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State v. Jensen Respondent's Brief Dckt. 44663

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44663
Plaintiff-Respondent,)	
)	Idaho County Case No.
v.)	CR-2014-58163
)	
MICHAEL L. JENSEN,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Jensen failed to establish that the district court abused its discretion by denying his Rule 35 motion for reduction of his unified sentence of four years, with two years fixed, imposed following his guilty plea to felony DUI?

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

Pursuant to a binding Rule 11 plea agreement, Jensen pled guilty to felony DUI (third DUI conviction within 10 years); the state agreed to not file additional charges related to the same incident; the parties stipulated that Jensen would be placed on

supervised probation with an underlying unified sentence of four years, with two years fixed; and Jensen waived his “right to appeal the judgment and sentence” but “expressly reserve[d] his right to appeal any subsequent decisions of the Court related to a subsequent revocation of probation or motion to reduce the sentence pursuant to Idaho Criminal Rule 35.” (R., pp.60-77.) The district court accepted the plea agreement, imposed the requested sentence, and placed Jensen on supervised probation for four years. (R., pp.86-92.)

Approximately nine months later, Jensen violated his probation by driving with a suspended driver’s license “periodically for [a] month” and consuming alcohol. (R., pp.105-09.) The district court revoked Jensen’s probation, executed the underlying sentence, and retained jurisdiction. (R., pp.121-23.) Following the period of retained jurisdiction, at the jurisdictional review hearing, Jensen’s counsel requested that the district court reconsider and reduce Jensen’s sentence pursuant to Rule 35 if it relinquished jurisdiction. (Tr., p.9, L.19 – p.11, L.5.) The district court relinquished jurisdiction and declined to reduce Jensen’s sentence. (R., pp.132-33; Tr., p.21, Ls.16-23.) Jensen subsequently filed a second Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.134-35, 139-42.) Jensen filed a notice of appeal timely, under the prison mailbox rule,¹ from the district court’s order denying his second Rule 35 motion. (R., pp.161-64.)

¹ Under the “mailbox rule,” notices of appeal and post-conviction petitions 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).

Jensen asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence in light of his substance abuse, willingness to participate in treatment, health problems and “issues with alcohol dementia,” and because, at the time that the court relinquished jurisdiction, Jensen’s wife – who “monitored” him before she was hospitalized due to an illness – was “back home” and could again monitor him. (Appellant’s brief, pp.2-5.) Jensen’s argument fails for three reasons. First, Jensen waived the right to challenge his sentence as excessive and failed to provide any new information in support of his Rule 35 motion. Second, the district court lacked jurisdiction to consider Jensen’s successive Rule 35 motion. Finally, even if this Court reviews the merits of Jensen’s claim, he has failed to establish an abuse of discretion.

The waiver of the right to appeal as a component of a plea agreement is valid and will be enforced if it was made voluntarily, knowingly and intelligently. State v. Murphy, 125 Idaho 456, 872 P.2d 719 (1994).

Pursuant to the plea agreement, signed by Jensen, Jensen waived his right to appeal “the judgment and sentence.” (R., p.66.) He also acknowledged that he was waiving his right to appeal his sentence in the signed guilty plea advisory form. (R., p.72.) At the guilty plea hearing, the district court reviewed the Rule 11 plea agreement and found that Jensen had entered his plea knowingly, voluntarily and intelligently, and Jensen has not challenged that determination on appeal. (R., pp.60-61.) Although, as part of the plea agreement, Jensen “expressly reserve[d] his right to challenge any subsequent decisions of the Court related to a ... motion to reduce the sentence pursuant to Idaho Criminal Rule 35” (R., p.66), the state submits that, under the facts of

this case, Jensen's waiver of his right to appeal his sentence incorporated his right to appeal from the denial of his Rule 35 request for leniency because Jensen failed to support his Rule 35 motion with any new evidence. As explained by the Idaho Court of Appeals:

We hold that [the defendant's] appellate challenge to the denial of his Rule 35 motion has been waived by his plea agreement. [The defendant's] plea agreement contained a clause by which [he] waived his right to appeal his sentence. Arguably, that waiver did not preclude [the defendant] from filing a Rule 35 motion for reduction of his sentence in the trial court. However, because [the defendant] filed no *new evidence* in support of that Rule 35 motion, an appeal from the order denying the motion would amount to nothing more than a challenge to the reasonableness of the sentence as originally imposed. To allow an appellate challenge to the denial of the Rule 35 in these circumstances would allow [the defendant] and similarly-situated defendants to evade the appeal waiver in their plea agreements by merely filing an unsupported Rule 35 motion and appealing the subsequent denial order. Accordingly, we dismiss [this] appeal.

State v. Rodriguez, 142 Idaho 786, 787, 133 P.3d 1251, 1252 (Ct. App. 2006) (emphasis in original, internal citation and footnote omitted). Because, as discussed in more detail below, Jensen failed to support his Rule 35 motion with any information that could legitimately be characterized as new, his appeal should be dismissed.

Even if the Court finds Jensen did not waive his right to appeal, the district court's order denying Jensen's successive Rule 35 motion for a reduction of sentence should be affirmed because the district court lacked jurisdiction to consider it. Idaho Criminal Rule 35 provides that "no defendant may file more than one motion seeking a reduction of sentence under this Rule." In State v. Bottens, 137 Idaho 730, 52 P.3d 875 (Ct. App. 2002), the Idaho Court of Appeals held that "a motion to reconsider the denial of a Rule 35 motion is an improper successive motion and is prohibited by Rule 35. We hold that the prohibition of successive motions under Rule 35 is a jurisdictional limit."

Jensen first moved for a Rule 35 reduction of sentence at the May 16, 2016, jurisdictional review hearing, and the district court denied the motion. (Tr., p.9, L.14 – p.11, L.5; p.21, Ls.16-23.) Jensen filed a second Rule 35 request for a reduction of sentence on June 30, 2016. (R., pp.134-35.) At the hearing on Jensen’s second Rule 35 motion, the district court acknowledged that there was “a previous motion for leniency” in this case. (Tr., p.28, L.1.) The district court denied Jensen’s second, successive Rule 35 motion for reduction of sentence on August 3, 2016. (R., pp.139-42.) Jensen did not deliver his notice of appeal to prison authorities for mailing until September 12, 2016; therefore, his appeal is timely only from the district court’s order denying his second, successive Rule 35 motion for sentence reduction. (R., pp.161-64.) Because the district court lacked jurisdiction to consider Jensen’s successive Rule 35 motion, the court’s order denying the motion must be affirmed.

Even if the Court considers the merits of Jensen’s claim, Jensen has still 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).

Jensen did not appeal his judgment of conviction, the order revoking probation, or the order relinquishing jurisdiction, and he provided no new information in support of his Rule 35 motion. The district court was aware, at the time of sentencing, of Jensen's substance abuse issues and motivation for treatment, his liver disease and "issues with alcohol dementia," that his wife provided him support and "supervision," and that his original sentence was "partially designed to help motivate [him] while on probation." (PSI, pp.8, 41-42, 47;² Tr., p.28, Ls.4-24; R., pp.134-35.) In fact, the stipulation for probation in the original plea agreement was reached in large part due to Jensen's health issues, with the belief that Jensen "didn't have much longer to live, possibly only six months," and that he would be "sort of under his wife's supervision" while on probation. (Tr., p.28, Ls.9-15; p.31, L.18 – p.32, L.9.) Jensen's claim that his relapse and "poor decision-making" while on probation coincided with his wife's illness and her placement in a medical facility was before the district court at the time that it revoked probation, and the fact that Jensen's wife was "back home" recovering from her illness and could resume monitoring him (as at the time of sentencing) was before the court at the time that it relinquished jurisdiction. (R., pp.106, 135; PSI, pp.84, 92.) As such, none of the information Jensen subsequently provided in support of his Rule 35 motion was new information before the district court, and Jensen's problems and circumstances were the same as they were at the time of sentencing. Because Jensen

² PSI page numbers correspond with the page numbers of the electronic file "Jensen Appeal PSI.pdf."

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 that this Court dismiss Jensen's appeal because he waived his right to appeal his sentence. Alternatively, the state requests this Court to affirm the district court's order denying Jensen's Rule 35 motion for a reduction of sentence.

DATED this 30th day of June, 2017.

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

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of June, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

ELIZABETH ANN ALLRED
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