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## State v. Chappell Respondent's Brief Dckt. 44960

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 44960
	)	
vs.	)	Twin Falls County No. CR42-2015-11025
	)	
ALEX JAMES CHAPPELL,	)	RESPONDENT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

Has Chappell failed to show that the district court abused its sentencing discretion when it sentenced him to 15 years with three years determinate upon his conviction for possession of marijuana with intent to deliver and denied his Rule 35 motion?

ARGUMENT

I.

Chappell Has Failed Show That The District Court Abused Its Sentencing Discretion

A. Introduction

Police found two large and three small clear plastic bags containing marijuana, a small scale, a large hunting knife and six clean baggies in Alex James Chappell's school backpack.

(Conf. Exhibits, p. 4.) Chappell was, at the time, on juvenile probation for petit theft and resisting and obstructing an officer. (Conf. Exhibits, pp. 4, 8.) The amount of marijuana in Chappell's possession, 108.8 grams or about 3.83 ounces, was about 17 times as much as officers would expect if it were merely for personal use. (Conf. Exhibits, p. 5.) Circumstances suggested Chappell had been dealing marijuana for a while, and he admitted he had been selling for about two years. (Conf. Exhibits, pp. 4, 6.) Chappell stated he did not use marijuana, but sold it to make money. (Conf. Exhibits, p. 6.)

The state charged Chappell with one count of possession of marijuana with intent to deliver. (R., pp. 88-89.) As part of a plea agreement that involved the state dismissing pending juvenile charges and making specific sentencing recommendations, Chappell pled guilty. (R., pp. 94, 98-108.) The district court imposed and executed a sentence of five years with two years determinate, and retained jurisdiction. (R., pp. 159-63.)

On appeal, Chappell argues the district court "should have suspended execution of his sentence and placed him on probation in light of the mitigating factors, including his young age, troubled childhood and family support." (Appellant's brief, p. 5.) Review of the record, however, shows this argument to lack merit.

B. Standard Of Review

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d

552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). Whether to retain jurisdiction is a question left to the court's discretion, as is the decision to grant probation. State v. Hernandez, 122 Idaho 227, 230, 832 P.2d 1162, 1165 (Ct. App. 1992).

C. Chappell Has Shown No Abuse Of The District Court's Discretion

To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). To establish that the sentence was excessive, he must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Farwell, 144 Idaho at 736, 170 P.3d at 401. In determining whether the appellant met his burden, the court considers the entire sentence but, because the decision to release him on parole is exclusively the province of the executive branch, presumes that the determinate portion will be the period of actual incarceration. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

The factors relevant to the court's discretion in ordering execution of the sentence or probation are set forth by statute as follows:

(1) The court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that imprisonment is appropriate for protection of the public because:

(a) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) A lesser sentence will depreciate the seriousness of the defendant's crime; or

(d) Imprisonment will provide appropriate punishment and deterrent to the defendant; or

(e) Imprisonment will provide an appropriate deterrent for other persons in the community; or

(f) The defendant is a multiple offender or professional criminal.

(2) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of avoiding a sentence of imprisonment:

(a) The defendant's criminal conduct neither caused nor threatened harm;

(b) The defendant did not contemplate that his criminal conduct would cause or threaten harm;

(c) The defendant acted under a strong provocation;

(d) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(e) The victim of the defendant's criminal conduct induced or facilitated the commission of the crime;

(f) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that was sustained; provided, however, nothing in this section shall prevent the appropriate use of imprisonment and restitution in combination;

(g) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;

(h) The defendant's criminal conduct was the result of circumstances unlikely to recur;

(i) The character and attitudes of the defendant indicate that the commission of another crime is unlikely.

I.C. § 19-2521. “The purpose of the retained jurisdiction procedure is to provide a period for evaluation of the offender's potential for rehabilitation and suitability for probation.” Bradford v. State, 124 Idaho 788, 790, 864 P.2d 626, 628 (Ct. App. 1993).

At sentencing the district court expressed several of its sentencing concerns about Chappell consistent with the applicable legal standards. (6/13/16 Tr., p. 13, L. 19 – p. 17, L. 9.) First, it was concerned about Chappell’s lack of remorse. (6/13/16 Tr., p. 14, Ls. 5-14.) Second, the court was concerned that Chappell’s criminality was the result of conscious intelligent choice, rather than impulse or addiction. (6/13/16 Tr., p. 14, Ls. 15-25.) Responding to a defense argument (6/13/16 Tr., p. 9, Ls. 17-22), the court stated it was “very sensitive to the fact that a person of [Chappell’s] age has the potential to not fare well in the Idaho State Penitentiary,” but that the juvenile system had thus far amounted to an ineffectual “slap on the wrist” (6/13/16 Tr., p. 15, Ls. 1-6). The district court imposed a sentence of five years with two years determinate and retained jurisdiction for 365 days. (6/13/16 Tr., p. 15, Ls. 7-12.) In conclusion, the district judge stated:

I think that you have got to make some significant mental changes in your life, and I think this program is the best I can offer you. I think if I put you back on probation today, it would just be a question of time before you relapsed and got back in trouble again. I'm not going to do it. It's time that you faced the consequences for the decisions that you made.

(6/13/16 Tr., p. 17, Ls. 3-9.)

The district court did not abuse its discretion by concluding it needed a period to evaluate Chappell’s potential for rehabilitation and suitability for probation. Its specific concerns about Chappell’s rehabilitation potential (6/13/16 Tr., p. 13, L. 19 – p. 17, L. 9), supported by Chappell’s extensive record of juvenile offenses (Conf. Exhibits, pp. 6-10), the fact he was selling marijuana for about two years as a business rather than to feed any personal addiction

(Conf. Exhibits, pp. 4, 6), and the fact he was on juvenile probation when he committed the instant crime (Conf. Exhibits, pp. 4, 8, 10), show the district court made a reasonable decision based on the applicable law and facts.

Chappell argues the district court abused its sentencing discretion by “imposing an excessive sentence under any reasonable view of the facts” and “should have suspended execution of his sentence and placed him on probation in light of the mitigating factors, including his young age, troubled childhood, and family support. (Appellant’s brief, p. 5.) The “mitigating factors” cited by Chappell are: (1) he “grew up in an unstable environment” (Appellant’s brief, p. 5); (2) he has “struggled greatly to cope with his father’s death,” which caused him to be diagnosed with depression which was treated with medication and caused “positive aspects of his life” to fall “to the wayside” to be replaced with alcohol and drug use and, ultimately, criminal behavior (Appellant’s brief, pp. 5-6 (internal quotations omitted)); (3) he professed a desire to change and a plan for his future (Appellant’s brief, pp. 6-7); and (4) he “had great support from his family” (Appellant’s brief, pp.7-8). These claimed “factors” do not show an abuse of discretion.

First, the “factors” relied on by Chappell do not show that the sentence of five years with two years determinate for possession of marijuana with intent to deliver is excessive. The evidence Chappell claims supports his “factors” was before the district court. The district court did not abuse its discretion by reaching different conclusions than Chappell about the significance or weight of this evidence.

Second, the “factors” have little, if any, relevance to the decision whether to grant probation or to retain jurisdiction. Chappell does not contend that the district court did not find facts *sufficient* to impose the sentence but retain jurisdiction, see I.C. § 19-2521(1), and the

“factors” he advocates are not “grounds” that “shall be accorded weight in favor of avoiding a sentence of imprisonment.” I.C. § 19-2521(2). Even accepting the “factors” as true and deserving of weight does not show that the district court abused its discretion in concluding it needed a better “evaluation of [Chappell]’s potential for rehabilitation and suitability for probation.” Bradford, 124 Idaho at 790, 864 P.2d at 628.

Chappell’s record and the facts of the crime justify the district court’s sentence of five years with two years determinate and retained jurisdiction. Chappell has failed to show an abuse of sentencing discretion.

## II.

### Chappell Has Shown No Error In The Denial Of His Rule 35 Motion

#### A. Introduction

Shortly after Chappell’s placement on retained jurisdiction, the Idaho Department of Correction recommended that the district court relinquish jurisdiction. (Conf. Exhibits, p. 73.) The recommendation was based primarily upon Chappell engaging in “major rule violations,” specifically getting a face tattoo while at the facility and use of drugs (NO2 cartridges used as inhalants). (Conf. Exhibits, pp. 75-76.) Chappell “was removed from the facility abruptly due to his involvement in drug use and lack of cooperation with the investigation into that matter.” (Conf. Exhibits, p. 76.) The report concluded:

In the short time Mr. Chappell was at this facility he received two Class B DORs. The second of these DORs was for using N02 as an inhalant, which is a behavior Mr. Chappell has received criminal charges for in the past. He has not taken full advantage of this opportunity to turn his life in a different direction. He has not demonstrated that he is willing to move away from his criminal and addictive behavior. Due to his behavior at this facility, he was unable to continue his program at NICI. It is recommended that the court relinquish jurisdiction at this time.

(Conf. Exhibits, p. 78.) Based on the report, the district court relinquished jurisdiction. (R., pp. 169-71.)

Chappell thereafter filed a Rule 35 motion “for reconsideration of the relinquishment of jurisdiction.” (R., p. 180.) The motion attached reports allegedly showing “the disciplinary actions against Defendant regarding both the tattoo and the inhalant were actually dismissed.” (R., pp. 180, 182-83.) The district court ordered an evidentiary hearing. (R., pp. 193-94.) After hearing the evidence presented (2/17/17 Tr., p. 22, L. 5 – p. 68, L. 19), the district court concluded the issue before it for decision was whether to “continue with the with the relinquishment” or put Chappell on probation (2/17/17 Tr., p. 79, Ls. 8-11). The district court ultimately denied the motion. (R., pp. 220-23). The district court found that in subsequent hearings at IDOC related to the first two DORs “Chappell admitted to the tattoo-related DOR but the drug-related DOR was dismissed.” (R., p. 221.) The district court further found that after filing the Rule 35 motion Chappell “got a second tattoo, for which he received a second DOR.” (Id.) The district court denied the motion, in large part because “the new DOR convinces the Court that its decision was the appropriate one.” (R., pp. 222-23.)

On appeal Chappell, citing State v. Flores, 162 Idaho 298, \_\_\_, 396 P.3d 1180, 1183-84 (2017), acknowledges that reinstating the court’s retained then relinquished jurisdiction was beyond the scope of a proper Rule 35 motion. (Appellant’s brief, p. 11.) He argues, however, the district court abused its discretion by not granting the motion by suspending execution of the sentence and placing him on probation. (Appellant’s brief, pp. 11-12.) Even assuming that ordering probation was within the scope of his motion, Chappell has failed to show an abuse of discretion.

B. Standard Of Review

A motion for reduction of sentence under Rule 35 is a plea for leniency, and the 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). “In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence.” State v. Carter, 157 Idaho 900, 903, 341 P.3d 1269, 1272 (Ct. App. 2014).

C. The District Court Did Not Abuse Its Discretion By Denying Chappell’s Rule 35 Motion

A motion for reduction of sentence under Rule 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). To prevail on a Rule 35 motion, a 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. Adamcik, 152 Idaho 445, 484-85, 272 P.3d 417, 456-57 (2012); Huffman, 144 Idaho at 203, 159 P.3d at 840.

The district court summarized the new evidence presented after sentencing as including an APSI that “documented two disciplinary offense reports (DORs) the defendant received: one for a tattoo-related incident, and one for a drug-related incident” and also “documented some progress the defendant made during the rider,” and evidence presented directly in support of the motion showing “dismissal of the drug-related DOR” but the issuance of a new DOR for another tattoo. (R., pp. 22-21.) Relying primarily upon the fact of a new DOR for a new tattoo (a behavior for which Chappell had been disciplined before), the district court “in its discretion” denied the motion. (R., pp. 222-23.) The court specifically rejected the argument that the new

tattoo DOR was merely the product of “unwise or impulsive” decision-making, but instead evidenced “deep-seated criminal thinking” and that Chappell had “still not learned respect for rules” and was “therefore ill-equipped for probation.” (R., p. 222.) Because the district court correctly applied the law to its factual findings, it did not abuse its discretion.

On appeal Chappell argues “the new tattoo DOR does not prove that he will be unsuccessful on probation” and that he correctly argued that the act was impulsive and the district court incorrectly found that it was indicative of criminal thinking and lack of respect for the rules. (Appellant’s brief, p. 12.) Chappell has shown neither clear error in the district court’s factual findings nor that the inferences drawn from those facts were unreasonable. See State v. Jensen, 137 Idaho 240, 246, 46 P.3d 536, 542 (Ct. App. 2002) (“Moreover, the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence were all matters within the province of the district court.”). He has therefore failed to show an abuse of discretion.

#### CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court and the order denying the Rule 35 motion.

DATED this 28th day of August, 2017.

/s/ Kenneth K. Jorgensen  
KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of August, 2017 I served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

JENNY C. SWINFORD  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

/s/ Kenneth K. Jorgensen  
KENNETH K. JORGENSEN  
Deputy Attorney General

KKJ/dd