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State v. Butler Respondent's Brief Dckt. 45557

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. DOUGLAS E. BUTLER, Defendant-Appellant.	)	Nos. 45557 & 45558 Ada County Case Nos. CR01-2017-25356 & CR01-2017-29176 RESPONDENT'S BRIEF

Issue

Has Butler failed to establish that the district court abused its discretion, either by imposing concurrent, unified sentences of seven years, with two and one-half years fixed, and declining to retain jurisdiction, or by denying his Rule 35 motions for reduction of his sentences?

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

On June 30, 2017, during the course of a traffic stop, officers searched the vehicle Butler was driving and found methamphetamine, marijuana, and drug paraphernalia. (PSI, pp.266-67.[1])

[1] PSI page numbers correspond with the page numbers of the electronic file "Butler 45557 psi.pdf."

Approximately one month later, again during the course of a traffic stop, officers searched the vehicle Butler was driving and again found methamphetamine, marijuana, and drug paraphernalia. (PSI, pp.356-57.) The state charged Butler with possession of methamphetamine and possession of drug paraphernalia in case 45557, and with possession of methamphetamine, possession of marijuana, possession of drug paraphernalia, and driving without obtaining a valid license in case 45558. (PSI, pp.26-27, 102-03.) Pursuant to a plea agreement, Butler pled guilty to both counts of possessing methamphetamine, and the state dismissed the remaining charges in each case. (R., pp.35-40, 108-18.) The district court consolidated the two cases and imposed concurrent, unified sentences of seven years, with two and one-half years fixed. (R., pp.41-42, 45-48, 119-20, 124-27.) Butler filed a notice of appeal in both cases, timely from the judgments of conviction. (R., pp.55-57, 134-36.) He also filed timely Rule 35 motions for reduction of his sentences, which the district court denied. (R., pp.54, 77-81, 133, 154-58.)

Butler asserts that the district court abused its discretion by declining to retain jurisdiction and by imposing concurrent, unified sentences of seven years, with two and one-half years fixed, in light of factors he deems mitigating, including his substance abuse issues and "focus on his sobriety." (Appellant's brief, pp.3-5.) Butler has failed to establish an abuse of discretion.

Sentencing decisions are reviewed for an abuse of discretion. State v. Moore, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994). 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. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016) (citations omitted). 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; Moore, 131 Idaho at 825, 965 P.2d at 185

(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 State v. Stevens, 146 Idaho 139, 148-49, 191 P.3d 217, 226-27 (2008)).

The decision whether to retain jurisdiction is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). The primary purpose of a district court retaining jurisdiction is to enable the court to obtain additional information regarding whether the defendant has sufficient rehabilitative potential and is suitable for probation. State v. Jones, 141 Idaho 673, 677, 115 P.3d 764, 768 (Ct. App. 2005). Probation is the ultimate goal of retained jurisdiction. Id. There can be no abuse of discretion if the district court has sufficient evidence before it to conclude that the defendant is not a suitable candidate for probation. Id.

The maximum prison sentence for possession of methamphetamine is seven years. I.C. § 37-2732(c)(1). The district court imposed concurrent, unified sentences of seven years, with two and one-half years fixed, which falls within the statutory guidelines. (R., pp.45-48, 124-27.) Furthermore, Butler is not a suitable candidate for probation in light of his ongoing disregard for the law and the terms of community supervision and his extensive criminal history.

Butler has an extensive criminal record that spans over 30 years and includes a juvenile adjudication for "strongarm robbery" and misdemeanor convictions for assault, battery, resisting or obstructing officers, possessing a dangerous drug without a prescription, carrying a concealed weapon, frequenting, petit theft, attempting to elude, DUI, driving without privileges, open

container, invalid driver's license, and possession of a controlled substance. (PSI, pp.4-8.) Butler has also been convicted of numerous felonies, including possession of a narcotic controlled substance (x2), possession of an explosive device, escape, taking a vehicle without owner's consent (x2), assault with a deadly weapon, grand theft, and unlawful possession of a firearm. (PSI, pp.4-8.) Butler has served multiple prison terms, having most recently been released from incarceration in October 2016 after serving almost five years. (PSI, p.9.) Butler has also previously been afforded (and squandered) multiple opportunities for probation and parole, and was on pre-trial release in case 45557 when he was arrested for the virtually identical crimes in case 45558. (PSI, pp.4-10.)

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Butler's sentences and for declining to retain jurisdiction. (10/25/17 Tr., p.35, L.22 – p.39, L.15.) The state submits that Butler has failed to establish an abuse of discretion, 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.)

Butler next asserts that the district court abused its discretion by denying his Rule 35 motions for reduction of his sentences, including by retaining jurisdiction, in light of his "amenability to treatment and commitment to sobriety." (Appellant's brief, pp.5-8.) 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, Butler 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. Butler has failed to satisfy his burden.

The only information Butler presented in support of his Rule 35 motion was a letter in which he reiterated his need for programming and his desire to quit using drugs. (R., pp.62-68, 137-43.) As found by the district court, however, this information was not new "as the request for retained jurisdiction due to Defendant's lengthy substance abuse history was argued at the sentencing hearing." (R., pp.78-79, 155-56.) This same information also appears in the presentence report. (See, e.g., PSI, pp.15-17 "Butler reported he wanted to quit using illegal substances and needed programming).) Because 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 Huffman, 144 Idaho at 203, 159 P.3d at 840, and because Butler failed to present any new information below, he has failed on appeal to show any basis for reversal of the district court's orders denying his Rule 35 motions.

Even if it were deemed new or additional information, Butler's desire for programming does not show the court abused its discretion in denying his motions for reduction of sentence, which sought placement in the retained jurisdiction program. In its orders denying Butler's motions for reconsideration, the district court recognized Butler's desire for rehabilitative programming but rejected it as a basis for reconsidering Butler's sentences, reasoning:

> … [A]t the time of the sentencing hearing, the Court was well aware of the programming requests of Defendant. The Court stated on the record that similar programming for substance abuse treatment and critical thinking errors would be available through the IDOC even though Defendant was not granted a rider and that such programming could start immediately regardless of the length of the fixed portion of his sentence. It will be up to Defendant to pursue the available programming to address his substance abuse issues.

(R., pp.77-81, 154-58.) Although Butler claims on appeal that "the district court did not exercise reason by denying his motion" (Appellant's brief, p.8), this bare assertion is directly belied by the above-quoted language and fails to show an abuse of discretion.

As an alternative basis for denying Butler's Rule 35 motions, the district court, citing State v. Flores, 162 Idaho 298, 396 P.3d 1180 (2017), found it could not "use a Rule 35 motion for reconsideration to change an imposed sentence to a retained jurisdiction sentence." (R., pp.79, 156.) Butler argues the district court's ruling "reads *Flores* too broadly," contending "[a] request for retained jurisdiction is a request to 'reduce' a sentence because a period of retained jurisdiction suspends execution of the judgment and gives a defendant the possibility of being placed on probation" and, therefore, his request for a period of retained jurisdiction, after the court had already ordered execution of his sentence, falls within the scope of Rule 35. (Appellant's brief, pp.7-8 (citing I.C. § 19-2601(4).) Butler's argument fails. Although the issue in Flores was whether the defendant could use Rule 35 to request reinstatement of a period of retained jurisdiction following relinquishment, the Court's holding appears to be broader and supports the district court's ruling that Rule 35 does not permit a court, once it has ordered a sentence executed, to take back its jurisdiction. Specifically, the Flores Court held:

> Rule 35 does not create a general basis for requesting reconsideration of an order or a judgment in the criminal context. Rule 35 instead narrowly operates to permit the correction, modification, or reduction of criminal sentences in certain instances. Flores's request for jurisdiction to be reinstated does not constitute a correction, modification, or reduction of a criminal sentence.

Flores, 162 Idaho at 301-02, 396 P.3d at 1183-84. Because reinstatement of jurisdiction "does not constitute a correction, modification, or reduction of a criminal sentence," Butler's request that the district court take back its jurisdiction over the sentence it had already ordered executed for the purpose of retaining jurisdiction fell outside the scope of Rule 35.

For all of the above alternative reasons, Butler has failed to show the district court abused its discretion in denying his Rule 35 motions.

Conclusion

The state respectfully requests this Court to affirm Butler's convictions and sentences and the district court's orders denying Butler's Rule 35 motions for reduction of his sentences.

DATED this 19th day of April, 2018.

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

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of April, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JENNY C. SWINFORD
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

this is a prison offer. I mean, that is what he was looking at and he didn't try to finagle it. He didn't bitch and moan about it. He said I'm guilty. This what I did, you know, I want some help. And so, you know, he stepped up on both of these.

Again, I think a rider would be a great start for Doug. I know he's talked about it. He is excited about the possibility. He said in all the time that he has done, all this time that you hear about, he has never had an opportunity like that. Never had a program that was, sort of, just treatment based like that. So again, he is looking forward to that possibility if the Court would consider that.

He does have an LSI of 26, puts him in the moderate risk. He is someone who works. Doesn't seem to have a problem holding down a job. Again, when you read the PSI he has a new relationship with his mother since she has gotten clean. He has a girlfriend, Lindsey McNulty. I believe she is here today in support or Douglas. She is someone who has watched him battle this addiction, but indicates that she would support him if he would ever be released back out in the

community. So it is good to see that he has those supports and those things out there.

I think Doug knows that meth is his biggest issue right now. He is committed to addressing that and again, you know, that is why he ask asking for this rider. If he wasn't serious about this, you know, he knows he can do time. If he wanted to go do time and do some more drugs he would just ask to be imposed again, but that is not what he is looking at. He sees the dead end that he is heading down at this point.

So, again, we know there is a long history. We tried a drug court screening, unfortunately he was found inappropriate for that. But it is clear that substance abuse issues, you know, what is driving this conduct at this point. So again, he is someone who has two PCS charges picked up within days of each other. He has had some time to think about this, to clean up. And again, he immediately took responsibility even with a prison offer. He has had no issues since he has been in Ada County Jail. You hear about the problems that he has when he has been in prison, none of those whatsoever.

He has actually been a really enjoyable

client, I have to say. He is looking for help, Judge. He is asking for help. We are going to ask the Court to follow that recommendation of two plus five. Suspend that or retain jurisdiction on those counts and give Doug a chance at the rider program. Thank you.

THE COURT: Mr. Butler, do you have statement you would like to make to the Court?

THE DEFENDANT: Yes, ma'am.

Your Honor, like Reed said, I did -- I was introduced to this drug in ICC and I did everything I could to get it and I got addicted to it out there. And I continued to use, like he said, when I got out. It cost me my home, my car, almost the woman that I am in love with and pretty much took me to the dirt. But like he said, I admitted to these crimes because I did them. And I am not asking for leniency in the Court's sentencing, I am just asking you for help, Your Honor, because I do feel I can change. Thank you.

THE COURT: Thank you, sir.

Based on your admissions, your pleas of guilty to each of the possession of controlled substance charges in each of the cases and in an exercise of my discretion at sentencing. I have

consider the Toohill factors and the nature of the offence, the character of the offender. Any mitigating or aggravating factors, fulfilling the objectives of protecting society, achieving deterrence, rehabilitation or retribution.

Mr. Butler, I hear what your counsel is saying regarding that these two crimes were committed within a short amount of time. And I think we all recognize that. That you were being controlled by the methamphetamine at that time and so I think that's the consideration for the concurrent sentence. That we are not actually trying to hit you twice for two individual crimes. That you are going to be sentenced for each of those crimes, but the Court is going to run them concurrent based on the fact that they did occur so similar in time.

So the next question for the Court is what would be an appropriate sentence in this matter? And while normally, sir, I am a big fan of retained jurisdiction and the rider program, based on your criminal history and the fact that this is your ninth and tenth felonies, it certainly just doesn't justify at your age the rider program.

Additionally, the Court finds that the substance abuse programming as well as the critical thinking classes are the same classes that are available on the rider program that are available that are in custody at IDOC. So you need to take advantage of those courses and you need to start taking advantage of them as soon as you get there. They no longer require you to wait until you're X amount of months away from release. You can start taking the classes the minute you get in there. So if you are really ready to change like you say, then make that change when you are at IDOC. And instead of getting involved in drugs that are available at the prison, unfortunately, but that's the reality, you need to have a complete different mindset on who you associate with when you are incarcerated and how you perform when you are incarcerated.

So the Court's going to sentence you, sir, to two-and-a-half years fixed plus four-and-a-half years indeterminate on each count in each case to run concurrent. The Court is going to give you credit of time served of 24 days in case 17- -- I am not sure I have this correct. I have a lower credit for time served in the

earlier case than the later case; would that be correct?

MS. HIGBEE: Yeah. That could be just because he had posted bond and I don't know if he was remanded on the older case.

THE COURT: Let me take a quick look.

MS. HIGBEE: I don't think that bond, I guess, was ever revoked that he posted.

THE COURT: All right. In 17-25356 you have 24 days of credit for time served. In case 17-29176 you have 91 days of credit for time served. I have already indicated the counts I am going to dismiss. The Court's ordering standard court cost in each case. There is a DNA requirement and a thumbprint impression.

You need to decide, sir, at your age if prison is where you want to be or if you want to be out with freedoms, able to establish healthy relationships, stay sober and enjoy life. I can't make that decision for you. You are going to have to decide how you want to proceed. This is less time than you did on the count in front of, I believe, Judge Greenwood where you were ordered to serve five years.

So the message I am trying to send is I

am not trying to throw you in jail and throw you are prison and throw away the key. That's not the goal of the Court. What I want is a sufficient sentence to deter you from future criminal activity and additional felonies. Adequate time to complete the programming in IDOC. And then time to prove yourself when you are out on parole that the change you want, the help you want to stop using drugs that you take advantage of. So you are going to need to come up with a plan when you are allowed parole of the treatment that you are immediately going to start when you are released from IDOC and how you are going to take the programming to heart to make a change in your life.

If you disagree with the Court's judgment, sir -- let me state one other thing. The Court is not imposing a fine in either case due to the fact that I want you getting substance abuse treatment and having the ability to pay for that treatment when you're released. So I am not trying to burden you with a fine based on the fact that you're currently indigent. And that using drugs, basically as you stated, cost you your car and all the rest of the assets that you formally

were in possession of.

You have a right to appeal in each of the cases. If you disagree with the Court's judgment you have a right to an attorney for purposes of an appeal. If you cannot afford an attorney one will be appointed at public expense for any appeals. Any appeal must be filed within 42 days.

Are there any issues that the Court has failed to address?

MS. HIGBEE: No, Your Honor.

THE COURT: Very good, sir.

Good luck to you.

(Hearing concluded.)