1-16-2014

State v. Taylor Appellant's Brief Dckt. 41114

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ANDREW TROY TAYLOR, Defendant-Appellant.	NO. 41114 TWIN FALLS COUNTY NO. CR 2011-557 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature of the Case

Andrew Taylor appeals, asserting that the district court abused its discretion when it relinquished jurisdiction over him or, alternatively, when it denied his motion for leniency pursuant to I.C.R. 35 (*hereinafter*, Rule 35). He contends that the district court insufficiently considered the mitigating information in both regards. He also contends that the waiver of his rights to file a Rule 35 motion and to appeal decisions in this case, which was part of his plea agreement, was, by its terms, limited to only prevent such challenges to the conviction and imposition of sentence, not to challenges of future decisions by the district court. Therefore, he requests that this Court reverse the district court's order relinquishing jurisdiction, or alternatively, reverse the district court's decision denying his Rule 35 motion without a hearing, and remand for further proceedings.

Statement of the Facts and Course of Proceedings

Mr. Taylor was initially charged in 2011 with possession of a controlled substance, methamphetamine. (R., pp.50-51.) He ultimately entered into a plea agreement, whereby he would plead guilty as charged, and in exchange, the State would recommend a unified sentence of five years, with three years fixed. (R., p.81.) As part of that agreement, Mr. Taylor also waived "the right to (1) file a Rule 35 Motion (except as to an illegal sentence) and (2) appeal any issues in this case, including all matters involving the plea or the sentencing and any rulings made by the court, including all suppression issues." (R., p.81 (emphasis in original).)

The presentence report (*hereinafter*, PSI) recommended that the district court retain jurisdiction over Mr. Taylor. (PSI, p.12.)[1] The GAIN-I Recommendation and Referral Summary (*hereinafter*, GRRS), prepared as part of the presentence report, ruled out various clinical diagnoses related to Mr. Taylor's mental health. (PSI, p.42.) It did not mention depression one way or the other. (*See generally* PSI, pp.41-54.) The district court imposed a unified sentence of seven years, with two years fixed, and retained jurisdiction. (R., pp.117-18.)

Mr. Taylor successfully completed the Traditional Rider program during that period of retained jurisdiction, thereby earning a recommendation for probation. (PSI, p.76.) He did not receive any formal disciplinary sanctions during that time, although he did receive two verbal warnings and an infraction. (PSI, p.78.) The rider staff noted that there was a positive shift in Mr. Taylor's understanding of his behavior, which resulted in a marked improvement in his participation in the program. (PSI, p.78.) He went on to serve in a leadership position with another group at the rider facility. (PSI, p.79.) As a result, the district court suspended Mr. Taylor's sentence for a three-year period of probation. (R., pp.127-131.)

However, the State filed a motion to revoke probation eight months later. (R., pp.141-44.) Mr. Taylor admitted to violating several of the terms of his probation. (R., p.187.) As a result, the district court revoked Mr. Taylor's probation and retained jurisdiction for a second time. (R., pp.188-92.)

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[1] PSI page numbers correspond with the page numbers of the electronic PDF file "Confidential Exhibits Supreme Court No. 4114-2013." Included in this file are the PSI report and all the documents attached thereto (police reports, addendums from rider staff, etc.).

This time, Mr. Taylor was sent to the CAPP program. He was unable to complete two of his assigned programs. (PSI, p.82.) He also received three formal disciplinary reports and five informal sanctions. (PSI, pp.83-84.) The rider staff noted that Mr. Taylor's coursework reflected understanding and positive growth, but that his other behavior did not. (PSI, pp.85-86; *see e.g.* PSI, p.95 (1/5/13 C-Note indicating that Mr. Taylor was demonstrating positive progress during his program).) Based on Mr. Taylor's behavioral issues in the program, the rider staff recommended that the district court relinquish jurisdiction over Mr. Taylor. (PSI, p.81.) The district court, pointing to the reports that Mr. Taylor was not taking responsibility for his actions, but was rather, displaying a victim mentality, relinquished jurisdiction. (R., p.195-98.)

Mr. Taylor filed a Rule 35 motion six days later. (R., pp.200-01.) Supporting that motion, Mr. Taylor informed the district court that he was "suffering from depression," which he believed impacted his performance during the CAPP rider program.[2] (R., p.200.) He also informed the district court that he was expecting to have a child born the next month, and wanted to work so as to support the child. (R., p.200.) As such, he requested that the district court modify his sentence so that he would be immediately eligible for parole. (R., p.200.) Mr. Taylor also requested a hearing to present further evidence and information in support of his motion. (R., p.200.) The State did not make any response to this motion. (*See generally* R.)

The district court did not immediately address Mr. Taylor's motion. (*See generally* R.) A few months later, Mr. Taylor's attorney moved to withdraw as his

[2] The GRRS did not mention depression at all in its assessment of Mr. Taylor. (*See generally* PSI, pp.41-54.) The only mention of depression is in the C-Notes generated during the CAPP rider, but those notes do not indicate whether there was a diagnosis in that regard. (*See* PSI, pp.90-104; *see generally* PSI.) They simply indicate that Mr. Taylor was seeking, but not receiving, treatment for that condition. (PSI, p.91.)

representative and let the district court know that the Rule 35 motion was still pending. (R., pp.202-03.) A few days later, the district court entered an order denying Mr. Taylor's motion. (R., pp.206-09.) The basis for that denial was that "The defendant has not presented, in conjunction with this motion, any evidence that was not considered by the Court at the time the court relinquished jurisdiction." (R., p.209 (emphasis from original).) The district court relied on its findings related to the CAPP rider report about Mr. Taylor's behavior in support of its decision to deny the Rule 35 motion. (R., p.209.)

Mr. Taylor filed a notice of appeal twenty-eight days after the district court entered its decision on his Rule 35 motion. (R., pp.214-16.)

ISSUE

Whether the district court abused its discretion when it denied Mr. Taylor's Rule 35 motion without a hearing.

ARGUMENT

The District Court Abused Its Discretion When It Denied Mr. Taylor's Rule 35 Motion Without A Hearing

A. The Waivers Included In The Plea Agreement Regarding The Ability To File A Rule 35 Motion And To Seek Appellate Relief Do Not Bar Mr. Taylor's Appeal

The waiver in the plea agreement in this case is inapplicable to Mr. Taylor's Rule 35 motion and current appeal for two reasons. First, the State, as the beneficiary of that term in the agreement, bore the burden of raising the issue of waiver in the district court. Because it did not invoke the waiver below, it cannot now raise the issue of waiver for the first time in its respondent's brief. Second, the specific terms of that agreement only indicate that Mr. Taylor was waiving his ability to challenge everything leading up to and including the initial sentencing decision. The principles of *expressio unius est exlculsio alterius* (*hereinafter*, *expressio unius*) and *ejusdem generis*, when applied to the waiver provision of the plea agreement, mean that the waiver provision specifically does not extend to decisions that occurred after the imposition of sentence, such as the relinquishment of jurisdiction. As such the waiver in the plea agreement does not bar appellate review of the Rule 35 motion.

1. The Idaho Supreme Court Has Held That The Party Favored By The Waiver Must Invoke The Waiver In A Timely Fashion

The Idaho Supreme Court held that the respondent in an appeal must file a motion to dismiss, *prior to the filing of the appellate briefing*, if it hopes to obtain dismissal of the appellant's appeal based on a waiver of appellate rights:

> Relying upon the above-quoted oral stipulation, the respondents contend that the appellants waived their right to appeal the district court's order. As the appellants correctly point out, however, an objection based upon such a stipulation should be raised by a motion to dismiss the appeal. *Southern Indiana Power Co. v. Cook*, 182 Ind. 505, 107 N.E. 12 (1914); *Speeth v. Fields*, 71 N.E.2d 149 (Ohio App.1946) (per curiam); 4 Am.Jur.2d, Appeal

> and Error s 240 (1962); *see Phelps v. Blome*, 150 Neb. 547, 35 N.W.2d 93 (1948); *cf.* 4 Am.Jur.2d, Appeal and Error § 241 (1962). Raising such an objection at the earliest stage of appellate proceedings may spare the appellant further useless expenditures (for, e.g., an appeal bond, transcripts, and additional attorneys' fees). **Having failed to move to dismiss the appeal, the respondents are in no position to rely, in their appellate brief, upon the alleged waiver of the right to appeal.**

Oneida, 95 Idaho at 106-07 (footnotes omitted) (emphasis added).

Oneida indicates that invocation of the waiver needs to be timely made.[3] *Id.* In the case of a Rule 35 motion, the invocation of the waiver should be made in the district court, not for the first time on appeal, since, as both the Idaho Supreme Court and Idaho Court of Appeals have held: "We will not address on appeal a challenge . . . where the trial court was not given an opportunity to consider the issue." *State v. Martin*, 119 Idaho 577, 579 (1991); *State v. Mauro*, 121 Idaho 178, 181 (1991); *see also State v. Gervasi*, 138 Idaho 813, 815 (Ct. App. 2003) ("As a general rule, issues must be raised before the trial court in order to be considered on appeal."), *abrogated on other grounds by State v. Hansen*, 154 Idaho 882, 887 (Ct. App. 2013). The only exception to this requirement is if the aggrieved party can show fundamental error. *State v. Perry*, 150 Idaho 209, 226 (2010).

Usually, this rule will be applied to appellants. However, there are certain situations when it will apply to the respondent, specifically, when the respondent has the burden of proof on the issue in question. *See, e.g., State v. Almaraz*, 154 Idaho 584,

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[3] The Court of Appeals has recently declared this argument to be "misplaced." *State v. Booth*, Not Reported in P.3d, 2014 Unpublished Opinion No. 324, p.2 n.1 (Ct. App. Jan. 14, 2014). However, it provides no explanation as to why that argument is misplaced. *See generally id.*; *see also State v. Calvo-Jimenez*, Not Reported in P.3d, 2013 Unpublished Opinion No. 753 (Ct. App. Nov. 19, 2013) (deciding, without explanation, that the defendant had waived his right to appeal in his plea agreement). Given the existing precedent from both the Idaho Supreme Court and the Idaho Court of Appeals to the contrary, Mr. Taylor contends that those cases were wrongly decided.

598-99 (2013) (holding that, when the State failed to raise an issue for which it bore the burden of proof (harmless error), that issue would not be considered on appeal); *compare Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 745 (2000) (holding that it is the party bearing the burden of proof to show error, and that, in that case, the respondent had no such burden, and therefore, the respondent's failure to address an issue was not reason to reverse the challenged order). In this case, because the State bears the burden of proof to show a waiver, *Oneida*, 95 Idaho at 106-07, its failure to assert the wavier before the district court prevents it from relying on the waiver for the first time on appeal. *See, e.g., Martin*, 119 Idaho at 579.

2. If This Court Allows The State To Argue The Waiver On Appeal, The Terms Of The Waiver Provision Reveal That It Does Not Extend Beyond Challenges To The Initial Sentencing Determination

In its entirety, the waiver provides: "By accepting this offer the defendant waives the right to: (1) file a Rule 35 Motion (except as to an illegal sentence) and (2) appeal any issues in this case, including all matters involving the plea or the sentencing and any rulings made by the court, including all suppression issues." (R., p.81 (emphasis in original).) The language of the waiver demonstrates that the scope of the waiver provision is limited to those decisions that would be properly challenged in an appeal from the entry of judgment. As such, it does not prohibit appeals from decisions made after the entry of judgment. *Compare State v. Straub*, 153 Idaho 882, 886 (2013) (holding that a similar waiver did not prevent an appeal from the subsequent order of restitution).

While the general phrase in the waiver does state Mr. Taylor waived his right to appeal any issue in this case (R., p.81), it is followed by an enumerated list of issues which could arise out of the entry of the judgment. (R., p.81.) Specifically, the waiver

applies to "all matters involving the plea or the sentencing and any rulings made by the court, including all suppression issues." (R., p.81 (emphasis added).) By listing these particular items as the issues which cannot be appealed, the agreement implicitly excludes all other items from the scope of the provision. *See, e.g., State v. Acuna*, 154 Idaho 139, 141-42 (Ct. App. 2013) (using the principle of *expressio unius* – the expression of one thing is the exclusion of another – to interpret the terms of a plea agreement). Application of the doctrine of *ejusdem generis* further supports this interpretation of the provision. *Ejusdem generis* provides that, where general words of a statute follow an enumeration of persons or things, such general words will be construed as meaning persons or things of like or similar class or character to those specifically enumerated. *State v. Kavajecz*, 139 Idaho 482, 486 (2003). Furthermore, the use of the phrase "rulings *made* by the district court" clearly evidences that the waiver is only to decisions made up to the point that the plea agreement was made. *Straub*, 153 Idaho at 886. Thus, by limiting the scope of this provision to waive an appeal from the entry of judgment, the provision does not extend to other, subsequent decisions.

As such, the waiver provision does not prevent Mr. Taylor from challenging the district court's subsequent decisions to relinquish jurisdiction and deny his Rule 35 motion on appeal. Based on this same analysis, particularly the second indicator, Mr. Taylor contends that the waiver provision vis-à-vis the ability to file a Rule 35 motion extended only insofar as he agreed not to file a Rule 35 motion challenging the initial imposition of sentence.

3. Alternatively, The Plea Agreement Is Ambiguous, And Lenity Requires That Ambiguity Be Resolved In Mr. Taylor's Favor

Mr. Taylor contends that reading the waiver provision to have a limited scope is a reasonable interpretation of that provision. In fact, as discussed *infra*, he contends that it is the most reasonable interpretation of that provision. However, if this Court concludes that the broader reading of the waiver provision is also reasonable, then there are two reasonable interpretations, and the rule of lenity applies. "Whether an ambiguity exists in a legal instrument is a question of law, over which [Idaho appellate courts exercise] free review." *Knipe Land Co. v. Robertson*,151 Idaho 449, 455 (2011). Plea agreements are contractual in nature and generally are examined by courts in accordance with contract law standards. *State v. Nienburg*, 153 Idaho 491, 496 (Ct. App. 2012). An instrument which is reasonably subject to conflicting interpretations is ambiguous. *Knipe Land Co.*, 151 Idaho at 455. "Ambiguities in a plea agreement are to be interpreted in favor of the defendant. As with other contracts, provisions of plea agreements are occasionally ambiguous; the government 'ordinarily must bear responsibility for any lack of clarity.'" *State v. Peterson*, 148 Idaho 593, 596 (2010) (quoting *United States v. De la Fuente*, 8 F3d 1333, 1338 (9th Cir. 1993)). Therefore, if this Court finds that there are two reasonable interpretations of the waiver provision in this case, lenity requires that the Court adopt Mr. Taylor's reasonable interpretation. As such, the waiver provision would Mr. Taylor's appellate challenge to the decisions to relinquish jurisdiction and deny his Rule 35 motion.

B. The District Court Abused Its Discretion By Denying Mr. Taylor's Rule 35 Motion Without A Hearing

A motion to alter an otherwise lawful sentence pursuant to Rule 35 is addressed to the sound discretion of the sentencing court, and is essentially a plea for leniency

which may be granted if the sentence originally imposed was unduly severe. *State v. Huffman*, 144 Idaho 201, 203 (2007). When petitioning for a sentence reduction pursuant to Rule 35, the defendant must show his sentence is excessive in light of new or additional information presented to the sentencing court. *Id.* "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). Therefore, the district court needed to sufficiently consider the recognized sentencing objectives in light of the mitigating factors as they were altered by the new evidence Mr. Taylor presented. *See id.*; *Huffman*, 144 Idaho at 203. A failure to do so should result in a more lenient sentence. *See e.g., Cook*, 145 Idaho at 489-90; *Alberts*, 121 Idaho at 209; *Carrasco*, 114 Idaho at 354-55; *Shideler*, 103 Idaho at 595.

As a preliminary matter, the district court applied the wrong standard to Mr. Taylor's Rule 35 motion. The district court asserted that Mr. Taylor had failed to present "any evidence that was not considered by the Court at the time the court relinquished jurisdiction." (R., p.209 (emphasis in original).) Defendants seeking relief under Rule 35 do not necessarily need to present new evidence to merit relief, or, at least, a hearing, on their motions. The Idaho Supreme Court has held that, "[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." *Huffman*, 144 Idaho 201, 203 (2007) (emphasis added).

The district court misapplied this standard by requiring Mr. Taylor to provide new *evidence*, even though the rule allows a defendant seeking Rule 35 relief to support his motion with new or additional *information* as well as new evidence. In this case,

Mr. Taylor did provide the district court with new information: that he was suffering from depression, and that he was expecting the birth of his first child. There is no indication in the record that the district court had been made previously aware that Mr. Taylor was suffering from depression. (*See generally* R, PSI.) The only references to "depression," which are in the C-Notes generated during Mr. Taylor's CAPP rider program, indicate episodes of depression, but not a diagnosis from which he was suffering. (*See* PSI, pp.90-104.) Therefore, the fact that Mr. Taylor was suffering from depression is new or additional information that the district court did not have when it relinquished jurisdiction. There is also no indication in the record that Mr. Taylor was about to become a father. (*See generally* R, PSI.) Therefore, the fact that his first child was about to born is new information for the district court to consider.

The new or additional information that Mr. Taylor presented in support of his Rule 35 motion should have at least merited a hearing, if not a grant of relief. First, Idaho Code § 19-2523 requires the trial court to consider a defendant's mental illness as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581 (1999). Mr. Taylor informed the district court that he was suffering from depression, and that he believed that depression had an impact on his behavior during the CAPP program. (R., p.200.) Given that the only assessment of Mr. Taylor's mental health – the GRRS evaluation performed before his initial sentencing does not mention "depression" at all, not even to rule it out – the district court could not have adequately considered Mr. Taylor's mental health when it decided to relinquish jurisdiction. All the district court had were some suggestions that depression or stress were affecting Mr. Taylor's performance during the CAPP rider. (PSI, p.91 ("I also questioned if he [Mr. Taylor] has attempted to work

with or talk to any clinician staff in regards to his stress or depression and he claimed that he has kited Mrs. Wolff repeatedly and has yet to get a response.").)

If Mr. Taylor was indeed suffering from depression and was not getting treatment, that would have a significant impact on his ability to succeed in the rider program.[4] That is a factor which does impact the district court's decision on whether it should relinquish jurisdiction. *See Hollon*, 132 Idaho at 581; I.C. § 19-2521(1)(b) (providing that, if the defendant is in need of treatment "that can be provided *most effectively* by his commitment to an institution," that is a factor indicating the district court should not suspend a sentence, thereby implying that if treatment would be more effectively provided without incarceration, that is a factor that should weigh against incarceration) (emphasis added). The CAPP rider staff reported that Mr. Taylor's coursework was demonstrating improvement. (PSI, pp.85-86, 95.) This is consistent with Mr. Taylor's performance during his traditional rider program. (PSI, pp.76-79.) The issue during the CAPP program was Mr. Taylor's behavior. (PSI, pp.81-84.) This combination of facts reveals that there likely was some other issue in play during Mr. Taylor's CAPP program other than just a lack of rehabilitative potential. That made it all the more necessary for the district court to at least have held a hearing and inquired as to Mr. Taylor's mental health condition, since it was an important factor for the district court to consider.

Given that Mr. Taylor demonstrated an ability to rehabilitate and treatment was available outside of prison (*see, e.g.,* PSI, p.53), the time at which Mr. Taylor received that treatment was also an important consideration. *State v. Owen*, 73 Idaho 394, 402

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[4] Depression interferes with daily life and can impact the patient's ability to work, sleep, eat, or function normally. National Institute of Mental Health, *What is Depression*, http://www.nimh.nih.gov/health/topics/depression/index.shtml (last visited Jan. 14, 2014).

(1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971); *Cook,* 145 Idaho at 489; *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988). This is particularly true given the fact that, although he has numerous misdemeanor convictions, the underlying crime was Mr. Taylor's first felony conviction. (*See* PSI, pp.3-6.) The Idaho Supreme Court has "recognized that the first offender should be accorded more lenient treatment than the habitual criminal." *Shideler*, 103 Idaho at 595, (quoting *State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971)). Therefore, it considered the fact that it was the defendant's first felony to be a factor in mitigation. *Shideler*, 103 Idaho at 595. Given all these facts, considered in light of the new evidence Mr. Taylor offered about his mental health condition, the district court's decision to deny the Rule 35 motion without a hearing was an abuse of discretion.

The district court also needed to sufficiently consider the fact that Mr. Taylor was about to become a father. The fact that Mr. Taylor was looking to be a supportive parent is an indication that he is maturing, and that is a factor which weighs in favor of a more lenient disposition. Sentences are to be crafted so that they do not force the prison system to continue detaining a person once rehabilitation or age has decreased the risk of recidivism. *Cook*, 145 Idaho at 489; *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988). Since Mr. Taylor's behavior demonstrates his maturation, the waiver provision indicates a more lenient disposition is appropriate, and thus, that relief pursuant to Rule 35 should have been granted.

Additionally, family constitutes an important part of a support network, which can help in rehabilitation. *See State v. Kellis*, 148 Idaho 812, 817 (Ct. App. 2010) (holding that familial support offered to affirm the defendant's innocence does not equate to

familial support offered in consideration of rehabilitation, implying that had the support been offered for rehabilitation, it would be a mitigating factor worthy of consideration). This new information indicates that Mr. Taylor is attempting to build this part of his support network, which demonstrates that a more lenient disposition is appropriate, and thus, that relief pursuant to Rule 35 should have been granted.

Furthermore, Mr. Taylor was not asking for a reduction in the total length of his sentence, but merely that his sentence be restructured so that he would be immediately parole-eligible. (R., p.200.) This demonstrates, to some degree, an acceptance of responsibility for his actions, since he was willing to accept the consequences of his actions. The acceptance of responsibility is a factor to be considered by the district court. *See Kellis*, 148 Idaho at 815. And, even if such relief were granted, it would not necessarily mean that Mr. Taylor would be released from prison. The Parole Board has broad discretion over whether or not to parole an inmate. *See, e.g., Stover*, 140 Idaho at 931. Therefore, even though the requested relief would make Mr. Taylor eligible for parole, the Board might not decide to grant parole at that time, causing Mr. Taylor to serve some or all of his seven-year unified sentence in prison. Such a result would still address all the sentencing objectives. *See Ransom*, 124 Idaho at 713. What the more lenient sentence would provide that the excessive sentence would not is the opportunity to rehabilitate, and as the Supreme Court has noted, rehabilitation is more likely now than in the future. *See Owen*, 73 Idaho at 402. Therefore, based on all these factors, the district court's decision to deny Rule 35 relief, particularly without holding a hearing, was an abuse of its discretion.

CONCLUSION

Mr. Taylor respectfully requests that this Court reverse the order denying his Rule 35 motion and remand this case for further proceedings.

DATED this 16th day of January, 2014.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of January, 2014, 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:

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