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### State v. Ware Respondent's Brief Dckt. 45038

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45038
Plaintiff-Respondent,	)	
	)	Madison County Case No.
v.	)	CR-2016-1124
	)	
THOR FITZGERALD WARE, JR.,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Ware failed to establish that the district court abused its discretion by declining to further reduce his sentence pursuant to his Rule 35 motion for reduction of sentence?

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

Ware pled guilty to rape and the district court imposed a unified sentence of 12 years, with three years fixed, and retained jurisdiction. (R., pp.143-44.) Ware filed a timely Rule 35 motion for a reduction of sentence. (R., pp.182-84.) Ware also filed a timely notice of appeal from the district court's judgment and order retaining jurisdiction. (R., pp.207-11.) While the

appeal was pending, the district court held a hearing on Ware's Rule 35 motion, after which the court granted the motion, in part, reducing Ware's sentence to 10 years, with two and one-half years fixed, and retained jurisdiction. (R., pp.227-28; 4/24/17 Tr., p.91, Ls.1-14.) After a period of retained jurisdiction the district court relinquished jurisdiction. (Order Relinquishing Jurisdiction (Augmentation).)

Ware asserts that the district court abused its discretion by declining to further reduce his sentence, in light of his reiteration of the facts of the case, his future plans, the results of the psychosexual evaluation, and because he has support from his family. (Appellant's brief, pp.3-6.) Ware has failed to establish an abuse of discretion.

If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this 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). To prevail on appeal, Ware 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. Ware has failed to satisfy his burden.

Ware claims the district court abused its discretion by not further reducing his sentence in light of the nature of his offense, his character, and "the protection of the public interest." (Appellant's brief, p.4.) Much of the information Ware presented regarding the nature of the offense, his future plans, the results of the psychosexual evaluation, and his family support was all before the district court at the time of sentencing. (R., pp.110-23; PSI, pp.5, 10-11, 97-167.) Furthermore, the district court conducted a lengthy hearing on Ware's Rule 35 motion and, after considering all of the "new" evidence and argument presented at that hearing, concluded that Ware's underlying sentence should be reduced to 10 years, with two and one-half years fixed.

(See 4/24/17 Tr., p.80, L.7 – p.92, L.12.) That Ware believes the court should have given greater mitigating weight to the evidence he presented does not show an abuse of discretion. In fact, Ware’s conduct after the district court granted his Rule 35 motion illustrates why the court’s decision to not further reduce Ware’s sentence was reasonable: While participating in the retained jurisdiction program, Ware received a Class B DOR for attempted escape, and staff noted he was “non-cooperative, aggressive and antagonistic” towards security. (Order Relinquishing Jurisdiction (Augmentation).) Ware has failed to establish any basis for reversal of the district court’s decision to not further reduce his sentence pursuant to his Rule 35 motion.

Conclusion

The state respectfully requests this Court to affirm the district court’s order granting Ware’s Rule 35 motion for a reduction of sentence.

DATED this 26th day of March, 2018.

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

ALICIA HYMAS  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of March, 2018, 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](mailto:briefs@sapd.state.id.us).

/s/ Lori A. Fleming  
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Deputy Attorney General