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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45906
Plaintiff-Respondent,)	
)	TWIN FALLS COUNTY NO. CR42-17-3806
v.)	
)	
JOSHUA LEE BJORNN,)	APPELLANT’S REPLY BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

The district court sentenced Joshua Bjornn to seven years, with two years fixed, for possession of a controlled substance. Mr. Bjornn then filed an Idaho Criminal Rule 35 (“Rule 35”) motion for leniency. The district court denied his motion. Mr. Bjornn appealed the district court’s sentencing decision and its denial of his Rule 35 motion.

Statement of Facts and Course of Proceedings

The statement of facts and procedural background of this case were previously articulated in Mr. Bjornn’s Appellant’s Brief and are incorporated here by reference. (App. Br., pp.1–2.)

ISSUES

- I. Did the district court abuse its discretion by sentencing Mr. Bjornn to seven years, with two years fixed, for possession of a controlled substance?
- II. Did the district court abuse its discretion by denying Mr. Bjornn's Rule 35 motion?

ARGUMENT

On appeal, Mr. Bjornn challenged the district court's sentencing decision and its denial of his Rule 35 motion. (App. Br., pp.3–8.) In response, the State first argued Mr. Bjornn waived his right to appeal these issues as part of the plea agreement. (Respt. Br., pp.3–4.) Mr. Bjornn acknowledges the State is correct.¹ In exchange for Mr. Bjornn's guilty plea, the State agreed to recommend probation with any underlying sentence of five years, with two years fixed. (R., p.99.) The agreement further provided the State "may alter" its sentencing recommendation if, among other things, Mr. Bjornn failed to comply with court compliance. (R., p.99.) The agreement also contained an appeal waiver:

By accepting this offer the defendant waives the right to: (1) file a Rule 35 Motion regarding the initial Judgment (except as to an illegal sentence) and (2) appeal any issues in this case, including all matters involving the plea or the sentence and any rulings made by the court, including all suppression issues. However, the defendant may appeal the sentence if the Court exceeds the recommendation made by the State at sentencing regarding: (1) the determinate portion of the sentence. and/or (2) a probation recommendation. and/or (3) a retained jurisdiction recommendation.

(R., p.99.) Mr. Bjornn did not comply with court compliance, and therefore the State could alter its sentencing recommendation. (R., pp.99, 133–34, 150; Tr. Vol. II,² p.3, Ls.10–17.) At the

¹ Undersigned counsel regrets the error in misinterpreting the plea agreement and, hence, omitting the appeal waiver portion. Undersigned counsel in no way intended to misrepresent the record to this Court.

² There are two transcripts on appeal. The first, cited as Volume I, contains the entry of plea hearing. The second, cited as Volume II, contains the sentencing hearing.

sentencing hearing, the State recommended a sentence of seven years, with three years fixed, and the district court imposed a sentence of seven years, with two years fixed. (Tr. Vol. II, p.20, Ls.13–18, p.32, Ls.1–8.) At the end of the hearing, the district court had the following colloquy with the State:

THE COURT: . . . Now, you have the right to appeal. And if you can't afford an attorney, you can request to have one appointment at public expense. Any appeal has to be filed within 42 days of this order. And I assume, since neither the state nor the court followed the original offer, that he is entitled to appeal?

[THE PROSECUTOR]: Yes, Your Honor.

THE COURT: All right. Then the presentence materials should be returned and sealed. Is there anything else in this case?

[THE PROSECUTOR]: Your Honor, the only thing with regards to that last statement, I believe that the defendant only had the right to appeal if the court exceeded the recommendation made by the state at sentencing, not in the original offer. So I don't believe he does have the right to appeal, so I think I spoke in error. . . .

(Tr. Vol. II, p.32, L.23–p.33, L.15.) Mr. Bjornn's counsel did not object to the State's position. In light of these facts, but mindful of the appeal waiver, Mr. Bjornn nonetheless submits the district court abused its discretion by imposing an excessive sentence and denying his Rule 35 motion.

CONCLUSION

Mindful of the appeal waiver, Mr. Bjornn respectfully requests this Court reduce his sentence as it deems appropriate, vacate the judgment of conviction and remand this case for a new sentencing hearing, or vacate the district court's order denying his Rule 35 motion and remand for further proceedings.

DATED this 20th day of November, 2018.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of November, 2018, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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E-Service: ecf@ag.idaho.gov

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

JCS/eas