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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45541
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-17-16081
v.)	
)	
MICHAEL PATRICK CAVANAGH,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Michael Patrick Cavanagh was convicted after entering a guilty plea to the crime of felony driving-under-the-influence of alcohol (“DUI”), while having suffered a prior felony DUI conviction within the previous fifteen years. The district court sentenced him to a unified ten year term, with three years determinate. Mr. Cavanaugh filed a timely Motion for Reconsideration of Sentence (“Rule 35”), requesting a reduction of his determinate term from three to two years. The district court denied his motion, and he now appeals that denial, asserting the district court abused its discretion by failing to fully consider the mitigating information.

Statement of the Facts & Course of Proceedings

On May 8, 2017, Mr. Cavanagh was pulled over for DUI after a concerned citizen called 911 to report witnessing his vehicle travel into oncoming lanes of traffic and almost strike a tree. (Presentence Investigation dated July 5, 2017 (“PSI”), p.3.) He was arrested and formally charged with felony driving under the influence of alcohol after suffering a previous felony DUI conviction within the previous fifteen years. (R., pp.26-27.) Mr. Cavanagh agreed to plead guilty to the felony DUI in exchange for the State’s agreement to recommend a ten year sentence, with three years fixed (to be served concurrently with Ada County Cases CRFE08-1107 and CRFE11-5185), and refrain from filing a persistent violator of the law enhancement. (R., pp.31-32.) At the July 12, 2017, sentencing hearing, the district court found him guilty and imposed a ten year sentence, with three years fixed, concurrent with the sentences in his other cases, along with a \$1,000 fine, five year driver license suspension (two years absolute), and an ignition interlock requirement. (R., pp.36-40, Tr. p.18, Ls.15-22.) Mr. Cavanagh then filed a timely Motion for Reconsideration of Sentence and Memorandum in Support, requesting a reduction of the fixed term from three years to two years so that he could more quickly begin programming at the community re-entry center, address his alcoholism, and financially support his thirteen year old daughter. (R., pp.44-46.)

After a hearing on the matter, the district court took the matter under submission, and then issued an order denying the motion for reconsideration. (R., pp.56-60.) Mr. Cavanagh thereafter filed a timely appeal. (R., p.62.)

ISSUE

Did the district court abuse its discretion when it denied Mr. Cavanagh’s Idaho Criminal Rule 35 Motion for a Reconsideration of Sentence?

ARGUMENT

The District Court Abused Its Discretion In Denying Mr. Cavanagh's Rule 35 Motion Because It Unreasonably Failed To Fully Consider The Mitigating Information

Mr. Cavanagh asserts that, given any view of the facts, his unified sentence of ten years, with three years determinate, is excessive in light of the mitigating factors before the court at sentencing, combined with the new information presented through the Rule 35 motion. 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). In order to be entitled to relief under Rule 35(b), the defendant must show how the sentence is excessive based upon new or additional information submitted since the original hearing. *State v. Huffman*, 144 Idaho 201, 203 (2007).

Upon review of a trial court's discretionary decision to deny a Rule 35 motion, the appellate court conducts a multi-tiered inquiry to assess whether the trial court correctly perceived the issue as one of discretion, acted within the outer bounds of such discretion, consistent with applicable legal standards, and reached its decision through an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600–01 (1989). The appellate court will conduct an independent review of the entire record, not solely the new information provided, 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). Here, an independent review of the record reveals it was unreasonable to deny Mr. Cavanagh's request to reduce his determinate term because he demonstrated a two year determine term was sufficient to accomplish sentencing goals.

At Mr. Cavanagh's original sentencing hearing, there was significant evidence in mitigation. The first factor was Mr. Cavanagh's full and early acceptance of responsibility. Mr. Cavanagh pled guilty within five days of being arraigned on the Information. (R., pp.26, 29.) During the sentencing hearing, he also demonstrated ownership of his misconduct and criminal behavior, devoid of blame. (Tr., p.14, Ls.5-16.) Acknowledgement of guilt and acceptance of responsibility by the defendant are critical first steps toward rehabilitation. *See State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010). In addition to his acceptance of responsibility, Mr. Cavanagh thoroughly benefited from parole supervision in the past, and performed well for an extended period of time.

Idaho Department of Correction ("IDOC") records indicate no violations were filed, outside of the present offense. (PSI, pp.74-108.) In fact, a review of those records demonstrates Mr. Cavanagh outperformed most probationers. IDOC notes begin in January 2014, and admittedly, describe Mr. Cavanagh's rocky start. *Id.* He was brought before the court within his first few weeks of supervision for continued alcohol consumption. (PSI, pp.74-75.) During a January 8, 2014, supervision contact, he was located at the Boise Rescue Mission with a purported blood alcohol level ("BAC") that was so high, .334, that the jail referred him for medical treatment and refused to admit him. (PSI, p.74.) This extremely high BAC suggests a severe alcohol problem.

Courts have recognized that substance abuse can be a mitigating factor in sentencing. *State v. Nice*, 103 Idaho 89 (1982) (reducing defendant's sentence, in part, because "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").

Moreover, alcoholism and addiction are recognized by the Surgeon General as disease, and are not merely a result of one's lack of willpower or compunction:

Most Americans know someone with a substance use disorder, and many know someone who has lost or nearly lost a family member as a consequence of substance misuse. Yet, at the same time, few other medical conditions are surrounded by as much shame and misunderstanding as substance use disorders. *Historically, our society has treated addiction and misuse of alcohol and drugs as symptoms of moral weakness or as a willful rejection of societal norms, and these problems have been addressed primarily through the criminal justice system.* Our health care system has not given the same level of attention to substance use disorders as it has to other health concerns that affect similar numbers of people. Substance use disorder treatment in the United States remains largely segregated from the rest of health care and serves only a fraction of those in need of treatment. *Only about 10 percent of people with a substance use disorder receive any type of specialty treatment. Further, over 40 percent of people with a substance use disorder also have a mental health condition, yet fewer than half (48.0 percent) receive treatment for either disorder.* Many factors contribute to this "treatment gap," including the inability to access or afford care, fear of shame and discrimination, and lack of screening for substance misuse and substance use disorders in general health care settings. Further, about 40 percent of individuals who know they have an alcohol or drug problem are not ready to stop using, and many others simply feel they do not have a problem or a need for treatment—which may partly be a consequence of the neurobiological changes that profoundly affect the judgment, motivation, and priorities of a person with a substance use disorder.

Surgeon General's Executive Summary of the Report on Alcohol, Drugs, and Health at <https://addiction.surgeongeneral.gov/executive-summary> (last accessed March 19, 2018) (footnotes omitted, emphasis added). Despite that rocky start, Mr. Cavanagh made stellar progress on his recovery from alcoholism. By July of 2014, Mr. Cavanagh was out of custody, obtained a good job at Kona Grill, completed Anger Management class and Driving the Right Way. (PSI, p.80.) That fall, he completed Matrix Relapse Prevention and Moral Reconciliation Therapy. (PSI, p.81.) Rather than having to chide Mr. Cavanagh to go and get a job and pay his fines and restitution, parole cautioned him that he was actually working too much; Mr. Cavanagh was working 60 hours and seven days a week. (PSI, p.82.) His progress continued.

In June of 2015, Mr. Cavanagh had been in a structured living environment, doing well, checking in regularly, and following procedures related to living arrangements. He sought and obtained permission to move. (PSI, pp.87-88.) He felt the new location would “be a good idea because he felt he would have another person to hold him accountable.” (PSI, p.88.) In August of 2015, he indicated he had been working 75 hours per week, and attending his daughter’s swim meets and basketball games. By September 2015, he was working fewer hours, went golfing with coworkers and was looking into a new puppy for his daughter. (PSI, p.90.) When he accidentally set the alarm off at his work, he proactively reported the police contact, and his supervising agent thanked him for the contact. (PSI, pp.93-94.) He even reported misconduct by his roommate, who had become a risk to Mr. Cavanagh’s own sobriety because the roommate was drinking and was terminated from work. (PSI, p.95.) These records demonstrate that Mr. Cavanagh was steadily working (albeit at times, too many hours), paying his fines, fully reporting, remaining sober, supporting himself and his daughter, and being a productive member of society. (PSI, pp.74-108.) This is frankly remarkable, given how Mr. Cavanagh grew up.

Mr. Cavanagh’s ex-wife, Robin, provided insight into the severity of Mr. Cavanagh’s and his family’s alcoholism. (PSI, pp.112-113.) She explained how Mr. Cavanagh’s father was an active alcoholic in denial, his numerous siblings were all alcoholics and in various stages of sobriety, and that his family of origin was one of “total dysfunction as a result of alcohol.” (PSI, p.113.) Apparently, Mr. Cavanagh had vomited blood and suffered from seizures. (PSI, p.114.) She opined that Mr. Cavanagh never learned any other coping skills, other than drinking, from his family. (PSI, p.13.) Yet, despite that his family of origin was ravaged by the family disease of alcoholism, Mr. Cavanaugh for the majority of his life refrained from significant crime, was motivated, self-supporting, a hard-worker, an asset to his employer, and a dedicated family man.

His legal troubles stemmed from alcoholism; absent suffering from this disease, he likely would not have been before the court. Mr. Cavanaugh's ex-wife also described him as a kind-hearted and generous person, in need of treatment. (PSI, p.114.) This is corroborated by Mr. Cavanaugh's dedication to his teenage daughter, examples of which are replete in his IDOC records. (PSI, pp.74-108.)

To augment the wealth of positive factors presented at sentencing, Mr. Cavanaugh provided new information to the court in his Rule 35 motion by way of his July 27, 2017, letters to counsel and the court. (R., pp.47-50.) During the hearing, the parties also discussed new information Mr. Cavanaugh had obtained regarding the IDOC's treatment programs and availability. (*See, generally*, Tr., pp.23-32.) In these letters, Mr. Cavanaugh fully admitted his criminal actions and relayed his full understanding and acceptance of his disease of alcoholism, and asserted that a reduction in sentence would allow him to get into treatment more quickly, including participating in the Community Re-Entry Program, and allow him to more actively support his teenage daughter. (R., p.48.) This information commands attention in two regards - it demonstrates rehabilitation through Mr. Cavanaugh's increased awareness and insight, and it demonstrates a reduced risk of harm to the public through Mr. Cavanaugh's identification of an articulated treatment plan upon release. During the Rule 35 hearing, Mr. Cavanaugh explained to the court how, with a shorter sentence, he would be able to report to the work center and pay child support more promptly. Mr. Cavanaugh even expressed eagerness to be held accountable to a third party for his actions while in the community. (R., pp.47-49.) This attitude bodes well for a reduced need for long incarceration. *See, e.g., State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991) (amenability to treatment should be considered a mitigating factor). In addition, Mr. Cavanaugh's character is good. *See State v. Shideler*, 103 Idaho 593, 595 (1982) (reducing

defendant's sentence, in part, because "[t]he overwhelming impression from this record is that except for this particular incident the defendant's character was good"). To simply conclude, in black and white terms, that Mr. Cavanagh's 2017 DUI is based upon a moral weakness or a lack of responsibility, completely ignores the reality that alcoholism is a multi-faceted disease, oft times with psychological and mental health components.

Contrary to the prosecution's belief and comments that Mr. Cavanagh's 2013 ten year sentence, with two years fixed, failed to deter and punish, Mr. Cavanagh's prior sentence had an opposite effect – it propelled him to get a great job, act as a model probationer, pay his financial debts, and refrain from drinking for an extended period of time – early 2014 until May of 2017 – until his relapse.¹ His unlawful conduct must be properly weighed against what society now comprehends about addiction, disease, recovery, and relapse. Further, Mr. Cavanagh's written letters and comments during the Rule 35 proceedings demonstrate changed circumstances with respect to his ownership of his actions, his insight, his willingness and eagerness to do treatment, and his ability to be successful throughout the same. While the incident did and should cause great concern for a sentencing court, Mr. Cavanagh's decision to drink and drive on May 7,

¹ At the Rule 35 hearing, the prosecution made an inappropriate argument, which appeared, at first blush, to have some impact on the trial court. The prosecution, asserting Mr. Cavanagh's exhibits to the Rule 35 were not new information, improperly urged the court to deny the motion because granting a Rule 35 would encourage a "torrent of these Rule 35 motions and we are going to do it on every single case because there doesn't need to be a reason anymore and the Judge is going to reconsider every sentence that comes in front of the court." (Tr., p.26, Ls.20-25.) The trial court responded, "[b]ut the court does have a problem – not a problem, but – I think the prosecution's point is well taken. That if on every sentence a motion for reconsideration is filed because they think well, if I just present something different about – that I found out about the IDOC, that justifies a basis for reducing the sentence. That is going to increase the workload of the Court." While these comments suggest the trial court may have initially been persuaded to consider the impact of granting Rule 35 on unrelated cases and its caseload, Mr. Cavanagh concedes the court cured any impropriety by relaying its intent to consider the circumstances in Mr. Cavanagh's case. (Tr., p.31, L.25 – p.32, L. 13.)

2017, was an isolated event throughout the course of his supervision. It does not obliterate his growth, the insight and self-knowledge he gained, or the self-care tools he developed.

In sum, a three year determinate term is longer than necessary, and unreasonable, under the circumstances. *See State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). Therefore, when the district court denied Mr. Cavanagh's request to reduce the determinate term of his ten-year term sentence, particularly where he was not even requesting an overall reduction of the unified term length (R., p.47.), the court failed to exercise reason and "balance the goals of retribution, protection of society and deterrence against the defendant's potential for rehabilitation." *State v. Douglas*, 118 Idaho 622, 624 (Ct. App. 1990).

CONCLUSION

Based upon the foregoing, Mr. Cavanagh requests this Court to vacate the trial court's Rule 35 denial, and reduce his sentence to a two year determinate term, followed by eight years indeterminate.

DATED this 5th day of April, 2018.

_____/s/_____
LARA E. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of April, 2018, 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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NANCY A BASKIN
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

LEA/eas