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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 45229
)	
v.)	CANYON COUNTY NO. CR 2016-14122
)	
JOE MICHAEL ATENCIO,)	APPELLANT'S
)	REPLY BRIEF
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Following a trial, the jury convicted Joe Michael Atencio of operating a motor vehicle while under the influence of alcohol (second felony within fifteen years). Despite Mr. Atencio's age, and a family connection to the Idaho Department of Correction that would likely result in his incarceration outside of Idaho, the district court imposed a unified sentence of twenty years, with seven years fixed. Mr. Atencio filed an Idaho Criminal Rule 35 (Rule 35) motion for a reduction of sentence, which the district court denied. On appeal, Mr. Atencio asserts the district court abused its discretion when it imposed his sentence, and when it denied his Rule 35 motion.

In its Respondent's Brief, the State argues Mr. Atencio did not establish that the district court abused its discretion when it imposed the sentence, or when it denied the Rule 35 motion. (*See* Resp. Br., pp.1-5.)

This Reply Brief is necessary to address the State's contention that Mr. Atencio did not establish any basis for reversal of the district court's order denying his Rule 35 motion, because he did not present any new information in support of the motion. Mr. Atencio asserts that even if he had not provided any new information in support of his Rule 35 motion, he submitted additional information that provides a basis for this Court to find that the denial of the Rule 35 motion was an abuse of discretion. Mr. Atencio also challenges the State's general arguments that he did not establish the district court abused its discretion when it imposed his sentence or when it denied his Rule 35 motion, and he relies on the arguments presented in his Appellant's Brief and will not repeat those arguments here.

Statement of the Facts and Course of Proceedings

The Statement of Facts and Course of Proceedings were previously articulated in Mr. Atencio's Appellant's Brief, and are incorporated herein by reference thereto.

ISSUES

- I. Did the district court abuse its discretion when it imposed a unified sentence of twenty years, with ten years fixed, upon Mr. Atencio following his conviction for operating a motor vehicle while under the influence of alcohol?
- II. Did the district court abuse its discretion when it denied Mr. Atencio's Idaho Criminal Rule 35 Motion for a Reduction of Sentence?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Twenty Years, With Ten Years Fixed, Upon Mr. Atencio Following His Conviction For Operating A Motor Vehicle While Under The Influence Of Alcohol

Mr. Atencio asserts the district court abused its discretion when it imposed his unified sentence of twenty years, with ten years fixed, because his sentence is excessive considering any view of the facts. The district court should have instead followed Mr. Atencio's recommendation by imposing a unified sentence of five years, with one year fixed.

The State argues Mr. Atencio has not established the district court abused its discretion when it imposed his sentence. (*See* Resp. Br., pp.2-4.) Because the State's argument is unremarkable, no further reply is necessary, and Mr. Atencio would refer the Court to pages 4-6 of the Appellant's Brief.

II.

The District Court Abused Its Discretion When It Denied Mr. Atencio's Idaho Criminal Rule 35 Motion For A Reduction Of Sentence

Mr. Atencio asserts that the district court abused its discretion when it denied his Idaho Criminal Rule 35 motion for a reduction of sentence. The district court should have granted the motion and reduced the fixed term of Mr. Atencio's sentence to a period of two or three years.

The State argues Mr. Atencio “provided no new information in support of his Rule 35 motion. He merely pointed out factors that existed at the time of sentencing” (Resp. Br., p.4.) The State contends that, “[b]ecause [Mr.] Atencio presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentence was excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court’s order denying his Rule 35 motion.” (Resp. Br., p.5.)

The Idaho Supreme Court has held that “[w]hen 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 Rule 35 motion.” *State v. Huffman*, 144 Idaho 201, 203 (2007). “An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information.” *Id.*

Mr. Atencio asserts that, even assuming (without conceding) he did not provide any *new* information in support of his Rule 35 motion, he nonetheless has provided a basis for this Court to find that the denial of his Rule 35 motion was an abuse of discretion. At the least, the information presented in support of the Rule 35 motion on Mr. Atencio’s family situation (*see generally* R., p.149), was *additional* information as contemplated by *Huffman*.

Mr. Atencio submits the State is incorrect in arguing that “new information” serves as the only basis for reversal of the denial of a Rule 35 motion. As discussed above, “[w]hen 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 Rule 35 motion.” *Huffman*, 144 Idaho at 203. While the Idaho Supreme Court stated in *Huffman* that “[a]n appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information,” *id.*, the Court has

indicated that additional information also serves as a basis for an appellate court to find that a denial of a Rule 35 motion was an abuse of discretion.

For example, in *State v. Adair*, 145 Idaho 514 (2008), the Idaho Supreme Court, citing *Huffman*, stated that, “absent the presentation of new evidence, an appeal from a Rule 35 motion merely asks this Court to review the underlying sentence. Without additional information being presented, there is no basis for this Court to find that the denial of the Rule 35 motion was an abuse of discretion.” *Adair*, 145 Idaho at 517 (citation omitted). The *Adair* Court, because “[n]o additional information was provided to the trial court to indicate that the sentence was excessive,” decided that “[t]he trial court operated without its discretion when it denied [the defendant’s] Rule 35 motion for reduction of sentence.” *Id.*

Because the Idaho Supreme Court in *Huffman* and *Adair* recognized “additional information” (alongside “new information”) as a way to show that a sentence is excessive in support of a Rule 35 motion, *Huffman*, 144 Idaho at 203, *Adair*, 145 Idaho at 517, Mr. Atencio submits that additional information serves as a basis for an appellate court to find that a district court’s denial of a Rule 35 motion was an abuse of discretion. Thus, because Mr. Atencio presented additional information in support of his Rule 35 motion, he has provided a basis for this Court to find that the denial of the motion was an abuse of discretion.

Mr. Atencio further submits the district court abused its discretion when it denied the Rule 35 motion, for the reasons contained in the Appellant’s Brief and incorporated herein by reference thereto. (*See App. Br.*, pp.6-8.)

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Atencio respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 4th day of May, 2018.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of May, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOE MICHAEL ATENCIO
INMATE #1178624
NNCC
PO BOX 7000
CARSON CITY NV 89702

DAVIS F VANDERVELDE
DISTRICT COURT JUDGE
E-MAILED BRIEF

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DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BPM/eas