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### State v. Ray Respondent's Brief Dckt. 45280

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45280
Plaintiff-Respondent,	)	
	)	Minidoka County Case No.
v.	)	CR-2012-642
	)	
TRAVIS SCOTT RAY,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Ray failed to establish that the district court abused its discretion by denying his Rule 35 motion for reduction of his unified sentence of six years, with four years fixed, imposed following his guilty plea to possession of methamphetamine?

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

In February 2012, an officer was dispatched “for a reported prowler” and contacted Ray after observing him “getting into a vehicle” in the immediate area. (R., p.10.) The officer recognized Ray “from previous encounters” and “was aware [that Ray] had a felony warrant for his arrest.” (R., pp.10-11.) Ray provided the officer with a false name and, when the officer

rejected the false identity information and advised Ray of the outstanding warrant, Ray “took off running.” (R., p.11.) The officer caught up with Ray, “tackled him to the ground,” and handcuffed him, after which Ray provided a different false identity. (R., p.11.) Upon searching Ray “for contraband,” the officer found a glass pipe with methamphetamine residue, a container of marijuana, and a “capped unused syringe.” (R., pp.11-12.)

The state charged Ray with possession of methamphetamine, possession of marijuana, possession of drug paraphernalia, providing false information to law enforcement, and resisting or obstructing an officer. (R., pp.19-23.) The state also filed an Information Part II alleging that Ray was a persistent violator of the law. (R., pp.24-27.) Shortly thereafter, Ray “fled the state to avoid going back to prison” and went to New Mexico. (PSI, p.13.<sup>1</sup>)

In June 2014, a warrant for Ray’s arrest was issued in Clovis, New Mexico, “for two counts of Forgery, two counts of Fraud, and two counts of Unlawful Withdrawal from a Financial Institution.” (PSI, p.13.) Ray subsequently fled to Springfield, Oregon, where he was arrested – in September 2014 – for “Felon in Possession of Weapon, Carrying a Concealed Weapon, and Possession of Methamphetamine.” (PSI, p.13.) In November 2014, Ray was charged with possession of methamphetamine in Multnomah County, Oregon, for which he was placed on probation in March 2015. (PSI, p.11.) Less than three months later, he committed the new crime of robbery in Lane County, Oregon; consequently, he was sentenced to serve a 14-month prison term in the Oregon Department of Corrections. (PSI, p.11.)

Ray returned to Idaho following his release from the Oregon Department of Corrections in “mid-2016”; however, he was not located and arrested on the outstanding warrant in this case until March 29, 2017. (Aug., pp.7, 40; PSI, pp.13-14; R., p.2.) In April 2017, pursuant to a plea

agreement, Ray finally pled guilty to possession of methamphetamine in this case and the state dismissed the four remaining charges and the persistent violator enhancement, as well as a 2011 Minidoka County case in which Ray was charged with felony possession of a controlled substance and possession of drug paraphernalia. (R., pp.28-29, 40-42; PSI, p.10.) The district court placed Ray in Drug Court pending sentencing and signed an order releasing him from the county jail on May 1, 2017. (R., pp.50-53.)

Less than three weeks later, Ray was terminated from Drug Court after he tested positive for THC and amphetamines, provided “dilute” UA samples on two separate occasions, failed to appear for UA testing, failed to attend treatment at “PCFS,” failed to pay his Drug Court fees, was charged with the new crime of disturbing the peace, and failed to appear for Drug Court. (R., pp.54-57; PSI, p.13.) At the sentencing hearing, held on July 3, 2017, the district court imposed a unified sentence of six years, with four years fixed. (R., pp.82-85.) Ray filed a notice of appeal timely from the judgment of conviction. (R., pp.102-04.) He also filed a timely Rule 35 motion for a reduction of sentence, which the district court denied on November 8, 2017. (Aug., pp.1-3, 86-88.)

Ray asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence in light of his mental health and substance abuse issues. (Appellant’s brief, pp.4-7.) Ray 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

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<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file “T. Ray Confidential Exhibit.pdf.”

of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Ray 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. Ray has failed to satisfy his burden.

In support of his Rule 35 motion, Ray provided a copy of his Oregon Department of Corrections medical records and reiterated his argument – previously made at sentencing – that he should be placed in the retained jurisdiction program to afford him another opportunity to address his mental health and substance abuse issues. (Aug., pp.9, 13; Tr., p.13, Ls.5-8; p.17, L.13 – p.19, L.10.) This was not “new” information, as the district court was aware, at the time of sentencing, of Ray’s substance abuse issues and that Ray had previously been diagnosed with “Post Traumatic Stress Disorder, anxiety, Attention Deficit Hyperactivity Disorder, and insomnia” and had taken mental health medications including anti-psychotic, anti-anxiety, and mood-stabilizing medications. (PSI, pp.17-18; Tr., p.13, Ls.5-8.) Furthermore, the only diagnosis given Ray by the Oregon Department of Corrections was that of “Posttraumatic Stress Disorder” and – in a report sent to the Hearings Officer shortly before Ray was released from the prison in Oregon – it was noted that Ray’s diagnosis did not qualify as a “Serious Mental Illness” and that he did not have “active” symptoms, which is consistent with the information the district court had at the time of sentencing. (Aug., pp.37, 40, 43, 76; PSI, pp.16-17, 23-24, 33-34.) When sentencing Ray, the district court acknowledged Ray’s substance addiction, mental health issues, and desire for treatment as mitigating factors, but appropriately determined that Ray presented an undue risk to the community and that he required correctional treatment that would be provided most effectively by his commitment to the Idaho Department of Correction. (Tr., p.21, Ls.16-19; p.24, L.21 – p.25, L.4.) Because Ray 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.

Even if this Court addresses the merits of Ray's claim, Ray has still failed to establish that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence, particularly in light of his incessant criminal offending, complete disregard for the terms of community supervision, and the risk he poses to society. Ray has a lengthy criminal record that includes numerous convictions for theft-related crimes. (PSI, pp.4-11.) He has been granted an abundance of rehabilitative opportunities, including the retained jurisdiction program, the prison's Therapeutic Community program, Drug Court, and multiple opportunities on probation and parole; however, he has repeatedly absconded and "quickly violated and failed every period of community supervision he was granted." (PSI, pp.11-13, 20.) Ray has demonstrated an unwillingness to abide by the rules even while incarcerated, as he continually incurred DOR's for behavior including disobedience to orders, "making pruno," and testing positive for substances including marijuana, synthetic cannabinoids, and methamphetamine. (PSI, p.12; Aug., p.46.)

Although he claims, on appeal, that he should have been placed in the retained jurisdiction program to afford him the opportunity to stabilize his mental health, Ray has previously been afforded the opportunity to do so and chose to not comply with his mental health medication regimen. In February 2016, while in the penitentiary in Oregon, Ray was determined to be "stable" and "endorse[d] this [was] due to stabilizing on [mental health] medication"; however, shortly thereafter, he was "caught cheeking his medications once again" and all of his medications were "stopped." (Aug., pp.42, 46.) Furthermore, his progress notes indicate that,

while he was placed in a “DBT-Mindfulness” group to help him deal with his anxiety, he was a “no show” at five of the 10 meetings. (Aug., pp.36, 38-39.) Prior to his sentencing hearing in this case, Ray was provided another opportunity for treatment via his placement in Drug Court, but he chose to not attend treatment at Preferred Child and Family Services as required. (PSI, p.13.) Ray’s refusal to comply with treatment, either while incarcerated or while in the community, demonstrates that he is not a viable candidate for community supervision; as such, he has not shown that the district court abused its discretion by denying his Rule 35 request to be placed in the retained jurisdiction program.

At sentencing, the district court articulated its reasons for imposing Ray’s sentence and declining to retain jurisdiction. (Tr., p.21, L.6 – p.26, L.23.) The state submits that Ray has failed to establish that the district court abused its discretion by denying Ray’s Rule 35 motion for a reduction of sentence, 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.)

### Conclusion

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

DATED this 20th day of February, 2018.

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

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of February, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

KIMBERLY A. COSTER  
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  
LORI A. FLEMING  
Deputy Attorney General

# APPENDIX A

1 Okay, anything further, Mr. McRae? Anything  
2 further on that?  
3 MR. McRAE: No, Your Honor.  
4 THE COURT: Mr. Ray, anything you wish to say on  
10:03AM 5 your own behalf?  
6 MR. RAY: Judge Brody, drug court was a great  
7 program. If I had the opportunity to go back and try it  
8 again, I'd do it. The living environment I was released to  
9 was awful. It was a drug-induced environment. And I asked  
10:03AM 10 the drug court judge every time I went to court to help me  
11 get into somewhere else and I was ignored. I couldn't get  
12 into nowhere else. I don't know if that's as a result of  
13 me not being sentenced yet or what.  
14 But since then I realize that I've made mistakes,  
10:03AM 15 a lot of mistakes, and I'm here. I'm not on the run. I've  
16 got family that are willing to support me as long as I'm  
17 not a fugitive on the run and I'm not all hopped up on  
18 drugs.  
19 THE COURT: Why wasn't your family prepared to  
10:04AM 20 support you in drug court?  
21 MR. RAY: I did go to one of my family members as  
22 a place to live. It was just the wrong family member to go  
23 to. I didn't have nowhere else to go to. Since then my  
24 family's -- they were thinking I was going to get back out  
10:04AM 25 on drug court. They've purchased a trailer for me to live  
20

1 in and a piece of property to stay on. I tried to get out  
2 to go my mom's house, but it was denied because she was on  
3 misdemeanor probation.  
4 Just thank you for the opportunity to -- if I can  
10:04AM 5 get the chance to do the rider program. Thank you.  
6 THE COURT: The place to start at sentencing is  
7 the law of sentencing and first consideration is the  
8 protection of society, with related goals of deterrence,  
9 rehabilitation and retribution, also protection of the  
10:07AM 10 public interest.  
11 And the reasonableness of a sentence requires  
12 consideration of the nature of the offense, the character  
13 of the offender and the protection of the public interest.  
14 The nature of the offense and protection of the public  
10:07AM 15 interest are related.  
16 I'm also familiar with the sentencing factors in  
17 Idaho Code 19-2521, and there are some mitigating factors,  
18 potentially mental health, addiction and taking  
19 responsibility by his plea.  
10:08AM 20 The problem is his track record here going back  
21 over 20 years and starting in the juvenile system. And  
22 then I think what's difficult to look at is when you say,  
23 Well, my living arrangement wasn't conducive to not doing  
24 drugs, you can get drugs anywhere, as you have  
10:08AM 25 demonstrated. Why? Because you've gotten them in the  
21

1 Idaho Penitentiary.  
2 In looking at page 12 of the PSI on your  
3 disciplinary offense reports from the '90s: Disobedience  
4 orders a couple times; present in unauthorized areas;  
10:09AM 5 possession of tobacco -- that's expensive in the pen, isn't  
6 it? Positive UA for methamphetamine in prison; produced an  
7 adulterated urine sample; positive UA for marijuana, two of  
8 those over a month apart; disrespect to staff and  
9 disobedience to orders. So you found a way to get drugs in  
10:09AM 10 a place where they should be the most difficult to get.  
11 And just as a practical matter, more expensive than street  
12 prices, I would assume. I don't know what the prices are  
13 there, so --  
14 And so the parole commission passed you. You  
10:09AM 15 were going to get a parole date and they passed you to your  
16 full term release date and you topped that sentence. Then  
17 you got more prison. You got released on parole, 15 days  
18 later you were arrested for petty theft. So you went back,  
19 you got more DORs -- or one DOR for quitting a job. No,  
10:10AM 20 that was the time you got paroled, excuse me. So you were  
21 paroled that time. The DOR was before the parole and you  
22 got arrested for theft. Then you absconded.  
23 So you were released on parole November 13th of  
24 2008. On January 13, 2009, not even two months later,  
10:10AM 25 parole absconded. You were arrested in February and  
22

1 returned to prison. Completed some programming. Your  
2 parole was revoked. You were paroled February 12th of  
3 2010, March 30th you absconded again. Arrested April 2010,  
4 returned to prison, in December 2010 they passed to you  
10:11AM 5 your full term release date. I'm still on page 12 of the  
6 PSI. You got a DOR for positive UA for synthetic  
7 cannabinoids, synthetic marijuana. You were released from  
8 prison May 25, 2011. Served your time.  
9 So this case -- so you were released May 25,  
10:11AM 10 2011. This case arose the 9th of February 2012. So less  
11 than a year from topping out the sentence this case arose  
12 and you fled. During that time there's the charges in New  
13 Mexico, and before getting back here you had the cases in  
14 Oregon. There was one No File there, but the Oregon  
10:12AM 15 conviction was for third degree robbery, and you got  
16 14 months, according to the PSI on page 11.  
17 So you entered a plea in this case, you got  
18 referred to drug court, terminated in less than a month in  
19 the drug court. So we can talk about positive tests and  
10:13AM 20 whether those were because of somehow the atmosphere where  
21 you were living or you just did drugs, with ingesting drugs  
22 more likely than just the atmosphere permeating your skin  
23 or something to cause a positive test.  
24 But let's talk about failing to report. And I  
10:13AM 25 mention this -- I don't think you were in the courtroom --  
23

1 but whether you're addicted or not, reporting is up to you.  
 2 And I'm sure you used tremendous ingenuity to report to  
 3 your methamphetamine dealers when you were using on the  
 4 outside to procure methamphetamine, you had to use  
 10:14AM 5 resources and ingenuity to procure drugs within prison, yet  
 6 you can't appear for treatment? That's in your control,  
 7 okay?  
 8 And another thing about treatment, looking at  
 9 page 17: Treatment doesn't help everybody. I mean, it  
 10:14AM 10 might, but you started using drugs at age seven, then hard  
 11 drugs at age 12 and 13. Unfortunately you probably did  
 12 enough damage to yourself then that I don't know if you're  
 13 ever going to be helped. Maybe. I don't want you to give  
 14 up, but that's early use and that's substantial. It just  
 10:15AM 15 doesn't suggest that one more go at treatment is going to  
 16 do the trick here when it hasn't for decades, basically.  
 17 Additionally, with the incident that you had --  
 18 you had a horrible health incident, almost died from using  
 19 drugs, and that wasn't enough. So what's enough? It's not  
 10:15AM 20 clear that anything is.  
 21 So the Idaho Code sentencing factors I'm weighing  
 22 more heavily here, despite the mitigating factors and your  
 23 stated desire to get some treatment. You know you have a  
 24 problem and you'd prefer you didn't, but there is an undue  
 10:16AM 25 risk you'll commit another crime while on probation. I

24

1 think the crime you committed in the other jurisdictions --  
 2 I'm going over the Oregon conviction here while fleeing  
 3 from this one -- suggests that you do need correctional  
 4 treatment most effectively provided by imposing a sentence.  
 10:16AM 5 There may not be correctional treatment of any kind, other  
 6 than maybe at some point you get it figured out, and maybe  
 7 you don't, but what's available in prison is the same as  
 8 what's on the rider now, and whether that works or not I  
 9 guess we will see some day.  
 10:16AM 10 I think a lesser sanction than an imposed  
 11 sentence would depreciate the seriousness of the crime here  
 12 in light of your record. Standing alone the crime is not  
 13 one where you intended to hurt others, but you fled, and  
 14 with your record that's a different story. I think  
 10:17AM 15 imprisonment here is appropriate punishment and a deterrent  
 16 to you and a deterrent for others hopefully, although  
 17 that's not a major consideration.  
 18 You are a multiple offender or a professional  
 19 criminal. You are a multiple offender and you have those  
 10:17AM 20 property crimes on your record. You have not led a  
 21 law-abiding of life for a substantial time and, again, have  
 22 a criminal history. Not much else can be done here.  
 23 The question I've been wrestling with mostly --  
 24 well, there's two -- one, whether to follow the plea  
 10:17AM 25 agreement. And I try to give plea agreements substantial

25

1 weight and deference. I think there are good reasons to do  
 2 that. And in the overwhelming majority of the cases we  
 3 can, but here we can't. But so that's a consideration,  
 4 whether to follow the agreement.  
 10:17AM 5 The second consideration is how long. And I've  
 6 debated giving you a fixed sentence, simply because parole  
 7 hasn't worked before. I don't know that it's going to.  
 8 Again, I don't know if you would qualify. I don't know.  
 9 So I've weighed giving you an all-fixed sentence, which I  
 10:18AM 10 do in some cases. Here I think -- and that causes some  
 11 problems sometimes for prison administration because  
 12 there's not any incentive potentially to behave better.  
 13 In your case I don't know that that's going to  
 14 make a difference. But because of your desire to try to  
 10:18AM 15 get clean and to give you some incentive and maybe make it  
 16 so parole is possible, I've decided not to give you a  
 17 completely-fixed sentence, but I don't think it sends the  
 18 right message either, and I don't think it's appropriate to  
 19 give you a very low determinate time and a substantial  
 10:18AM 20 period of indeterminate time. If you go in and avoid using  
 21 while in and have some clean time and stay out of trouble  
 22 and avail yourself of treatment, maybe down the road parole  
 23 will be doable. And maybe it won't be.  
 24 So in the exercise of discretion I will sentence  
 10:19AM 25 you to a unified sentence of six years, comprising four

26

1 years fixed, two years indeterminate, impose court costs,  
 2 no fine. Credit for time served as soon as I see the  
 3 calculation here. You're entitled to all the time served  
 4 on this case. You have not previously provided a DNA  
 10:20AM 5 sample and right thumbprint, so I'll order you to provide  
 6 one. I will not order restitution for that. I've signed  
 7 the restitution orders as agreed here. So restitution as  
 8 in these orders. It is imposed. So six years, four fixed,  
 9 two indeterminate, impose credit for time served, the other  
 10:20AM 10 terms I've mentioned. You have 42 days to appeal. If  
 11 there's anything you wish to appeal discuss it with Mr.  
 12 McRae, he can perfect it for you, including appointment of  
 13 counsel on the appeal. Good luck.  
 14  
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