “should have been postponed until after [he] was allowed due process and proven [his] innocence” in the new case. (R., pp.76-77.) In the same motion, Dick *admitted* he violated the no contact order on at least two occasions and that he drove “despite [his] inability to drive,” but justified his conduct by claiming the victim had been removing property from his residence, where she and her children resided for the eight months preceding the instant offense. (R., pp.78-80; PSI, p.3.) This information was available at the time of sentencing; however, Dick chose not to provide the information he felt should have been considered, and specifically declined to clarify or add to the information contained in the police reports detailing the new DUI and no contact order violation – although he was given the opportunity, at sentencing, to do so. (Tr., p.7, L.16 – p.8, L.5; p.24, L.18

– p.25, L.19.) He also failed to request the continuance to which he later claimed he was entitled, and in fact, when asked at sentencing whether there was any legal reason as to why sentence should not be imposed at that time, his counsel stated there was not. (Tr., p.25, Ls.21-24.)

Rule 35 functions to allow a defendant to request leniency in light of “new or additional” information *that was not available* at the time of sentencing, not to allow a defendant to purposefully withhold information that was clearly available at the time of sentencing so he can later present it as “new” for the purpose of a Rule 35 motion. Because Dick presented no new information in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentence is 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 Dick’s claim, he has still failed to establish an abuse of discretion. On appeal, Dick argues the district court “did not exercise due caution when it considered, at sentencing, the facts of [his] arrest” for violation of a no contact order and DUI, which occurred after he pled guilty to the instant offense, but before sentencing in this case. (Appellant’s Brief, pp.4-6; R., p.66.) The district court has broad discretion in determining what evidence is to be admitted at a sentencing hearing. State v. Martinez, 154 Idaho 940, 947, 303 P.3d 627, 634 (Ct. App. 2013) (citations omitted). The sentencing judge is presumably able to ascertain the relevancy and reliability of the broad range of information and material presented to it during the sentencing process and to disregard the irrelevant and unreliable. Id. at 947-948, 303 P.3d at 634-635 (citations omitted). It is well established that a sentencing

court may, with appropriate caution, consider a defendant's alleged criminal conduct for which he has not been convicted or for which charges have been dismissed. State v. Thomas, 133 Idaho 800, 804, 992 P.2d 795, 799 (Ct. App. 1999) (citations omitted).

Dick's assertion the district court "did not exercise due caution" when it considered his new charges in sentencing him for the instant offense is without merit. (Appellant's brief, p.4.) When sentencing Dick for the instant offense, the district court expressly stated, "I agree with [Dick's trial counsel] that these [new charges] are *only accusations* at this point." (Tr., p.26, Ls.4-5 (emphasis added).) The court noted, however, that "a very thorough investigation was done by the police, according to the reports that are contained here," and consideration of the accusations was reasonable particularly because the new charges involved the same victim and the same type of criminal behavior. (Tr., p.26, Ls.5-10; R., p.109.) The court went on to articulate its consideration of numerous other factors, including the seriousness of the instant offense, the great harm done to the victim, Dick's failure to accept full responsibility for his criminal conduct, his ongoing alcohol abuse and violent criminal offending, and his failure to rehabilitate or be deterred despite his repeated convictions for crimes involving his alcohol abuse and domestic violence. (Tr., p.26, L.11 – p.28, L.24.) As such, it is clear the district court exercised "due caution" in considering Dick's pending charges for DUI and violation of a no contact order as "only accusations," and it did not sentence Dick based solely on the new charges. Dick has failed to establish the district court erred by considering his pending charges.

Dick's assertion that the district court abused its discretion because it "was not aware of all the circumstances surrounding" the new charges likewise fails. (Appellant's

Brief, p.4.) As previously noted, Dick admitted in his Rule 35 motion that he violated the no contact order with the victim on several occasions and that he drove “despite [his] inability to drive.” (R., pp.78-80.) His argument in support of his Rule 35 motion primarily consisted of setting forth justifications for his “poor decision” to violate the no contact order and commit the new DUI – purportedly to “retrieve [his] property,” which he felt the victim had wrongfully removed from the residence they previously shared. (R., pp.78-80.) In its order denying Dick’s Rule 35 request, the district court advised that Dick’s excuses for engaging in the newly charged criminal conduct, even if known at the time of sentencing, “would not have affected the sentence.” (R., p.109.) The court stated, “Defendant attempts to place blame on the victim as explanation for why he violated the no contact order in this case; however, the facts alleged by Defendant do not justify or provide new information to the crime to which he pled guilty.” (R., pp.109-110.) The court indicated it imposed Dick’s sentence based largely on “the horrific nature of the crime” and “in order to protect society and deter Defendant.” (R., p.110.) The district court also noted Dick’s “statement of ‘new’ facts is essentially asking the Court to take into account mitigating circumstances for why he committed the *new* charges against him that are not before this Court,” and, “Defendant’s allegations that the victim ‘broke into his house and stole certain items’ are irrelevant to the fact that Defendant horribly beat the victim *before* she allegedly did these bad acts, and immaterial to the sentence imposed.” (R., p.110 (emphasis original).)

The district court considered all of the relevant information and appropriately determined that Dick’s justifications for committing the new crimes did not merit a reduction of his sentence for the instant offense, particularly in light of the egregious

nature of the offense and the great harm done to the victim. The district court's decision not to reduce Dick's sentence was also appropriate in light of Dick's longstanding pattern of abusive behavior and driving while intoxicated, his "moderate to high" risk to violently reoffend, and his failure to rehabilitate or be deterred despite prior legal sanctions and treatment opportunities. (PSI, pp.6-11, 14, 38.) Given any reasonable view of the facts, Dick has failed to establish the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence.

Conclusion

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

DATED this 17th day of May, 2016.

/s/

JESSICA M. LORELLO
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of May, 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/

JESSICA M. LORELLO
Deputy Attorney General