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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**Nos. 45483 & 45484**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case Nos.**
v.	)	**CR-2017-5661 & CR-2017-10118**
	)	
JAMIE LYNN BENNETT,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Jamie Lynn Bennett appeals from her judgments of conviction and sentences in Kootenai County case numbers CR-2017-5661 (burglary) and CR-2017-10118 (criminal possession of a financial transaction card). For the first time on appeal, Bennett asserts that the prosecutor violated her plea agreement in his sentencing recommendation.

Statement Of The Facts And Course Of The Proceedings

This consolidated appeal arises from two separate criminal cases. In CR-2017-5661, the state charged Bennett with grand theft of a financial instrument (Count I), and three counts of burglary (Counts II, III, and IV), with a persistent violator enhancement. (R., pp.34-36.) Pursuant to an I.C.R. 11(f) plea agreement, which did not bind the court to the state's sentencing recommendation (6/8/17 Tr., p.5, Ls.10-13)[1], Bennett pled guilty to Count II (burglary – by entering a Chevron store with the intent to commit theft via a stolen financial transaction card), and the remaining charges and sentencing enhancement were dismissed on the state's motion (R., pp.45-49; PSI p.3). As part of the plea agreement, the state agreed to recommend "NTE Rider," which was shorthand for "not to exceed a Rider" (i.e., retained jurisdiction). (R., p.49; see 8/17/17 Tr., p.4, Ls.18-24.)

In CR-2017-10118, the state charged Bennett with criminal possession of a financial transaction card (Count I) and grand theft by acquiring lost property (Count II), with a persistent violator enhancement. (R., pp.116-118.) Bennett's arraignment on those charges was set at the same time as her sentencing hearing in the first case. (8/17/17 Tr., p.3, Ls.4-7.) At that hearing,

[1] One of the dates on the transcript of that arraignment hearing incorrectly reads June 6, 2018; it should read June 8, 2017. (See R., p.41 (minutes); see generally 6/8/17 Tr., pp.1-4.)

pursuant to another Rule 11(f) plea agreement, Bennett pled guilty to criminal possession of a financial transaction card and the remaining count and sentencing enhancement were dismissed on the state's motion. (R., pp.120-126.) As in the first case, the plea agreement required the state to recommend "NTE Rider" at sentencing. (R., p.120; 8/17/17 Tr., p.4, Ls.12-24.)

After Bennett pled guilty to criminal possession of a financial transaction card in CR-10118, the parties and court agreed to sentence Bennett in both cases at that time. (8/17/17 Tr., p.3, L.14 – p.4, L.24; p.9, Ls.12-13.) After the prosecutor recounted the specifics of Bennett's "terrible record, as indicated in the PSI[,]" and several comments by the presentence investigator (8/17/17 Tr., p.11, L.24 – p.12, L.2), he said:

> The state would recommend five years fixed, five years indeterminate, total underlying of ten years.
>
> No objection to a retain [sic] jurisdiction if the Court feels it's warranted.
>
> Recommend those on both cases to run concurrent.

(8/17/17 Tr., p.12, L.23 – p.13, L.4). Bennett's attorney did not object to the prosecutor's recommendation. (See generally 8/17/17 Tr., p.13, L.13 – p.18, L.12.)

The trial court sentenced Bennett to a unified ten years, with two years fixed, for burglary, and a concurrent unified five years, with two years fixed, for criminal possession of a financial transaction card. (R., pp.57-62, 127-131; 8/17/17 Tr., p.17, Ls.4-17.) Bennett filed a joint Rule 35 motion requesting sentence reductions in each case (R., pp.63-64, 139-140), which the district court denied at a hearing in which Bennett participated telephonically (see generally 1/22/18 Tr.). Bennett filed timely notices of appeal from each judgment. (R., pp.68-71, 132-135.) The Idaho Supreme Court subsequently entered an order consolidating the two appeals for all purposes. (R., pp.75, 143.)

ISSUES

Bennett states the issues on appeal as:

I. Was Ms. Bennett's Constitutional Right to Due Process violated at the sentencing hearing when the State breached the plea agreement, and Ms. Bennett's counsel's failure to object cannot be excused as a tactical decision?

II. Did the district court abuse its discretion when it imposed upon Ms. Bennett a ten-year sentence, with two years fixed, for a burglary conviction, plus a concurrent five-year sentence, with two years fixed, for a fraud conviction?

III. Did the district court abuse its discretion when it denied Ms. Bennett's Rule 35 motions in light of her testimony regarding her rehabilitation and minimal risk to the community, demonstrating a reduced sentence would fulfill sentencing goals?

(Appellant's Brief, p.4.)

The state rephrases the issues as:

1. Has Bennett failed to show that the prosecutor's unobjected-to comments at sentencing constituted a breach of the plea agreement, much less that the alleged breach constitutes fundamental error?

2. Has Bennett failed to show that the district court abused its discretion by imposing excessive sentences or by denying her Rule 35 motions for reduction of sentence?

ARGUMENT

I.
Bennett Has Failed To Show That The Prosecutor Breached The Plea Agreement, Much Less That The Alleged Breach Constitutes Fundamental Error

A. Introduction

Pursuant to a plea agreement, the prosecutor agreed to recommend a sentence that was "not to exceed" a Rider.[2] On appeal, Bennett argues for the first time that the prosecutor breached the plea agreement at the sentencing hearing. A review of the record shows that the prosecutor's sentencing recommendation was consistent with the plea agreement, and that Bennett has failed to demonstrate fundamental error.

B. Standard Of Review

When raised for the first time on appeal, a claim that the state breached a plea agreement will only be reviewed for fundamental error. State v. Gomez, 153 Idaho 253, 281 P.3d 90 (2012). "Whether a plea agreement has been breached is a question of law to be reviewed by this Court *de novo*, in accordance with contract law standards." State v. Schultz, 150 Idaho 97, 244 P.3d 241 (Ct. App. 2010) (citing State v. Jafek, 141 Idaho 71, 73, 106 P.3d 397, 399 (2005); Puckett v. United States, 556 U.S. 129, 137 (2009)).

C. Bennett Has Failed To Demonstrate That The Prosecutor's Sentencing Recommendation Breached The Plea Agreement And Constituted Fundamental Error

The issue Bennett seeks to present on appeal, an alleged violation of her plea agreement, was never presented to, nor decided by, the district court. The issue is therefore unpreserved and

[2] The state did not agree to recommend a Rider; it agreed to recommend a sentence that was not to exceed a Rider, which could have meant either probation or a Rider.

can only be addressed under the fundamental error standard articulated by the Court in State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010). To show fundamental error,

> the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

Id. at 228, 245 P.3d at 980. Application of this legal standard to the facts of this case demonstrates that Bennett has failed to show error, much less fundamental error entitling her to review of this unpreserved issue.

1. The Prosecutor Followed The Sentencing Recommendation And Did Not Violate Bennett's Constitutional Rights

Bennett argues that her "plea rested on the State's promise to recommend a sentence no harsher than a rider, *yet the State recommended prison*." (Appellant's Brief, pp.8-9 (emphasis added).) However, the record shows that the prosecutor did not breach the plea agreements in Bennett's case. Therefore, Bennett has failed to meet the first prong of Perry by showing "that one or more of [her] unwaived constitutional rights were violated." Perry, 150 Idaho at 226, 245 p.3d at 978.

When the state breaches its obligation under a plea agreement to recommend a specific sentence, it violates the defendant's due process rights. Puckett, 556 U.S. at 136 (citing Santobello v. New York, 404 U.S. 257 (1971)); see also Gomez, 153 Idaho at 256, 281 P.3d at 93. The plea agreements in both of Bennett's cases required the state's sentencing recommendations not to exceed a Rider ("NTE Rider"). (R., pp.49, 120; see 8/17/17 Tr., p.3, L.12 – p.4, L.24.) At the sentencing hearing the prosecutor said:

> The state would recommend five years fixed, five years indeterminate, total *underlying* of ten years.
>
> No objection to a retain [sic] jurisdiction if the Court feels it's warranted.
>
> Recommend those on both cases to run concurrent.

(8/17/17 Tr., p.12, L.23 – p.13, L.4 (emphasis added).) Notwithstanding this recommendation, the district court sentenced Bennett to a unified ten years, with two years fixed, for burglary, and a concurrent unified five years, with two years fixed, for criminal possession of a financial transaction card and declined to retain jurisdiction. (R., pp.57-62, 127-131; 8/17/17 Tr., p.17, Ls.4-17.)

Bennett now blames the prosecutor for the district court's sentencing decision and, for the first time on appeal, asserts that the prosecutor breached his obligations under the plea agreement. (Appellant's brief, pp.6-19.) Review of the record and application of the correct legal standards, however, shows no breach, much less fundamental error entitling Bennett to review of this unpreserved issue.

Contrary to Bennett's contention, the state did not recommend prison – at least not in the way she suggests. (See Appellant's Brief, pp.8-9 ("yet the State recommended prison").) In requesting an *underlying* sentence of ten years, the prosecutor was laying the foundation for either a probation sentence or a Rider. If the prosecutor had been requesting an executed sentence of ten years, with five years fixed, he would not have characterized the sentence as "underlying" – it would not have been underlying anything. In State v. Doe, 138 Idaho 409, 411, 64 P.3d 335, 337 (Ct. App. 2003) (emphasis added), the Idaho Court of Appeals explained:

> [I]n State v. Fuhriman, 137 Idaho 741, 745, 52 P.3d 886, 890 (Ct. App. 2002), we held that no breach occurred where the State agreed to recommend "not more than a rider" and, at the sentencing hearing, additionally recommended that the underlying sentence be of four to seven years' duration. *The agreement to*

> *recommend not more than a rider, we held, implicitly recognized that there would be an underlying sentence*.

The agreement to recommend "not more than a rider" in Fuhriman "implicitly recognized that there would be an underlying sentence." Id. The converse is also true – a recommendation for an underlying sentence necessarily contemplates that the execution of the sentence will be suspended and the defendant will be placed on probation or sent on a Rider. See id.; State v. Walker, 161 Idaho 1, 2, 382 P.3d 847, 848 (Ct. App. 2015) ("The modification judge, pursuant to Idaho Criminal Rule 35, revoked probation and, *sua sponte*, reduced the underlying sentence to one year determinate followed by two years indeterminate."); State v. Stocks, 153 Idaho 171, 174, 280 P.3d 198, 201 (Ct. App. 2012) ("Second, the information recounted by the prosecutor is relevant to both the underlying sentence to be imposed and to the length of a term of probation . . . ."). Similarly, in Bennett's case, the prosecutor's recommendation of an underlying sentence clearly signaled a recommendation for either probation or a Rider.

On its face, by stating he had "[n]o objection to a retain [sic] jurisdiction if the Court feels it's warranted," the prosecutor did not recommend a sentence that would *exceed* a Rider. Further, the prosecutor's comment, "if the Court feels it's warranted," referred to what the district court had informed Bennett of when she entered her first guilty plea; that it was "not bound to follow any sentencing recommendations that the lawyers may make." (6/8/17 Tr., p.5, Ls.10-12.) Accordingly, the decision of whether to sentence Bennett to a Rider was dependent upon the district court's discretionary determination that a Rider was "warranted." The prosecutor's recognition of that fact did not convert his recommendation into a request to sentence Bennett in excess of a Rider.

Finally, the prosecutor's recitation of Bennett's lengthy criminal history (an undeniably "terrible record" of seven felony and 17 misdemeanor convictions) and comments by the

presentence investigator (Bennett was self-serving, antisocial, lacked remorse, etc.) did not violate the plea agreement to make a recommendation that did not exceed a Rider. (See 8/17/17 Tr., p.11, L.23 – p.12, L.22.) It appears more likely that the prosecutor cited Bennett's past criminality and questionable character to support his recommendation that the court impose the maximum underlying sentence of 10 years for burglary (see I.C. § 18-1403). This was not a breach. See State v. Stocks, 153 Idaho 171, 174-175, 280 P.3d 198, 201-202 (Ct. App. 2012) ("[T]he information recounted by the prosecutor is relevant to both the underlying sentence to be imposed and to the length of a term of probation, had the district court decided to grant probation, as the prosecutor made no agreement to stand silent or to limit his ability to persuade the court that either period of time be significant. In similar circumstances, we have previously found no breach of a plea agreement."); State v. Orr, Docket No. 43592, 2016 WL 4413240, at *2 (Idaho Ct. App. 2016) ("Absent an agreement to the contrary, the prosecutor may refer to information relevant to sentencing and refer to the objectives of sentencing.)

The prosecutor did not violate the plea agreement; he fulfilled his obligation to recommend a sentence that did not exceed a Rider. Bennett's constitutional rights, therefore, were not violated and she cannot show fundamental error entitling her to review of this unpreserved issue.

2. Bennett Has Failed To Show That Any Error Was Clear From The Record

Bennett has also failed to meet the second prong of Perry, which requires her to show that a constitutional error is clear or obvious from the appellate record, and that trial counsel's failure to object was not a tactical decision.[3] Perry, 150 Idaho at 224, 226, 245 P.3d at 976, 978. Because

[3] It appears that Bennett's argument in regard to the first requirement for showing fundamental error under Perry (i.e., whether the alleged error violated one or more of her unwaived constitutional rights) is made within her argument that, under Perry's second requirement, such

the prosecutor's sentence recommendation did not clearly violate the plea agreement, it was likely a tactical decision by defense counsel not to object to it.

In determining whether a prosecutor's comment violated due process, the Idaho appellate courts do "not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." State v. Severson, 147 Idaho 694, 719, 215 P.3d 414, 439 (2009) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974)).

Bennett asks this Court to read into the prosecutor's sentencing recommendation a request that the court impose and execute a prison sentence. Bennett asserts the prosecutor breached the plea agreement by telling the sentencing court he had no objection to a Rider "if the Court feels it's warranted." (Appellant's Brief, pp.8-13.) From there, Bennett contends that, by focusing "on negative aspects of [her] PSI, emphasizing the comments regarding appropriateness for probation and threat to the community, [the state] was *effectively* disavowing a recommendation for retained jurisdiction."[4] (Id., p.11 (emphasis added).) To the contrary, as discussed in regard to the first requirement under Perry, the prosecutor's sentence recommendations did not ask the court to exceed a Rider. The prosecutor's comments about Bennett's criminal history and character, as related in the presentence report, appear to have been made to support the ten-year maximum

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error was clear and obvious on the record, and that trial counsel's failure to object was not a valid tactical decision. (Compare Appellant's Brief, pp.6-7 with Appellant's Brief, pp.7-14.)

[4] Bennett's reliance on State v. Jones, 139 Idaho 299, 77 P.3d 988 (Ct. App. 2003), State v. Lankford, 127 Idaho 608, 903 P.2d 1305 (1995), and State v. Daubs, 140 Idaho 299, 92 P.3d 549 (Ct. App. 2004), is misplaced. (See Appellant's Brief, pp.11-12.) None of those cases involve a fundamental error claim under Perry, much less the second prong of Perry – whether a constitutional error is "clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision[.]" Perry, 150 Idaho at 226, 245 P.3d at 978.

unified term he recommended as an underlying sentence to either a period of probation or a Rider – not a straight prison sentence. Because the prosecutor's sentence recommendations did not violate the plea agreement, there is no reason to believe the decision by Bennett's trial counsel to not object was anything other than a reasonable tactical decision. See Perry, 150 Idaho at 226, 245 P.3d at 978.

To the extent the prosecutor's sentence recommendations may be viewed as impliedly (or "effectively") violating the plea agreement, such a violation is not "clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision[.]" Id.; See State v. Merrill, 428 P.3d 811, 816 (Ct. App. 2018) (citing Stocks, 153 Idaho at 174, 280 P.3d at 201) ("The requirement that a violation be clear all but definitively defeats a claim of an implied [breach of plea agreement]."); Hollon v. State, 132 Idaho 573, 576, 976 P.2d 927, 930 (1999) ("It is presumed that counsel is competent and that trial tactics were based on sound legal strategy."); Estes v. State, 111 Idaho 430, 434, 725 P.2d 135, 139 (1986) ("The presumption in evaluating attorney effectiveness is that the attorney is competent and that his actions represented sound trial strategy."). Bennett has failed to meet the second prong of the fundamental error analysis under Perry.

3. Even If There Was Clear Constitutional Error, Bennett Has Failed To Show That The Error Was Not Harmless

Bennett's claim also fails on Perry's third prong of fundamental error because, contrary to her assertions, there is no basis for concluding the prosecutor's comments affected the sentence. Under the prejudice prong of the fundamental error test, "the defendant must further persuade the reviewing court that the error was not harmless; i.e., that there is a reasonable possibility that the error affected the outcome of the trial." State v. Jackson, 151 Idaho 376, 378, 256 P.3d 784, 786

(Ct. App. 2011). When the error relates to sentencing, "the 'outcome' he must show to have been affected is his sentence." Puckett, 556 U.S. at 142 n. 4. "The defendant whose plea agreement has been broken by the Government will not always be able to show prejudice, either because he obtained the benefits contemplated by the deal anyway (e.g., the sentence that the prosecutor promised to request) or because he likely would not have obtained those benefits in any event …." Id. at 141-42.

Review of the record shows that, even had the prosecutor breached the plea agreement (which he did not), such breach would be harmless because there is no reasonable possibility that Bennett would have received a period of retained jurisdiction in any event based upon her extensive criminal history and poor character, as revealed by the presentence report. In sentencing Bennett, the district court explained:

> When I look at the Presentence Report, I see someone with a terrible record in front of me, plus sentencing for two additional theft charges here today. Several felonies. Apparently eight felony convictions, 17 misdemeanors. And it appears the majority of these are theft offenses.
>
> The Presentence Report concludes that you're a threat to society and that there's a high potential for recidivism.
>
> I think that both those conclusions are entirely correct, just based upon your history. You've done a Rider in the past. That hasn't – doesn't seem to have helped anything. The thing that's unusual about this case is the – as both counsel know most of the criminal cases we get in here there's the issue of substance abuse and that does not seem to be an issue in this case. Normally if I were to send someone on a Rider, that rehabilitation is certainly an overriding factor.
>
> . . . .
>
> I'm certainly one who believes in giving people a second and third chances [sic] but when someone comes in with this type of record, I think that the conclusion in the Presentence Report is correct that incarceration is required.
>
> Accordingly, the sentence I'm going to impose on each of the – in each of the cases is a ten year unified sentence that will consist of two years fixed, eight

> years indeterminate. They will run concurrent with one another. I'm not going to retain jurisdiction.[5]

(8/17/17 Tr., p.16, L.1 – p.17, L.9.)

From the district court's comments, it is apparent that its sentencing decision was based on Bennett's lengthy criminal history, her character, and the lack of any substance abuse issues that a Rider might address. Bennett has failed to show that, absent the prosecutor's arguments, there is a reasonable possibility that she would have received a Rider.

In sum, Bennett has failed to show that the prosecutor breached her plea agreement, much less committed fundamental error entitling her to review of this unpreserved issue. Bennett's conviction and sentence should be affirmed.

II.
Bennett Has Failed To Show That The District Court Abused Its Discretion By Imposing An Excessive Sentence Or By Denying Her Rule 35 Motion For Reduction Of Sentence

A. Introduction

The district court imposed a ten-year sentence, with two years fixed, for Bennett's conviction on burglary, and a concurrent five-year sentence, with two years fixed, for criminal possession of a financial transaction card. (R., pp.57-62, 127-131; 8/17/17 Tr., p.17, Ls.4-17.) Bennett filed a joint Rule 35 motion requesting sentence reductions in each case (R., pp.63-64, 139-140), which the district court denied (see generally 1/22/18 Tr.).

Bennett argues on appeal that, "given any view of the facts, her unified ten and five year sentences were excessive." (Appellant's Brief, p.16.) Bennett specifically contends that her sentences were excessive in light of (1) her acceptance of responsibility and apology for her crimes,

[5] Upon being informed that the statutory maximum sentence for criminal possession of a financial transaction card is five years, the court sentenced Bennett to a unified five years, with two years fixed, on that offense. (8/17/17 Tr., p.17, Ls.10-17.)

(2) her past successes on probation and while on a Rider, (3) as reported by her ex-husband and half-brother, she has substance abuse issues that warrant rehabilitative measures through probation or a Rider, (4) she is homeless, (5) she had an unstable family environment as a child, (6) she has little current family support, and (7) her criminal record is overstated because four of her felonies stemmed from one case, and 15 of her misdemeanors stemmed from one case. (Appellant's Brief, pp.16-l9; see PSI, pp.5-6.) Bennett further contends that the district court erred by denying her Rule 35 Motion for Reduction of Sentence. (Id., pp.19-21.) The record demonstrates that the sentences imposed were reasonable under any view of the facts and that Bennett failed to provide any additional information in her Rule 35 motion to demonstrate otherwise.

B. Standard Of Review

When a sentence is within statutory limits, the appellate court will review only for an abuse of discretion. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). The appellant has the burden of demonstrating that the sentencing court abused its discretion. Id. Where, as here, the sentences are within applicable statutory limits, the denial of a Rule 35 motion for reduction of that sentence is reviewed for an abuse of discretion. State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007).

C. Bennett Has Shown No Abuse Of Discretion

To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentences were excessive. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). To establish that the sentences were excessive, she must demonstrate that reasonable minds could not conclude the sentences were appropriate to

accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Farwell, 144 Idaho at 736, 170 P.3d at 401.

In the "burglary" in case CR-17-5661, Bennett stole a financial transaction card from Jamie Thacker's purse while Thacker was exercising at "Anytime Fitness," and then used the debit card to make several purchases, including one at a Chevron in Coeur d'Alene. (PSI, p.3.) According to the probable cause affidavit supporting the charge of criminal possession of a financial transaction card in case CR-17-10118, while Bennett worked as a server at a restaurant, she found a customer's credit card (Annie Marie Beardslee) and made several unauthorized purchases with it.[6] (R., pp.100-103.)

The district court recognized the four sentencing factors set out in State v. Toohill, 103 Idaho 565, 650 P.2d 707, 708 (Ct. App. 1982), and concluded that incarceration was required based on Bennett's extensive criminal record and the presentence investigator's conclusion that she is a "threat to society" and has a "high potential for recidivism." (8/17/17 Tr., p.16, Ls.7-9; see PSI, p.20.) The presentence investigator provided the following outline of Bennett's extensive criminal record, which consists of mostly theft-related offenses:

> The instant offense appears to be Ms. Bennett's seventh adult felony conviction; she also has two pending felony charges in a separate case – which are Fraud-FTC and Theft by Acquiring Lost Property. Her previous felony convictions are for two counts of Grand Theft and two counts of Forgery in Idaho in 2005; and two counts of Forgery in Washington in 2005. Ms. Bennett's record shows she has 17 misdemeanor convictions, including four counts of Use Account Data Without Consent; nine counts of Burglary-2; Theft by Forged/Invalid Credit Card; Forgery in California in 2004; and Driving Without Privileges in Idaho in 2017. She has two other misdemeanors pending, one in Idaho for Driving Without Privileges and one in Oregon for Theft in the Second Degree. Ms. Bennett was formerly on IDOC supervision in District One between 2005 and 2008, and had no reported violations.

[6] In case CR-17-10118, the parties agreed to waive a presentence report. (8/17/17 Tr., p.3, L.14 – p.4, L.24.)

(PSI, p.20.)

The presentence investigator commented on Bennett's questionable character as follows:

> Ms. Bennett presents as a glib, charming, and likable individual, who has simply made some poor choices in life due to difficult circumstances and financial strain. However, when looking at her overall pattern of behavior and speaking with individuals who know her and/or who have been victimized by her, it becomes apparent that though she presents well, Ms. Bennett has a very self-serving anti-social mindset. Ms. Bennett was not forthcoming about many areas of her life, including failing to report multiple jobs, failing to report child support information, failing to be honest about her housing issues, and failing to be honest about her past-substance use. Ms. Bennett appears to be a talented bartender and chef who likes to impress people using her culinary skills. However, she also seems to like money – and has a talent for stealing from strangers and from her employers – as evidenced by the charges on her record.

(PSI, p.20.)

The presentence investigator concluded that it would be too risky to allow Bennett to be placed back into the community, stating:

> Ms. Bennett presents as a high risk offender based on the criminogenic factors in her life at present. She has displayed a remarkable criminal versatility, has multiple charges pending in various jurisdictions, and appears to have little genuine remorse for her actions. Because her criminal behavior also appears to be escalating, Ms. Bennett poses a significant threat to the community and is not a good candidate for probation at this time. Ms. Bennett has previously been through a rider program, but it does not appear to have made a significant impact on her recidivism. Therefore, based on her level of assessed risk/need and with consideration for the protective factors discussed above, it is respectfully recommended that Ms. Bennett be sentenced to the physical custody of the Idaho Department of Correction.

(PSI, p.20.)

The district court's comments at the sentencing hearing have been previously discussed in section I, supra, and are relied upon here to show that the court reasonably based Bennett's two sentences on her extensive criminal record, her character, and the nature of her offenses. (See 8/17/17 Tr., p.16, L.1 – p.17, L.9.) The district court correctly noted that, based upon her criminal history, Bennett's past Rider had not "helped anything" in regard to her criminal conduct. (8/17/17

Tr., p.16, Ls.11-13.) According to the district judge, Bennett's criminal history was enough to override (in this instance) his basic belief that people should be given second and third chances. (8/17/17 Tr., p.16, L.24 – p.17, L.3.)

While it is certainly hoped that Bennett's apology ("acceptance of responsibility") at the sentencing hearing was sincere (see 8/17/17 Tr., p.15, Ls.14-23), the presentence investigator concluded that she "appears to have little genuine remorse for her actions" (PSI, p.20). Given her track record for duplicity, only time will tell if Bennett's apology was authentic. (See PSI, p.20 ("However, when looking at her overall pattern of behavior and speaking with individuals who know her and/or who have been victimized by her, it becomes apparent that though she presents well, Ms. Bennett has a very self-serving anti-social mindset.").) Bennett's argument that she should have been granted probation or a Rider due to her homelessness, her past success while on probation and a Rider, her unstable family as a child, and her little current family support, while arguably mitigating, does not overcome her extensive history of theft-related crimes. Although Bennett made it through past probation and a Rider, those measures did not, in the long run, curtail her criminal conduct. Lastly, although Bennett's half-brother and ex-husband each indicated to the presentence investigator that Bennett had a substance abuse problem (PSI, pp.9, 11, 17), Bennett said "she has never used illegal drugs or abused prescription drugs and feels drug abuse is not a problem area for her" (id., p.17). Therefore, even if the court suspected that Bennett had a substance abuse problem, without her acknowledgment of it, ordering her into a treatment program while on probation or a Rider would most likely have been a wasted effort.

In sum, Bennett has failed to show that her sentences are excessive under any reasonable view of the facts. Bennett has therefore failed to show an abuse of discretion.

Bennett has also failed to show an abuse of discretion in the denial of the motion for reconsideration of the sentences pursuant to Rule 35, I.C.R. 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).

In her telephonic testimony, Bennett specifically requested the district court to reduce the indeterminate portion of her ten-year burglary sentence in case CR-17-5661.[7] (1/22/18 Tr., p.13, Ls.6-9; p.17, Ls.14-22.) The court summarized Bennett's bases for Rule 35 relief as follows:

> In support of that, Ms. Bennett testified that she hasn't been in any trouble while incarcerated. She's been an inmate worker. She's in the work preparation program. She is making arrangements for applying for work through the work center in south Idaho. And she's making plans to relocate back to the Coeur d'Alene area and trying to get on a list to get some living quarters.

(1/22/18 Tr., p.18, Ls.16-23.)

The district court explained that all of Bennett's strides toward rehabilitation were to be encouraged; nonetheless, they were not "sufficient to justify reduction of either the fixed portion of the sentence or of the eight year indeterminate portion of the sentence in case No. CR 2017-

[7] Bennett testified, "my request is to have my indeterminate time considered to be shortened in any way, shape or form so I can complete, you know, parole successfully and that's all I really have to request of the Court." (1/22/18 Tr., p.13, Ls.6-9.) However, Bennett did not explain why, as her comment implies, she might not be able to complete parole successfully with an eight-year indeterminate term.

5661." (1/22/18 Tr., p.18, L.24 – p.19, L.4.) The court denied Bennett's motion, explaining that she had a "history of this" which the court considered "when imposing the sentence and making the sentences concurrent." (1/22/18 Tr., p.19, Ls. 5-7.)

Even though Bennett provided the district court with new evidence of how she had been performing in positive ways since she was sentenced, the court reasonably exercised its discretion in determining such evidence was not enough to justify a reduction of either the fixed or indeterminate terms of her sentences. See State v. Cobler, 148 Idaho 769, 773, 229 P.3d 374, 378 (2010) (defendant's prison behavior did not provide valid grounds for reduction of sentence). Bennett has failed to show that, based on new evidence presented at the Rule 35 hearing, her sentences were excessive. See State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007) (defendant must show sentence was excessive with new evidence).

CONCLUSION

The state respectfully requests this Court affirm Bennett's judgment of conviction and sentence, and the denial of Bennett's Rule 35 motion.

DATED this 19th day of November, 2018.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of November, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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/s/ John C. McKinney
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JCM/dd