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### State v. Conner Appellant's Brief Dckt. 45868

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45868
Plaintiff-Respondent,	)	
	)	MINIDOKA COUNTY NO. CR 2017-354
v.	)	
	)	
JAMES MICHAEL CONNER, III,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

James Michael Conner, III (*hereinafter*, Mr. Conner), appeals from the district court order denying his Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion for leniency. Mindful of the fact that Mr. Conner did not submit new or additional information in support of his Rule 35 motion, Mr. Conner asserts that the district court abused its discretion when it denied the motion and declined to reduce his sentence.

## Statement of the Facts & Course of Proceedings

On February 20, 2017, officers responded to a report of a shoplifting burglary at Wal-Mart. (Presentence Investigation Report (*hereinafter*, PSI),<sup>1</sup> p.9.) Mr. Conner tried to take \$53.46 worth of merchandise. (R., p.25; PSI, pp.9, 30-31.) When the loss prevention specialist confronted Mr. Conner, he reported that Mr. Conner hit him in the groin. (PSI, p.9.) Mr. Conner was trying to steal food because he was homeless. (PSI, p.9.)

Based on these facts, Mr. Conner was charged by Information with burglary, misdemeanor battery, and petit theft. (R., pp.24-27.)

Pursuant to a plea agreement, Mr. Conner pled guilty to burglary, and the misdemeanor charges were dismissed as well as Minidoka County case number CR17-671.<sup>2</sup> (R., pp.45-59, 65-66.) As part of the plea agreement, the State agreed to recommend a sentence of ten years, with five years fixed, and a retained jurisdiction. (R., pp.48-59.) The district court accepted the plea, and the matter was set for sentencing. (R., pp.45-47.)

The district court sentenced Mr. Conner to a unified sentence of ten years, with five years fixed, but retained jurisdiction over him. (R., pp.60-63.) Thereafter, the district court relinquished jurisdiction without a hearing. (R., pp.72-76.) Mr. Conner filed a motion pursuant to I.C.R. 35, asking the district court for leniency. (R., pp.77-78.) The district court denied the motion without a hearing. (R., pp.79-80.) Mr. Conner filed a Notice of Appeal timely from the order denying his Rule 35 motion. (R., pp.85-87)

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<sup>1</sup> Appellant's use of the designation "PSI" includes the packet of documents grouped with the electronic copy of the PSI, including the original PSI, the Addendum to the PSI, and substance abuse evaluation.

<sup>2</sup> In Minidoka County case number CR17-671, Mr. Conner was charged with felony eluding.

Mindful of the fact that Mr. Conner did not submit any new or additional information in support of his Rule 35 motion, *see State v. Huffman*, 144 Idaho 201 (2007), Mr. Conner contends on appeal that the district court abused its discretion by denying his Rule 35 motion requesting a sentence reduction after the court relinquished its jurisdiction.

### ISSUE

Did the district court abuse its discretion when it denied Mr. Conner's Rule 35 motion for a sentence reduction?

### ARGUMENT

#### The District Court Abused Its Discretion When It Did Not Reduce Mr. Conner's Sentence Pursuant to Rule 35

Counsel for Mr. Conner did not present any new information in support of the Rule 35 motion for sentence reduction. Mindful of this fact, as well as the Supreme Court's holding in *State v. Huffman*, 144 Idaho 201 (2007) (holding that a defendant presenting a Rule 35 motion must provide new or additional information in support of the Rule 35 motion), Mr. Conner nonetheless asserts that the district court abused its discretion when it denied his Rule 35 motions for reduction of his sentence because his sentence was excessive as initially imposed. This Court should remedy the district court's abuse of discretion.

A motion to alter 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 if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* "If the sentence was

not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.*

Mr. Conner first used methamphetamine and marijuana when he was 14 years old. (PSI, pp.13-14.) The Idaho Supreme Court has held that substance abuse should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982). In *Nice*, the Idaho Supreme Court reduced a sentence based on Nice's lack of prior record and the fact that "the trial court did not give proper consideration of the defendant's alcoholic problem, the part it played in causing defendant to commit the crime and the suggested alternatives for treating the problem." *Id.* at 91. Additionally, the Idaho Supreme Court has ruled that ingestion of drugs and alcohol resulting in impaired capacity to appreciate criminality of conduct, could be a mitigating circumstance. *State v. Osborn*, 102 Idaho 405, 414 (1981). Mr. Conner wants to stop using illegal drugs. (PSI, p.14.)

Another aspect that should have received the attention of the district court is the fact that Mr. Conner has support from his family members. *See State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who had the support of his family and employer in his rehabilitation efforts). Mr. Conner has a great relationship with his siblings and a decent relationship with his mother. (PSI, p.10.)

Further, Mr. Conner did well in the retained jurisdiction program prior to receiving a Disciplinary Offense Report for fighting. (PSI, p.67.) Mr. Conner appeared serious about his recovery and volunteered to go first in groups. (PSI, p.68.) Mr. Conner worked on thinking about the consequences of his actions and using his new skills to assist his decision-making in real life situations. (PSI, p.68.) He also made progress by gaining new tools to assist him in staying sober. (PSI, p.68.) Mr. Conner explained why he had earned probation:

I want to start by taking full responsibility for my actions, and accept the consequences of them. I was given an opportunity to better my life, and feel like I did very well throughout my program. I completed 2 of the 3 classes and only had a month on the last one. I was on my way my housing was even approved by probation and parole. I was put in a situation where I got swung on by an inmate and I swung back. I understand that was not the pro-social way to handle the situation, it was instinct, and I regret it. I just hope that I will be able to finish my program and prove Im not what Ive showed in the past. Than[k] you for your time.

(PSI, pp.69-70.)

Counsel for Mr. Conner did not submit any new information or documentation in support of his Rule 35 motions; however, Mr. Conner still asserts that the district court should have reduced his sentence pursuant to the Rule 35 motion.

#### CONCLUSION

Mr. Conner respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that the order denying his Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 13<sup>th</sup> day of September, 2018.

/s/ Sally J. Colley  
SALLY J. COOLEY  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13<sup>th</sup> day of September, 2018, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith  
\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

SJC/eas