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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 45565
)	
v.)	BANNOCK COUNTY NO. CR 2015-8827
)	
CRAIG BOGAN,)	
)	
Defendant-Appellant.)	APPELLANT'S BRIEF
_____)	

STATEMENT OF THE CASE

Nature of the Case

Craig Bogan was sentenced to a unified term of eight years, with three years fixed, for aggravated battery. He filed a timely motion pursuant to Rule 35 which the district court denied. Days later, after discovering that documents he had sent to his attorney in connection with his Rule 35 motion had been misfiled by the attorney, and that these documents had not been provided to the district court, Mr. Bogan filed a motion to have the district court reconsider his Rule 35 based on his attorney's inadvertence. The district court denied the motion, ruling that it lacked jurisdiction to hear the matter, or alternatively, that the additional information did not warrant a reduction of sentence. On appeal, and mindful of the holdings in *State v. Flores*, 162

Idaho 298 (2017), that the Idaho Rules of Criminal Procedure have no rule similar to I.R.C.P. 11.2(1)'s motion for reconsideration, and of the Court of Appeals' decision in *State v. Bottens*, 137 Idaho 730, 732-33 (2002), that a motion to reconsider the denial of a Rule 35 motion is an improper successive motion prohibited by Rule 35, Mr. Bogan asserts the district court had jurisdiction to consider his request for reconsideration based on his attorney's inadvertence, and that the district court abused its discretion by denying his motion for Rule 35 relief.

Statement of the Facts and Course of Proceedings

The State charged Mr. Bogan with aggravated battery. (R., pp.12-13; 34-39.)¹ He pled guilty to the charge, and in exchange, the State dismissed a second aggravated battery charge stemming from the same incident, and agreed to recommend no more than a unified term of six years, with two years fixed. (R., pp.185-197; Tr. 9/19/16, p.8, L.5 – p.19, L.24.) At sentencing, both the prosecutor and Mr. Bogan asked the court to impose a unified term of six years, with two years fixed, though Mr. Bogan additionally asked the court to retain jurisdiction. (Tr. 12/5/16, p.11, Ls.3-22, p.14, Ls.11-18, p.16, Ls.14-15, p.18, Ls.9-13.) The district court rejected the parties' joint recommendation and instead imposed a unified sentence of eight years,

¹ Mr. Bogan has a prior appeal from the original judgment of conviction, *State v. Bogan*, Supreme Court docket No. 44771, and the Reporter's Transcripts and Clerk's Record in that appeal have been augmented into this case by the Supreme Court's Order Augmenting Appeal, filed December 5, 2015. By that same Order, a limited Clerk's Record and Reporter's Transcript was prepared. Citations to that limited record use the designations "Aug.R." and "Aug.Tr."; all other citations refer to the record filed in the prior appeal.

with three years fixed, declining to retain jurisdiction.² (R., pp.202-205; Tr. 12/5/16, p.36, Ls.12-14.)

Mr. Bogan timely filed a Rule 35 motion seeking a reduction of his sentence. (R., p.217.) In support of that motion, Mr. Bogan's counsel submitted a letter of character reference from his employer (Aug.R., p.16), a letter from the recovery program he had been attending prior to incarceration (Aug.R., p.17), and a letter from Cresta Dittman (Aug.R., p.22). Following a hearing, the district court denied the motion. (Aug.R., pp.26, 28.)

Several days later, counsel for Mr. Bogan filed a motion to reconsider the denial of the Rule 35 motion, "on the grounds and for the reasons that there is additional information which was misfiled and inadvertently not submitted for the Court's consideration at the hearing on the Rule 35 Motion." (Aug.R., p.30.) Attached to the motion is a twenty-page packet that his counsel had received from Mr. Bogan, and which contained multiple letters and documents attesting to the financial and emotional hardship faced by Mr. Bogan's wife, Cresta Miller-Bogan, as a result of Mr. Bogan's incarceration. (*See* Aug.R., pp.33-52.) These letters also detail the classes Mr. Bogan had taken at the recovery center. (Aug.R., p.39.)

At the subsequent hearing on the matter, Mr. Bogan's counsel recognized that the district court generally lacks jurisdiction to reconsider a denial of a Rule 35 motion, but he urged the district court to treat his motion under Rule 60(b) of the Idaho civil rules, as motion for relief based on inadvertence. (Aug.Tr., p.8, L.14 – p.9, L.3.) The district court denied the motion concluding that it lack jurisdiction, but that even if it had jurisdiction, the additional information

² Mr. Bogan filed a timely appeal from the judgment of conviction challenging his excessive sentence (R., pp.206-209), and the Court of Appeals has since affirmed. *See State v. Bogan*, 2017 Unpublished Opinion No. 657, Supreme Court docket no. 44771 (Ct. App. Nov. 30, 2017).

presented did not warrant a reduction of the sentence originally imposed. (Aug.R., p.58; Aug.Tr., p.12, L.22 – p.13, L.13.)

Mr. Bogan filed a Notice of Appeal that is timely from the district court’s order denying his motion for reconsideration. (Aug.R., pp.58, 60.)

ISSUE

Did the district court err when it denied Mr. Bogan’s motion for reconsideration of the denial of his Rule 35 motion?

ARGUMENT

The District Court Erred When It Denied Mr. Bogan’s Motion To Reconsider The Denial Of His Rule 35 Motion

A. The District Court Had Jurisdiction To Entertain Mr. Bogan’s Motion For Reconsideration, Under The Principles Recognized By I.R.C.P. 60(b)

The question of the district court’s jurisdiction to hear and rule upon a defendant’s Criminal Rule 35(b) motion for a reduction of sentence is subject to free review by this Court. *See State v. Bottens*, 137 Idaho 730, 731 (Ct. App. 2002). Mr. Bogan is mindful of the Idaho Court of Appeals’ holding in *State v. Bottens* that a motion to reconsider the denial of a rule 35 motion is an improper successive Rule 35 motion that is prohibited by Rule 35, and that the district court lacks jurisdiction to hear it. 137 Idaho at 732-33.³ He notes, however, that in *Bottens*, the Court of Appeals was addressing its prior decisions which had permitted the district court to entertain a request for reconsideration as a motion to alter or amend judgment, under I.R.C.P. 59(e). 137 Idaho at 732 (*citing State v. Hickman*, 119 Idaho 7, 9 (Ct. App.1990) and

³ Mr. Bogan is likewise mindful of the Supreme Court’s observation in *State v. Flores*, that “there is no criminal procedural rule that provides a basis to reconsider a decision” like a decision to relinquish jurisdiction. 162 Idaho 298, 302, n.1 (2017).

State v. Lenwai, 122 Idaho 258, (Ct. App. 1992)). However, it is unclear that the Court of Appeals intended its holding in *Bottens* to preclude a defendant from seeking relief on the grounds of his counsel's inadvertence, which is one of the grounds for relief recognized by Rule 60(b) of the Idaho Rules of Civil Procedure. *See* I.R.C.P. 60(b)(1). Because the Idaho Criminal Rules do not directly speak to this ground for relief, Mr. Bogan urges this Court to apply I.C.R.P. 60(b)(1) by analogy. *See State v. Walker*, 161 Idaho 1, 2 (2015) (where criminal rules did not set forth a time limit for filing a motion for reconsideration the Court of Appeals will look to the Idaho Civil Rules of Procedure for guidance).

I.C.R.P. 60(b)(1) provides that the trial court may relieve a party or its legal representative from a final judgment or order by reason of “mistake, inadvertence, surprise, or excusable neglect.”

Mistake or inadvertence referred to in Rule 60(b) applies primarily to errors or omissions committed by an attorney or by the court that are not apparent in the record. Any claim of mistake must be a mistake of fact and not a mistake of law. ... The conduct constituting excusable neglect must be that which would be expected of a reasonably prudent person under the same circumstances.

PHH Mortg. v. Nickerson, 160 Idaho 388, 397 (2016) (citations omitted).

Here, Mr. Bogan asked the district court for relief “on the grounds and for the reasons that there is additional information which was misfiled and inadvertently not submitted for the Court’s consideration.” (Aug.R., p.30; *see also* Aug.Tr., p.9, L.25 – p.9, L.3.) Counsel’s inadvertence was a mistake of fact, not a mistake of law, and counsel promptly moved the court for relief upon realizing his inadvertence. (Aug.R., pp.28, 30.) Mr. Bogan submits that, applying the guiding principles of I.C.R.P. 60(b)(1), the district court did have jurisdiction to grant Mr. Bogan’s request to re-hear the motion and to consider the additional information.

B. The District Court Erred When It Denied Mr. Bogan's Motion On The Merits

Given the additional letters and documents Mr. Bogan presented with his request for relief, the district court's refusal to order retained jurisdiction or to reduce Mr. Bogan's sentence was unreasonable, representing an abuse of the district court's discretion. A motion to reduce 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 where new or additional information shows that the sentence originally imposed was excessive. *State v. Huffman*, 144 Idaho 201, 203 (2007). The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable; to succeed on appeal, Mr. Bogan must establish "that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment, which 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." *State v. Knighton*, 143 Idaho 318, 319029 (2006).

At the original sentencing, Mr. Bogan presented the district court with information from his wife, Cresta Miller-Bogan, which provided insight into Mr. Bogan's character. (PSI, p.68.)⁴ Ms. Miller-Bogan stated, "There are two sides to Craig. The sober Craig is loving, caring, and helpful. ... The intoxicated Craig is angry, aggressive and can be somewhat mean." *Id.* Ms. Miller-Bogan noted that when he drinks, Mr. Bogan "often experiences flash backs of past

⁴ Citations to the Presentence Investigation Report and its attached documents will use the designation "PSI," and will include the page numbers associated with the electronic file containing those documents; Mr. Bogan's PSI is included within the record in the prior appeal, No. 44771.

childhood abuse, molestations and other traumatic emotional abuse.” *Id.* However, when Mr. Bogan is sober, he puts the needs of others, including strangers, ahead of his own needs. *Id.*

At the original sentencing, the district court was also presented with the information contained within the presentence report, showing that Mr. Bogan suffered physical, sexual, and emotional abuse when he was a child: his mother, who suffers from bipolar disorder, physically and emotionally abused him; he was the victim of sexual abuse at the hands of a babysitter when he was five or six; and when he was nine he was abused by a camp counselor. (PSI, p.20.) The PSI also detailed Mr. Bogan’s drinking problem, which began when he was 16 and continued over the years. (PSI, pp.26-27.) Mr. Bogan recognized, “I used to be the funny drunk, then I became the angry drunk.” (PSI, pp.26-27.) He stated, “I realize now I’m an alcoholic. Whether I self-medicate or not, I take one drink and drink until I pass out.” (PSI, p.27.) The PSI also documents Mr. Bogan’s multiple mental health diagnoses, including anxiety disorder, post-traumatic stress disorder, and, like his mother, bipolar disorder. (PSI, p.26.) The district court was advised that Mr. Bogan now accepts the fact he has mental problems, and has started taking responsibility for his actions and the steps necessary to deal with his issues without the use of alcohol. (PSI, pp.7, 22.) The information confirms that that Mr. Bogan “participated fully” in the Recovery 4 Life program, and had passed all of his Urine Analysis tests. (PSI, p.71), and that during the time he was living at the Ustick/Hervey Sober Living House, Mr. Bogan was helpful and courteous, and followed all of the house rules. (PSI, p.72.) Additional letters in support were provided at that time by Mr. Bogan’s father-in-law, his mother-in-law, and two other friends, who all describe Mr. Bogan as a kind and helpful person, who is striving to improve himself. (PSI, pp.69-70, 72-73.)

With his subsequent motion for reconsideration of the denial and his Rule 35 motion – which is the subject of this appeal – Mr. Bogan presented new and additional information that demonstrates the financial hardship that his wife, Cresta Miller-Bogan, has and will continue to suffer as a result of his incarceration; the information also illustrates the heavy toll his absence has taken on her physical and emotional wellbeing. (Aug.R., pp.14-25.) As detailed in the letters that accompany the motion, Ms. Miller-Bogan recently underwent a series of foot surgeries and continues to suffer from the substantial and painful complications of those procedures; she needs Mr. Bogan to help her manage her daily life as she recovers from these unfortunate medical conditions. (Aug.R., p.25, 42-46.) She is in poor health, suffers asthma and sleep apnea (she is on a C-PAC machine), and requires live-in supervision. (Aug.R., pp.35, 42-46.) Ms. Miller-Bogan’s letter, as well the letter of others who have tried to help her, show she has also suffered increased anxiety and depression since Mr. Bogan’s incarceration. (Aug.R., p.38.)

Mr. Bogan’s incarceration has placed a serious financial burden on Ms. Miller-Bogan. In addition to her medical expenses, she has incurred ordinary and extraordinary expenses trying to maintain the family home. (Aug.R., pp.38, 47-51.) However, as indicated in Ms. Miller-Bogan’s letter, her husband has a job waiting for him upon his release. (Aug.R., p.38.)

In light of this new and additional information, Mr. Bogan’s unified sentence of eight years, with three years fixed, is excessive. The district court’s refusal to grant a reduction or to order retained jurisdiction was unreasonable and represents an abuse of discretion.

CONCLUSION

Mr. Bogan respectfully requests that this Court vacate the district court's order denying his motion for reconsideration, and that it remand his case to the district court with directions to order retained jurisdiction or else to reduce his sentence. Alternatively, he asks this Court to reduce his sentence as it deems appropriate.

DATED this 1st day of May, 2018.

_____/s/_____
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of May, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

CRAIG BOGAN
INMATE #121390
ICIO
381 W HOSPITAL DRIVE
OROFINO ID 83544

ROBERT C NAFTZ
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENT V REYNOLDS
BANNOCK COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

KAC/eas