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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 45119 & 45120
Plaintiff-Respondent,)	
)	Bonneville County Case Nos.
v.)	CR-2012-1005 & 2016-5591
)	
ERICK DELAROSA,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Delarosa failed to establish that the district court abused its discretion, either by imposing a unified sentence of seven and one-half years, with two and one-half years fixed in case 45120, upon his guilty plea to forgery, or by denying his Rule 35 motions for reduction of his sentences in both case 45120 and case 45119?

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

In case 45119, Delarosa pled guilty to forgery and the district court imposed a unified sentence of 10 years, with three years fixed, and retained jurisdiction. (R., pp.73-75.) Delarosa filed a Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.80-81,

84-85.) After a period of retained jurisdiction, the district court suspended the balance of Delarosa's sentence and placed him on probation for four years. (R., pp.88-91.)

Three years later, Delarosa's probation officer filed a report of probation violation alleging Delarosa had violated his probation by consuming methamphetamine and Adderall and committing a new crime: forgery. (R., pp.121-35.) Delarosa admitted to having violated his probation in case 45119 and pled guilty to forgery in case 45120. (R., pp.175-78, 271-74.) The district court revoked Delarosa's probation and executed his sentence in case 45119 (R., pp.190-92) and imposed a concurrent unified sentence of seven and one-half years, with two and one-half years fixed in case 45120 (R., pp.288-90). Delarosa filed Rule 35 motions for reduction of his sentences in both cases, which the district court denied. (R., pp.186-87, 203-04, 278-79, 298-99.) Delarosa filed a notice of appeal timely from the order denying his Rule 35 motion in case 45119. (R., pp.300-03.) He also filed a notice of appeal timely from both the judgment and the order denying his Rule 35 motion in case 45120. (R., pp.205-08.)

Delarosa asserts that the district court abused its discretion by imposing an excessive sentence in case 45120 in light of his substance abuse issues, desire for treatment, and purported acceptance of responsibility. (Appellant's brief, pp.3-6.) Delarosa has failed to establish an abuse of discretion.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion.

McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, “[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The maximum prison sentence for forgery is 14 years. I.C. § 18-3604. The district court imposed a unified sentence of seven and one-half years, with two and one-half years fixed, which falls well within the statutory guidelines. (R., pp.288-90.) Delarosa’s sentence is also appropriate in light of his ongoing criminal behavior and his failure to rehabilitate while in the community.

Delarosa’s criminal record demonstrates his disregard for the law and the terms of community supervision. Delarosa has accumulated four misdemeanor convictions and, with the instant offenses, five felony convictions. (PSI, pp.34-37.) Delarosa’s felony convictions include: theft by acquiring lost property, fraud – possess forgery device, possession of a controlled substance, and two counts of forgery. (PSI, pp.35-37.) Delarosa has had multiple

opportunities to rehabilitate in the community and on retained jurisdiction. (PSI, pp.5-6, 37.) Additionally, incarceration has failed to deter Delarosa as he has been in prison two different times, for a total of nine years. (PSI, p.37.) While in prison from 2000-2004, Delarosa received multiple DOR's for sexual acts, disobedience, physical contact, simple assault, possession of contraband, ordinance violations, manipulation of staff, rule violations, failure to comply, and false statement. (PSI, p.6.) While Delarosa does have substance abuse issues and showed remorse for his actions, such do not outweigh the seriousness of the offense nor his demonstrated inability or unwillingness to conform his behavior to the law.

At sentencing, the district court articulated the correct legal standards applicable to its decision and addressed the seriousness of the offense, Delarosa's ongoing criminal offending, the risk he poses to society, and his failure to rehabilitate or be deterred despite prior treatment opportunities and legal sanctions. (1/30/17 Tr., p.21, L.14 – p.23, L.13.) The state submits that Delarosa has failed to establish that his sentence is excessive for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Next, "mindful of the fact that [he] had previously filed a Rule 35 motion in" case 45119, Delarosa nevertheless asserts that the district court abused its discretion by denying his latest Rule 35 motions for a reduction of his sentences in both case 45119 and case 45120 because he "had been treatment-oriented and treatment-focused since being back in custody." (Appellant's brief, p.6.) Delarosa's arguments fail.

Delarosa has failed to establish the district court abused its discretion by denying his Rule 35 motion in case 45119 because, as Delarosa all but concedes on appeal, the motion was impermissibly successive and, as such, the district court was without jurisdiction to even

consider it. See I.A.R. 35(b) (“no defendant may file more than one motion seeking a reduction of sentence under this Rule”); State v. Bottens, 137 Idaho 730, 52 P.3d 875 (Ct. App. 2002) (“the prohibition of successive motions under Rule 35 is a jurisdictional limit”).

Delarosa has also failed to show any abuse of discretion in the denial of his Rule 35 motion in case 45120. 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, Delarosa 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. Delarosa has failed to satisfy his burden.

Information with respect to Delarosa’s desire for treatment was before the district court at the time of sentencing and, as such, was not new information that entitled Delarosa to a reduction of sentence. (PSI, pp.43, 70.) Furthermore, the availability of treatment options does not demonstrate that Delarosa’s sentence is excessive. See, e.g., State v. Charboneau, 124 Idaho 497, 500, 861 P.2d 67, 70 (1993) (“While the appellant points to the evidence in the record that he is capable of being rehabilitated ... his possibility of rehabilitation, standing alone, is not enough to meet his burden of showing unreasonableness...”); State v. Wargi, 119 Idaho 292, 294, 805 P.2d 498, 500 (Ct. App. 1991) (“Sentence of confinement is not rendered unreasonable simply because it will arguably have a negative effect on prisoner's rehabilitation.”).

The district court considered all of the relevant information and appropriately concluded that Delarosa’s sentence of two and one-half years fixed “is appropriate” and even “modest in some sense.” (Tr., p.33, Ls.16-17.) Delarosa has not shown that he was entitled to a reduction of sentence simply because of his desire for treatment. Given any reasonable view of the facts,

Delarosa has failed to establish that the district court abused its discretion by denying his Rule 35 motions for a reduction of his sentences.

Conclusion

The state respectfully requests this Court to affirm Delarosa's conviction and sentence in case 45120 and the district court's order denying Delarosa's Rule 35 motions for a reduction of his sentences in both cases.

DATED this 13th day of February, 2018.

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

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of February, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JUSTIN M. CURTIS
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

1 THE DEFENDANT: No.
2 THE COURT: And --
3 THE DEFENDANT: Sorry just to waste all you
4 guys' time.
5 THE COURT: Okay. Thank you for your
6 statement.
7 And then are you fully satisfied with
8 Mr. Grant's representation?
9 THE DEFENDANT: Yes.
10 THE COURT: And, Counsel, any legal reason why
11 the Court shouldn't proceed?
12 MR. GRANT: No, sir.
13 THE COURT: Okay.
14 Well, I appreciate the new information as it
15 relates to the KeyBank.
16 I -- I know we went through that change of plea
17 on the washer and dryer. It was a felony offense. No one
18 disputes that. I certainly don't. I accepted it.
19 But as I went through the presentence report, I
20 was, you know, wondering what an appropriate sentence would be
21 on a case like this.
22 I hear the State's recommendation and think,
23 Oh, my goodness; 3 years fixed and 10 years indeterminate.
24 It's justified in many respects because this is repeat felony.
25 And you -- and -- and if I accept what they

21

1 have stated, as you spending so much of your life in prison,
2 how do -- how do I -- how do I sentence you, and all over a
3 washer and dryer?
4 And, yet, now I -- I see that there's more
5 information. And there is one or two statements in the police
6 report relating to the washer and dryer, but I certainly
7 didn't have the full picture that there were other things
8 going on.
9 There are objectives that the State have
10 identified for the Court. They include punishment, protection
11 of society, deterrence, and rehabilitation.
12 And, you know, you -- you put the Court in the
13 difficult position of sentencing you in a way that satisfies
14 those objectives but while also trying to put the context of
15 this offense in -- you -- you've got a problem with taking
16 other people's property. There's no question about that.
17 You have a history of that with theft and
18 forgery and -- and then this case. That's not all of your
19 prior offenses.
20 You know, I'm discouraged about rehabilitation
21 and -- and deterrence, as we have this ongoing pattern of
22 criminal violations.
23 And yet I'll try to give you credit for your
24 plea of -- of guilty and your ownership to that and putting in
25 the context this to those factors and all the other cases that

22

1 this Court sees.
2 It -- it is a prison case. By itself, maybe
3 the washer and dryer alone would be a prison case given your
4 prior criminal history. But I'm -- you know, I'm not prepared
5 to necessarily send you to prison for 13 years.
6 But the -- as I said, it makes sense to me why
7 the State would recommend that when they consider you've had a
8 history of being in prison, and here we are again.
9 So I'm going to try to do something in between
10 the recommendations of the party. I don't think a retained
11 jurisdiction is appropriate nor community placement.
12 There is a protection of society issue there
13 that I think requires some prison.
14 How much time, Mr. Delarosa, have you served on
15 this case, do you believe?
16 MR. GRANT: We're just about, I think, eight
17 months, your Honor.
18 THE COURT: Okay. And then, as the State
19 highlighted, we are dealing with a probation violation.
20 In that case, you've got a 3 years fixed,
21 correct? Do you know how much time --
22 THE DEFENDANT: That one ends March 20th of
23 this year.
24 THE COURT: Of this year?
25 MR. GRANT: I -- I think that's the

23

1 probation.
2 THE DEFENDANT: The probation.
3 THE COURT: Mm-hmm.
4 MR. GRANT: But as for the underlying sentence,
5 your Honor, there was a -- a -- a retained jurisdiction that
6 was served. There have been some previous incarceration there
7 plus this 8 months.
8 He's got to be at about a year and a half on
9 that, probably, of the fixed sentence.
10 THE COURT: Okay.
11 MR. GRANT: Maybe a little over. Maybe 20
12 months.
13 THE COURT: Okay. So the Court will provide
14 the following sentence:
15 On the forgery count that you've pled guilty
16 to, 2 1/2 years fixed followed by 5 years indeterminate, for a
17 unified sentence of 7.5 years. That's in between where the
18 parties are suggesting the Court go.
19 And I think I'm doing my best to satisfy the
20 objectives of criminal punishment by the 2 1/2, recognizing
21 you've got some time to serve on the probation case and you've
22 also accumulated some time.
23 And then an indeterminate period, that is
24 exceeding the -- what we typically see. But there is a pretty
25 significant indeterminate time on the other matter. So it's a

24