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State v. Henson Respondent's Brief Dckt. 43871

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43871
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2014-8384
)	
KIMBERLY DAWN HENSON,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Henson failed to establish that the district court abused its discretion by denying her Rule 35 motion for a reduction of her unified sentence of 15 years, with three years fixed, imposed upon her guilty plea to trafficking in methamphetamine?

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

Henson pled guilty to trafficking in methamphetamine (28 grams or more, but less than 200 grams) and the district court imposed a unified sentence of 15 years, with three years fixed. (R., pp.74-75, 90-94.) Henson filed a timely Rule 35 motion for a

reduction of sentence, which the district court denied. (R., pp.99-115.) Henson filed a notice of appeal timely only from the district court's order denying her Rule 35 motion.¹ (R., pp.116-18.)

Henson asserts that the district court abused its discretion by denying her Rule 35 motion for a reduction of the indeterminate portion of her sentence because she had a stroke prior to sentencing, which affected her memory and independence. (Appellant's brief, pp.2-4.) Henson 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).

Henson did not appeal the judgment of conviction in this case. On appeal, she merely argues that her sentence was excessive as originally imposed because she had

¹ In her Appellant's brief, Henson erroneously states "[t]he judgment was entered on July 25, 2015" (Appellant's brief, p.2.) Henson is mistaken. According to the filing stamp, the judgment was actually entered on July 21, 2015. (R., p.90.) Because Henson did not file her Rule 35 motion until August 5, 2015, the filing of that motion did not extend the 42-day period for filing an appeal from the judgment. See I.A.R. 14(a) (time for appeal from criminal judgment extended by filing of motion with 14 days of the entry of judgment, the disposition of which could affect the judgment).

a stroke prior to sentencing, which affected her memory and independence. (Appellant's brief, pp.3-4.) This information was before the district court at the time of sentencing and, as such, it is not "new" information. (See PSI,² p.108 (Henson "advised she could not remember a lot of things. In regards to the instant offense, [when] she was asked if she had been selling methamphetamine, she responded, 'I don't really know. It says in my things I did. It says a bunch of stuff I don't remember'"), p.164-65 ("Of particular interest in regard to her left frontal stroke is that it affects emotional control, verbal communications, verbal memory, reasoning and judgment. This is consistent with many of the difficulties with which Ms. Henson presents"), p.167 ("Ms. Henson is significantly impaired at this point in time. ... She clearly lacks the capacity to live independently out in the community").) Because Henson presented no new evidence in support of her Rule 35 motion, she failed to demonstrate in the motion that her sentence was excessive. Having failed to make such a showing, she has failed to establish any basis for reversal of the district court's order denying her Rule 35 motion.

Even if this Court addresses the merits of Henson's claim, Henson has still failed to establish an abuse of discretion. At sentencing, the state addressed the seriousness of the offense, the harm such offenses cause to society, Henson's ongoing criminal behavior, and her failure to rehabilitate despite multiple treatment opportunities. (Tr., p.6, L.10 – p.8, L.21 (Appendix A).) The district court subsequently articulated its reasons for imposing Henson's sentence. (Tr., p.13, L.15 – p.15, L.1 (Appendix B).) The state submits that Henson has failed to establish that the district court abused its

² PSI page numbers correspond with the page numbers of the electronic file "HENSON 43871 psi.pdf."

discretion by denying Henson's Rule 35 motion for a reduction of sentence, for reasons more fully set forth in the attached excerpts of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendices A and B.)

Conclusion

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

DATED this 26th day of May, 2016.

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

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th 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/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

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1 opportunity to examine the presentence report?
 2 MR. MARX: Yes, sir.
 3 THE DEFENDANT: Yes, sir.
 4 THE COURT: You have read it as well,
 5 Ms. Henson?
 6 THE DEFENDANT: Yes, sir, I have.
 7 THE COURT: And does either party contend
 8 there are any deficiencies or errors in the
 9 presentence report?
 10 MR. MARX: Nothing that substantively
 11 changes any of the content.
 12 MR. GUNN: No.
 13 THE COURT: And does either party contend
 14 there should be any additional investigation or
 15 any additional evaluation of the defendant before
 16 sentencing?
 17 MR. MARX: No, Your Honor.
 18 MR. GUNN: No.
 19 THE COURT: Restitution claim, Mr. Gunn?
 20 MR. GUNN: Yes. I have a proposed order for
 21 \$3,948.01.
 22 THE COURT: Will there be any objection,
 23 Mr. Marx?
 24 MR. MARX: One moment, Your Honor.
 25 In this particular case, there will no

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1 who is 18, and yet is selling ounce quantities of
 2 methamphetamine in the community. I mean, she is
 3 willing to have other people's 18- to 19-year-olds
 4 ruin their lives with methamphetamine. I
 5 seriously doubt if she would want that of her own
 6 children, but if there's people like her out there
 7 poisoning the streets, that's what can happen.
 8 316 is more than half a pound of
 9 methamphetamine, and that's in one snapshot of
 10 time. That's enough to ruin several lives, and
 11 again, given her experience through drug court and
 12 felony experience, she knows better than most the
 13 harm she is doing is cause to the community.
 14 So she got a break on the reduction on
 15 the trafficking amount, so the state is going to
 16 recommend if reduce the amount, you just as well
 17 make it a real reduction, so instead of the five,
 18 five years, the state does believe that this
 19 warrants more than the two years on the 28 grams
 20 given the constant weekly ounce pedaling of the
 21 methamphetamine.
 22 So the state is going to recommend a
 23 four-year sentence fixed and 16 years
 24 indeterminate.
 25 We think -- we appreciate that's a long

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1 objection, Your Honor.
 2 THE COURT: All right. Thank you, Mr. Marx.
 3 In the absence of an objection, I will
 4 enter the state's proposed order for restitution
 5 in the amount of \$3,948.01.
 6 Just argument, counsel?
 7 MR. GUNN: Yes.
 8 MR. MARX: Yes, Your Honor.
 9 THE COURT: Mr. Gunn, you may proceed.
 10 MR. GUNN: Thank you, Your Honor. Defendant
 11 comes here after a search warrant of her house,
 12 was executed by detectives, where they located 316
 13 grams of methamphetamine, a digital scale, and
 14 \$17,000. She admitted at that time to selling an
 15 ounce a week and making \$700 a week after paying
 16 her supplier.
 17 The defendant is no stranger to the
 18 drug trade. This is her fifth felony. She went
 19 on a rider I believe on the grand theft and then
 20 after the rider completed drug court. And so she
 21 is in a position to know the damage that
 22 methamphetamine causes to people and the wreckage
 23 it leaves behind and how long it takes to work
 24 through and past it.
 25 She has children, one who is 19 and one

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1 indeterminate sentence and that she is old enough
 2 that that is going to carry her well into old age.
 3 But given her experience after five felonies, a
 4 rider, drug court, and she is still out there
 5 pedaling ounces of methamphetamine, the state
 6 believes that someone should be able to have their
 7 eye on her pretty much for the rest of her life,
 8 and so that this kind of behavior will not repeat
 9 itself.
 10 This is the kind of thing that leads to
 11 deterioration of communities when people get --
 12 well, we went through it a few years back where
 13 every social service, every community and public
 14 service was just flooded with methamphetamine and
 15 methamphetamine users, and it wasn't just the drug
 16 itself but just permeating things like the social
 17 welfare systems were overwhelmed.
 18 And those systems should be there for
 19 people who need it, and if not, people who have
 20 been converted into drug addicts so that somebody
 21 can earn \$700 a week. Thank you.
 22 THE COURT: Thank you, Mr. Gunn.
 23 Mr. Marx, your comments?
 24 MR. MARX: Thank you, Your Honor.
 25 Ms. Henson comes to the court in

APPENDIX B

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1 violation case as is, that's a three plus seven
 2 for ten, so we would ask that the new crime not
 3 exceed that length of time.
 4 THE COURT: All right. Thank you, Mr. Marx.
 5 Ms. Henson, would you like to make a
 6 statement?
 7 THE DEFENDANT: I'm fine.
 8 THE COURT: You said you're fine?
 9 THE DEFENDANT: Yeah.
 10 THE COURT: Meaning you don't have anything
 11 you would like to say?
 12 THE DEFENDANT: No.
 13 THE COURT: That's fine. You don't have to
 14 have say anything.
 15 Well, as Mr. Marx noted, this is a case
 16 in which there's a three-year mandatory minimum
 17 sentence, and my hands are tied in that regard. I
 18 mean, I could go up from there, but I can't go any
 19 lower. So we know the general outcome today is a
 20 prison sentence. We know that before we start.
 21 This is, as counsel have indicated, a
 22 very significant quantity of methamphetamine you
 23 were caught with, Ms. Henson.
 24 It's a very serious crime.
 25 Methamphetamine has wide-ranging negative impacts

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1 to do here today.
 2 Taking all of that into account, this
 3 is what I'm going to do. Ms. Henson, we'll start
 4 with the 2009 case first. That's the case in
 5 which you're on probation.
 6 On your admission to violating your
 7 probation in that case, Ms. Henson, I find you in
 8 violation of the terms and conditions of
 9 probation. I'm going to revoke your probation,
 10 and I'm going to impose your underlying prison
 11 sentence in that case, which is a ten-year prison
 12 sentence consisting of three years fixed followed
 13 by seven years indeterminate.
 14 I will note that you have by our count
 15 a substantial accumulation of credit for time
 16 served toward that sentence. We come up with 666
 17 days in that case.
 18 Now, on your plea of guilty to the
 19 crime of trafficking with methamphetamine 28 grams
 20 or more, I find you guilty. I'm going to sentence
 21 you to the Idaho State -- the custody of the Idaho
 22 State Board of Correction under the unified
 23 sentence law of the State of Idaho for an
 24 aggregate term of 15 years. I'll specify a
 25 minimum period of confinement of three years and a

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1 on society. There is no denying that.
 2 As negative impacts on the people who
 3 take it, it has negative impacts on the people who
 4 love and care for those people. It has negative
 5 impacts on the people who are victims of violent
 6 or property crimes, because people taking
 7 methamphetamine commit those crimes to support
 8 their habits.
 9 So what you've done is extremely
 10 serious, and there aren't any two ways about that.
 11 And, of course, that has a lot to do with why the
 12 legislature saw fit to impose a mandatory minimum
 13 prison sentence for this crime.
 14 And what's also relevant is your
 15 history prior to this crime. The PSI indicates
 16 this is your fifth felony. You've had a lot of
 17 trouble with the law in your life. I'm certainly
 18 well aware of your significant medical problems
 19 that you have, and there's I'm sure a degree to
 20 which those can be considered as a mitigating
 21 factor here.
 22 I'm aware that you have been told that
 23 you may have only a few years of life left despite
 24 that you're a 47-year-old women. And so I've
 25 taken that into account as well in deciding what

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1 subsequent indeterminate period of confinement of
 2 12 years.
 3 In this case you have a different level
 4 of credit for time served, and that's of course
 5 because the other case has a much more
 6 longstanding history.
 7 In this case, by our count, you have
 8 385 days of credit for time served.
 9 You'll be remanded to the sheriff for
 10 custody in this county to be delivered to the
 11 proper agent of the state Board of Correction in
 12 execution of the sentences imposed against you in
 13 these two cases.
 14 You have the right to appeal,
 15 Ms. Henson, and if you cannot afford an attorney,
 16 you can request to have one appointed at public
 17 expense. Any appeal must be filed within 42 days.
 18 I've neglected so far to mention that
 19 in the 2014 case, the law requires that I impose a
 20 \$10,000 fine. I'll impose that fine, and of
 21 course, I've ordered restitution in the amount of
 22 \$3,948.01 as was previously agreed by the parties.
 23 Counsel will need to return presentence
 24 reports to be sealed.
 25 MR. MARX: The defense has done so,