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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45176
Plaintiff-Respondent,)	
)	ADA COUNTY NOS. CR01-17-4432
v.)	& CR01-17-4116
)	
RICHARD KELLY DICKSON,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Richard Dickson pled guilty to one count of delivery of marijuana, one count of sexual battery, and one count of dispensing alcohol to a minor. He received an aggregate unified sentence of fifteen years, with four years fixed.

On appeal, Mr. Dickson contends that this sentence represents an abuse of the district court's discretion, as it is excessive given any view of the facts. He further contends that the district court abused its discretion by failing to reduce his sentence in light of the additional information submitted in conjunction with his Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion.

Statement of the Facts & Course of Proceedings

Ada County case number CR-01-17-4116 (*hereinafter*, “the marijuana delivery case”) and Ada County case number CR-01-17-4432 (*hereinafter*, “the battery case”) were consolidated by the district court. (R., pp.49-50.)

Seventeen-year-old R.D.’s boyfriend reported to law enforcement that R.D. had sexual contact with Richard Dickson. (Presentence Investigation Report (*hereinafter*, PSI),¹ p.4.) When she was interviewed, R.D. told law enforcement that the conduct had occurred on several occasions, after Mr. Dickson provided her with alcoholic beverages. (PSI, p.4, 89.) R.D. also told officers that she had seen marijuana plants growing at Mr. Dickson’s house. (PSI, p.4.) Based on these facts, Mr. Dickson was charged by information with five counts of sexual battery of a minor and four counts of dispensing alcohol to a minor. (R., pp.27-30.) Mr. Dickson was also charged by Information with one count of trafficking in marijuana and one count of possession of drug paraphernalia after a search was conducted of his residence pursuant to a search warrant. (Augmentation, pp.5-6.)

Pursuant to a plea agreement, Mr. Dickson pled guilty to one count of delivery of marijuana, one count of sexual battery of a minor, and one count of misdemeanor dispensing alcohol to a minor. (4/7/17 Tr., p.8, L.7 – p.9, L.19; p.23, Ls.9-21; p.27, L.20 – p.28, L.14; p.32, Ls.7-14; R., pp.54-61.) In exchange, the State agreed to dismiss the remaining charges and not to file a persistent violator sentencing enhancement. (R., p.56.) There was no agreement as to sentencing recommendations other than the State would not be recommending more than five years, fixed. (R., p.56.)

¹ Mr. Dickson will refer to the electronic pagination of the PSI file in his Appellant’s Brief.

At the sentencing hearing, the State asked the district court to sentence Mr. Dickson to fifteen years, with five years fixed, on the battery case, and left the rest of the sentence to the court's discretion. (6/9/17 Tr., p.48, Ls.9-12.) Mr. Dickson's counsel asked the district court to sentence Mr. Dickson to twelve years, with two years fixed, but place Mr. Dickson on probation. (6/9/17 Tr., p.52, Ls.2-5.)

Mr. Dickson was sentenced to fifteen years, with four years fixed on the marijuana case, and fifteen years, with four years fixed, on the battery case. (6/9/17 Tr., p.54, L.11 – p.56, L.6; R., pp.65-66, 68-72; Augmentation, pp.10-13.) His sentences were ordered to be served concurrently. (6/9/17 Tr., p.55, Ls.18-19; R., p.69; Augmentation, p.11.)

Mr. Dickson filed a timely Rule 35 motion asking the district court for leniency. (Augmentation, p.14.) Mr. Dickson submitted additional materials in support of his Rule 35 motion. (Augmentation, pp.18-20.) On September 13, 2017, the district court denied Mr. Dickson's Rule 35 motion without a hearing. (Augmentation, pp.23-27.) Mr. Dickson filed a notice of appeal timely from the judgment of conviction and the district court's order denying his Rule 35 motion. (R., pp.73-75.)

ISSUES

1. Did the district court abuse its discretion when it imposed an aggregate unified sentence of fifteen years, with four years fixed, upon Mr. Dickson following his plea of guilty to delivery of marijuana, sexual battery of a minor, and dispensing alcohol to minors?
2. Did the district court abuse its discretion when it denied Mr. Dickson's Idaho Criminal Rule 35 Motion?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed An Aggregate Unified Sentence Of Fifteen Years, With Four Years Fixed, Upon Mr. Dickson Following His Plea Of Guilty To Delivery Of Marijuana, Sexual Battery Of A Minor, And Dispensing Alcohol To A Minor

Mr. Dickson asserts that, given any view of the facts, his aggregate unified sentence of fifteen years, with four years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, “[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.” *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Dickson does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Dickson must show that in light of the governing criteria, the sentences were excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

In light of the mitigating factors present in this case, Mr. Dickson’s sentence is excessive considering any view of the facts.

Mr. Dickson maintained steady employment for over four years as a bartender. (PSI, p.13.) Mr. Dickson loved his job, and would still be there but for his current incarceration.

(PSI, p.13.) Mr. Dickson has a job waiting for him, should he be released from custody. (6/9/17 Tr., p.51, Ls.11-13.) Idaho recognizes that good employment history is a mitigating factor. *See State v. Nice*, 103 Idaho 89, 91 (1982); *see also State v. Shideler*, 103 Idaho 593, 595 (1982) .

Mr. Dickson has long struggled with an addiction to methamphetamine. (PSI, pp. 14-15, 41.) Although Mr. Dickson did not begin using methamphetamine until he was twenty years old, his methamphetamine use continued, intermittently, for almost twenty years. (PSI, pp.19-20, 41.) Mr. Dickson also has used marijuana regularly for much of his adult life. (PSI, pp.20, 41.)

The Idaho Supreme Court has held that substance abuse should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982). In *Nice*, the Idaho Supreme Court reduced a sentence based on Nice's lack of prior record and the fact that "the trial court did not give proper consideration of the defendant's alcoholic problem, the part it played in causing defendant to commit the crime and the suggested alternatives for treating the problem." *Id.* at 91. Additionally, the Idaho Supreme Court has ruled that ingestion of drugs and alcohol resulting in impaired capacity to appreciate the criminality of conduct, could be a mitigating circumstance. *State v. Osborn*, 102 Idaho 405, 414 (1981). Mr. Dickson would like to stop using controlled substances. (PSI, p.23.)

Further, Mr. Dickson has been diagnosed with depression and anxiety. (PSI, pp.18, 42, 77-79.) Mr. Dickson attempted suicide while in custody. (PSI, pp.77, 79.) He is taking medication to manage his mental health conditions. (PSI, pp.13, 42.) The Idaho Supreme Court has held that the trial court must consider a defendant's mental illness as a factor at sentencing. *Hollon v. State*, 132 Idaho 573, 581 (1999).

Mr. Dickson does have a supportive family to assist him in his rehabilitation. He is close to his family, although he worries that he has lost the respect of family members due to these

crimes. (PSI, pp.37, 42.) His mother expressed to the presentence investigator both her love for, and her disappointment in, Mr. Dickson. (PSI, p.10.)

Further, Mr. Dickson expressed remorse and accepted responsibility for his actions. (PSI, p.37; 4/7/17 Tr., p.8, L.7 – p.9, L.19; p.23, Ls.9-21; p.27, L.20 – p.28, L.14; p.32, Ls.7-14; 6/9/17 Tr., p.52, Ls.15-16.) Mr. Dickson wanted the court to know that he was very sorry and planned to do what he had to do to better himself. (6/9/17 Tr., p.52, Ls.15-24.) Idaho recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *Shideler*, 103 Idaho at 595; *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

The issue of reducing a sentence because a defendant expresses remorse has been addressed in several cases. For example, in *Alberts*, the Idaho Court of Appeals noted that some leniency is required when the defendant has expressed “remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character.” *Alberts*, 124 Idaho at 209.

The Idaho Supreme Court has also reduced a defendant’s term of imprisonment because the defendant expressed regret for what he had done. *Shideler*, 103 Idaho at 595. In *Shideler*, the Idaho Supreme Court ruled that the prospect of Shideler’s recovery from his poor mental and physical health, which included mood swings, violent outbursts, and drug abuse, coupled with his remorse for his actions, was so compelling that it outweighed the gravity of the crimes of armed robbery, assault with a deadly weapon, and possession of a firearm during the commission of a crime. *Id.* at 594-95. Therefore, the Court reduced Shideler’s sentence from an indeterminate term not to exceed twenty years to an indeterminate term not to exceed twelve years. *Id.* at 593.

Based upon the above mitigating factors, Mr. Dickson asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his remorse, family support, and substance abuse/addiction it would have imposed a less severe sentence.

II.

The District Court Abused Its Discretion When It Denied Mr. Dickson's Rule 35 Motion For A Sentence Reduction In Light Of The New Information Offered In Support Of His Rule 35 Motion

Although Mr. Dickson contends that his sentence is excessive in light of the information in front of the district court at the time of his June 9, 2017 sentencing hearing (*see* Part I, *supra*), he asserts that the excessiveness of his sentences is even more apparent in light of the new information submitted in conjunction with Mr. Dickson's Rule 35 motion. Mr. Dickson asserts that the district court's denial of his motion for a sentence modification represents an abuse of discretion.

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.*

In support of his motion for a sentence reduction, Mr. Dickson submitted information regarding his family situation. (Augmentation, p.20.) Mr. Dickson is very close with his family. (Augmentation, p.20.) His grandparents are not in good health and he does not believe they will

still be alive when he is released from custody. (Augmentation, p.20.) Mr. Dickson desperately wants to make amends to his grandparents and his father before it is too late. (Augmentation, p.20.) In light of Mr. Dickson's family situation, the district court should have reduced his sentences.

Based on the foregoing, in addition to the mitigating evidence before the district court at the time of sentencing, it is clear the district court abused its discretion in failing to reduce Mr. Dickson's sentences in response to his Rule 35 motion.

CONCLUSION

Mr. Dickson respectfully requests that this Court reduce his sentences as it deems appropriate.

DATED this 30th day of October, 2017.

_____/S/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of October, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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