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## State v. Fisk Appellant's Brief Dckt. 44899

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 44899
	)	
v.	)	BONNEVILLE COUNTY
	)	NO. CR 2015-11456
RYAN SCOTT FISK,	)	
	)	APPELLANT'S BRIEF
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Ryan Scott Fisk pled guilty to operating a motor vehicle without the owner's permission. He received a suspended sentence of five years, with two and one-half years fixed, and was placed on probation. A few months later, the district court revoked his probation, and then denied Mr. Fisk's subsequent Rule 35 motion to reduce the sentence. Mr. Fisk appeals from the order denying his Rule 35 motion, claiming that the court's decision represents an abuse of discretion in light of the additional information he presented.

## Statement of the Facts and Course of Proceedings

Mr. Fisk was living with friends in Idaho Falls and one of them agreed to loan him a car, for an hour, to go the store. (R., p.20; PSI, p.3.) Mr. Fisk was using methamphetamine at the time and drove to Twin Falls and did not return. (R., p.20; PSI, p.3.) Weeks later, police found the car, damaged, in a Twin Falls parking lot. (R., p.23.) The State arrested Mr. Fisk and charged him with grand theft (R., pp.11, 103.)

Pursuant to an agreement, Mr. Fisk pled guilty to an amended charge of operating a motor vehicle without the owner's consent, and the State recommended probation at sentencing. (R., p.123; Tr., p.23, Ls.17-18.) The district court gave Mr. Fisk a suspended sentence of five years, with two and one-half years fixed, and placed him on probation. (R., pp.137-138.) Mr. Fisk violated his probation the following month by testing positive for drug use and by failing to submit to a search. (Tr., p.48, Ls.3-6.) The district court revoked his probation and executed Mr. Fisk's previously-suspended sentence. (R., p.168.)

Mr. Fisk filed a motion to reduce his sentence pursuant to Idaho Criminal Rule 35. (R., p.173.) At his hearing, Mr. Fisk asked the court to shorten the fixed portion his sentence by one year, to allow him to undergo treatment for his drug abuse; he offered letters from family members who would support him in that effort, and he personally addressed the court. (Tr., p.57, L.16 – p.58, L.1.) He informed the court of his significant, although unsuccessful, efforts to access the area's problem-solving courts, and he asked for the opportunity to pursue treatment and aftercare, albeit outside of those court-sponsored programs. (Tr., p.58, L.2 - p.59, L.24.)

The district court told Mr. Fisk his motion presented “a close call” but that the court did not “feel comfortable” reducing his sentence, and then entered an order denying his motion. (Tr., p.66, Ls.3-4; R., p.176.) Mr. Fisk timely appealed from that order. (R., p.178.)

### ISSUE

Did the district court abuse its discretion when it denied Mr. Fisk’s Rule 35 motion for a reduction of sentence in light of the new information offered?

### ARGUMENT

#### The District Court’s Denial Of Mr. Fisk’s Motion For Reduction Of His Sentence Represents An Abuse Of Discretion, In Light Of The Additional Information Offered

A. Introduction

Pursuant to Rule 35, Mr. Fisk asked the district court to reduce the fixed portion of his sentence to allow him more ready access to drug treatment, and he offered the court information demonstrating his commitment to obtaining that treatment, and showing that he had family support to help him follow through with that treatment. Mr. Fisk contends on appeal that, in light of this additional information, the district court’s denial of his motion was unreasonable, and represents an abuse of discretion.

B. Standard Of Review

A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In 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 motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). In conducting its

review of the grant or denial of a Rule 35 motion, this Court considers the entire record and applies the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987); *Lopez*, 106 Idaho at 449-51, 680 P.2d at 871-73. “When reviewing the reasonableness of a sentence this Court will make an independent examination of the record, ‘having regard for the nature of the offense, the character of the offender and the protection of the public interest.’” *State v. Williams*, 151 Idaho 828, 834 (2011) (quoting *State v. Shideler*, 103 Idaho 593, 594 (1982)). When a defendant challenges his sentence as excessively harsh, this Court will conduct an independent review of the record, taking into account “the nature of the offense, the character of the offender, and the protection of the public interest.” *State v. Miller*, 151 Idaho 828, 834 (2011).

C. The District Court’s Denial Of Mr. Fisk’s Motion For Reduction Of His Sentence Represents An Abuse Of Discretion, In Light Of The Additional Information Offered

Mr. Fisk, now thirty years old, has a history of drug abuse and a demonstrated desire to overcome his addictions. (PSI, pp.2, 13.) He began drinking when he was fifteen, but methamphetamine and marijuana had become his drugs of choice by the time of his recent offense, and he had been using these drugs on a daily basis. (PSI, p.13.) His GAIN-I report, prepared prior to his original sentencing, had recommended intensive, substantial outpatient treatment, but Mr. Fisk did not fully recognize the need for that treatment, then. (PSI, p.14.)

However, at his Rule 35 hearing, Mr. Fisk informed the court of his recent, significant efforts to get into a problem-solving court; although unsuccessful, these efforts demonstrate his sincere desire to obtain much-needed treatment. (Tr., p.58, L.2 – p.59, L.24.) Mr. Fisk also showed that he had the strong support from his family to help him with outpatient treatment and any follow up treatment. (Tr., p.60, Ls.2-28.) He asked the court to modify his five year sentencing by reducing the fixed term by one year, so that he could begin this treatment, sooner.

(Tr., p.60, Ls.13-22.) Mr. Fisk's history with drug dependency, and his potential for overcoming that dependency, are strong mitigating factors in this case. *See State v. Coffin*, 146 Idaho 166, 171 (Ct. App. 2008).

Additionally, Mr. Fisk personally addressed the court and took accountability for his conduct, stating "I fully own up to my actions." (Tr., p.63, L.8.) His remorse and responsibility should be considered as mitigation. *See State v. Coffin*, 146 Idaho 166, 171 (Ct. App. 2008). He also told the court that he was willing to do the time, for himself, but he asked for a shortened term so that he that he could get back to his daughter, who is three. (Tr., p.63, L.17; PSI, p.11.) Mr. Fisk missed the first two years of her life but more recently had enjoyed weekend visitation; he has been working to create stability in his own life so that he can build a relationship with her. (PSI, p.11.) His hope for a good relationship with his daughter provides strong motivation for Mr. Fisk to succeed in his treatment and achieve recovery and rehabilitation.

Mr. Fisk submits that, in light of this additional information, the district court abused its discretion by declining to reduce his sentence.

#### CONCLUSION

Mr. Fisk respectfully requests that this Court remand his case to the district court with instructions that it reduce the fixed portion of his sentence, or alternatively, that this Court reduce his sentence as it deems appropriate.

DATED this 16<sup>th</sup> day of August, 2017.

\_\_\_\_\_/s/\_\_\_\_\_  
KIMBERLY A. COSTER  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15<sup>th</sup> day of August, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

RYAN SCOTT FISK  
INMATE #80814  
BONNEVILLE COUNTY JAIL  
605 N CAPITAL  
IDAHO FALLS ID 83402

DANE H WATKINS JR  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

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DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

KAC/eas