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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45671
Plaintiff-Respondent,)	
)	Kootenai County Case No.
v.)	CR-2017-4331
)	
RONALD VAUGHN HERRERA,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Herrera failed to establish that the district court abused its discretion by denying his Rule 35 motion for reduction of his unified sentence of 25 years, with 10 years fixed, imposed following his guilty plea to sexual battery of a minor?

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

Herrera pled guilty to sexual battery of a minor and the district court imposed a unified sentence of 25 years, with 10 years fixed. (R., pp.77-79.) Herrera filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.80-81, 91-92.) Herrera filed

a notice of appeal timely from the district court's order denying his Rule 35 motion. (R., pp.93-96.)

Herrera asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence in light of testimony presented by psychosexual evaluator (Dr. Paul Wert), the fact that he had been assaulted in prison, had not yet received programming while in custody, and that the district court did not "give proper weight and consideration" to mitigating factors of his case. (Appellant's brief, pp.2-5.) Herrera has failed to establish an abuse of discretion.

In State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007), the Idaho Supreme Court observed that a Rule 35 motion "does not function as an appeal of a sentence." The Court noted that where a sentence is within statutory limits, a Rule 35 motion is merely a request for leniency, which is reviewed for an abuse of discretion. Id. Thus, "[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." Id. Absent the presentation of new evidence, "[a]n appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence." Id. Accord State v. Adair, 145 Idaho 514, 516, 181 P.3d 440, 442 (2008).

Herrera did not appeal the judgment of conviction in this case. The only information he provided in support of his Rule 35 motion was the testimony of psychosexual evaluator (Dr. Paul Wert), his claim that he had been assaulted in prison, and that he had not yet received programming while incarcerated. (Appellant's brief, p.3.) At the Rule 35 motion hearing, Dr. Paul Wert stated there was an error in the report, but did not know what significance the error

had. (10/12/17 Tr., p. 11, L. 17 – p. 12, L. 5.) Ultimately Dr. Wert did not present any new information. (Compare 10/12/17 Tr., p.6, L.4 – p.12, L.5 with PSI, pp.2-13¹.)

Herrera also testified during the Rule 35 hearing, and stated that he had been assaulted while incarcerated and had not received any programming. (10/12/17 Tr., p.13, L.4 – p.20, L.11.) Challenges to prison conditions are more appropriately brought in a post-conviction proceeding or a petition for a writ of habeas corpus. State v. Leach, 135 Idaho 525, 532, 20 P.3d 709, 716 (Ct. App. 2001). Similarly, the placement of inmates in programs lies within the discretion of the Idaho Department of Correction, and “alleged deprivation of rehabilitative treatment is an issue more properly framed for review either through a writ of habeas corpus or under the Uniform Post-Conviction Procedure Act.” State v. Sommerfeld, 116 Idaho 518, 520, 777 P.2d 740, 742 (Ct. App. 1989) (affirming district court's denial of defendant's I.C.R. 35 motion).

The state submits that Herrera has failed to establish that the district court abused its discretion by denying Herrera’s Rule 35 motion for a reduction of sentence, for reasons more fully set forth in the attached excerpt of the Rule 35 hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

¹ PSI page numbers correspond with the page numbers of the electronic file “Herrera Sealed 45671.pdf.”

Conclusion

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

DATED this 4th day of June, 2018.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of June, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

ELIZABETH ANN ALLRED
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

APPENDIX A

1 sentence as originally imposed.
 2 Thank you.
 3 THE DEFENDANT: Can I say something?
 4 THE COURT: No.
 5 THE DEFENDANT: Now.
 6 The — the prosecution blows a bunch of smoke
 7 and — and possibilities.
 8 THE COURT: Mr. Herrera, would you please be
 9 quiet? I'm trying to read. And your attorney will be given
 10 a chance to make any response to the State's argument, but
 11 you don't get a right of allocution in a Rule 35.
 12 You know, I don't have a recollection of the
 13 neighbor 16 or the wife's niece 14. Where is that mentioned
 14 in the PSI or — I'm not finding it in my notes, and I don't
 15 have a clear recollection of it now three months down the
 16 road so —
 17 MS. SIMMONS: Your Honor, if I may have a moment.
 18 I was going off of Miss McClinton's notes, so if I may have
 19 a moment, please.
 20 THE COURT: And then there was I guess another
 21 thing that's related to that. There's a — obviously,
 22 Dr. Wert's report. And I don't recall that issue coming out
 23 in the full disclosure polygraph.
 24 There's a victim "BM," and I don't know if that's
 25 one of those people.

1 Prior to this offense Mr. Herrera had had
 2 insignificant misdemeanor criminal history. This is the —
 3 that was out of the '90s, and since then has maintained a
 4 clean record.
 5 So, while the State doesn't find any merit in two
 6 weeks of not getting into any trouble, there is a period
 7 from 1999 to 2012 that show no charges of any sort.
 8 Based on the disclosure by Mr. Herrera as to the
 9 trauma or abuse that he has received himself as a young man,
 10 I do believe that this is a case that is appropriate for
 11 some sort of treatment, at least sooner than ten years. So
 12 we renew our request that the Court consider modifying the
 13 fixed portion of his sentence and converting that to the
 14 indeterminate portion to satisfy the goals of sentencing.
 15 THE COURT: All right.
 16 Well, I am going to deny the motion. The
 17 sentence — the Rule 35 motion is denied.
 18 The sentence remains 10 years fixed, 15
 19 indeterminate, total of 25.
 20 All of my comments that I made on August 1st, 2017
 21 pertain today. The only thing that really has changed —
 22 nothing has changed I guess in Mr. Herrera's favor.
 23 The likelihood of re-offense, or the assessments
 24 made by Paul Wert worth I think are more at issue today,
 25 based on what I pointed out to Dr. Wert, and it wasn't made

1 MS. SIMMONS: It is, Your Honor.
 2 THE COURT: And then a different victim "N." I
 3 don't know if that's the other person. That's on Page —
 4 MS. SIMMONS: That is correct, Your Honor.
 5 THE COURT: Okay.
 6 MS. SIMMONS: I apologize for not making that more
 7 clear.
 8 THE COURT: All right.
 9 And, Miss Montalvo.
 10 MS. MONTALVO: Well, Your Honor, it's my
 11 understanding that Mr. Herrera has entered a guilty plea to
 12 one single count of sexual battery on a minor listing HM as
 13 the named victim. The conduct that he has pled guilty to is
 14 fondling her breasts and her buttocks.
 15 This is a situation that Mr. Herrera has taken
 16 accountability for. He's anxious to be able to get into
 17 treatment to be able to address this issue and is attempting
 18 to make amends through reflection.
 19 The assessments that are completed by the
 20 Department of Corrections, the PSE, things of those nature
 21 are the only tools that the Court has to be able to assess
 22 the level of risk that a person poses if reintegrated into
 23 the community. The PSE put him at a low risk to a moderate
 24 risk of sexual recidivism. The LSI score placed him at a
 25 level 11, which is a low to moderate score.

1 clear by Dr. Wert how that cuts. But either the assessment
 2 at 12 — of 12 is an error, or the range of 4 to 11 is an
 3 error. I don't know. But based on the report it would seem
 4 like Mr. Herrera on that one diagnostic criteria, the
 5 Stable-2007 is above moderate.
 6 I'll give Mr. Herrera the benefit of the doubt,
 7 and that is that he is in the moderate level, according to
 8 that diagnostic tool.
 9 I think I made it pretty clear in my comments at
 10 sentencing that my sentencing decision isn't really about
 11 rehabilitation. I wish it was. I wish that from day one,
 12 Mr. Herrera, you were being given rehabilitation in the
 13 penitentiary. I can't control what the Department of
 14 Corrections does in that regard. We've been assured as
 15 judges that the Department of Corrections will do something
 16 along the lines of treatment as you approach parole
 17 eligibility.
 18 If all I was concerned about in your case was
 19 rehabilitation, then I — I would love to be able to try and
 20 give you the benefit of the retained jurisdiction, but
 21 that's not what's going on here. There is other issues that
 22 are paramount to your rehabilitation. One of those is
 23 protection of society, which we have to hold highest
 24 according to the Idaho Supreme Court. Another is deterrence
 25 of you and others. And another one is punishment.

