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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46108
Plaintiff-Respondent,)	
)	JEROME COUNTY NO. CR-2017-3150
v.)	
)	
JOSE LUIS)	APPELLANT'S BRIEF
BARONA-HERNANDEZ,)	
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Following Jose L. Barona-Hernandez's guilty plea to possession of a controlled substance with the intent to deliver, the district court sentenced him to fifteen years, with three years fixed. Mr. Barona-Hernandez then filed an Idaho Criminal Rule 35 ("Rule 35") motion requesting leniency. The district court denied his motion. Mr. Barona-Hernandez appeals, and he argues the district court abused its discretion by imposing an excessive sentence and denying his Rule 35 motion.

Statement of Facts and Course of Proceedings

The State charged Mr. Barona-Hernandez with three drug-related offenses: possession of a controlled substance (methamphetamine) with the intent to deliver, possession of marijuana, and possession of drug paraphernalia. (R., pp.89–90.) Pursuant to a plea agreement, Mr. Barona-Hernandez pled guilty to possession of a controlled substance with the intent to deliver, and the State dismissed the remaining charges. (R., pp.132–34; Tr., p.4, L.19–p.5, L.12, p.12, Ls.4–22, p.18, L.21–p.20, L.4.) Sentencing recommendations were left open. (Tr., p.12, Ls.12–16.)

At sentencing, the State recommended the district court impose a sentence of fifteen years, with five years fixed. (Tr., p.46, Ls.4–6.) The presentence investigator recommended probation. (Presentence Investigation Report (“PSI”),¹ p.16.) Similarly, Mr. Barona-Hernandez requested probation or a period of retained jurisdiction. (Tr., p.53, Ls.6–9, p.55, Ls.14–15.) The district court sentenced him to fifteen years, with three years fixed. (Tr., p.61, Ls.15–19.) The district court entered a judgment of conviction, and Mr. Barona-Hernandez timely appealed. (R., pp.174–76, 185–86.)

Mr. Barona-Hernandez then filed a Rule 35 motion requesting the district court reduce his sentence to seven and one-half years, with one and one-half years fixed. (R., pp.193–96.) The district court denied his motion. (R., pp.217–19.)

ISSUES

- I. Did the district court abuse its discretion when it imposed a unified sentence of fifteen years, with three years fixed, upon Mr. Barona-Hernandez following his guilty plea to possession to a controlled substance with the intent to deliver?
- II. Did the district court abuse its discretion when it denied Mr. Barona-Hernandez’s Rule 35 motion?

¹ Citations to the PSI refer to the twenty-seven page electronic document containing the confidential exhibits.

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Fifteen Years, With Three Years Fixed, Upon Mr. Barona-Hernandez Following His Guilty Plea To Possession Of A Controlled Substance With Intent To Deliver

“It is well-established that ‘[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.’” *State v. Pierce*, 150 Idaho 1, 5 (2010) (quoting *State v. Jackson*, 130 Idaho 293, 294 (1997) (alteration in original)). Here, Mr. Barona-Hernandez’s sentence does not exceed the statutory maximum. *See* I.C. § 37-2732(a)(1)(A) (maximum of life imprisonment) Accordingly, to show that the sentence imposed was unreasonable, Mr. Barona-Hernandez “must show that the sentence, in light of the governing criteria, is excessive under any reasonable view of the facts.” *State v. Strand*, 137 Idaho 457, 460 (2002).

“‘Reasonableness’ of a sentence implies that a term of confinement should be tailored to the purpose for which the sentence is imposed.” *State v. Adamcik*, 152 Idaho 445, 483 (2012) (quoting *State v. Stevens*, 146 Idaho 139, 148 (2008)).

In examining the reasonableness of a sentence, the Court conducts an independent review of the entire record available to the trial court at sentencing, focusing on the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public; (3) possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

Stevens, 146 Idaho at 148. “A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution.” *State v. Delling*, 152 Idaho 122, 132 (2011).

“The primary purpose of the retained jurisdiction program is to enable the trial court to gain additional information regarding the defendant’s rehabilitative potential and suitability for

probation.” *State v. Jones*, 141 Idaho 673, 676 (Ct. App. 2005). “[P]robation is the ultimate objective of a defendant who is on retained jurisdiction.” *Id.* at 677. The district court’s decision to retain jurisdiction is reviewed for an abuse of discretion. *Id.* “There can be no abuse of discretion in a trial court’s refusal to retain jurisdiction if the court already has sufficient information upon which to conclude that the defendant is not a suitable candidate for probation.” *Id.* Similarly, “[t]he choice of probation, among available sentencing alternatives, is committed to the sound discretion of the trial court” *State v. Landreth*, 118 Idaho 613, 615 (Ct. App. 1990).

In this case, Mr. Barona-Hernandez asserts the district court failed to exercise reason and therefore abused its discretion by imposing an excessive sentence under any reasonable view of the facts. Specifically, he contends the district court should have sentenced him to a lesser term of imprisonment in light of the mitigating factors, including his absence of a criminal record, immigration status, employment history, and acceptance of responsibility and remorse.

First, the absence of any prior criminal convictions supports a lesser sentence for Mr. Barona-Hernandez. “The absence of a criminal record is a mitigating factor that courts consider.” *State v. Miller*, 151 Idaho 828, 836 (2011). “It has long been recognized that ‘[t]he first offender should be accorded more lenient treatment than the habitual criminal.’” *State v. Hoskins*, 131 Idaho 670, 673 (Ct. App. 1998) (alteration in original) (quoting *State v. Nice*, 103 Idaho 89, 91 (1982)). Here, the instant offense is Mr. Barona-Hernandez’s first criminal conviction of any kind. (PSI, pp.6–7.) At age twenty-nine, Mr. Barona-Hernandez had no prior criminal record or arrests. (PSI, pp.3, 6–7.) The lack of a criminal history stands in favor of mitigation. In light of this information, the district court should have imposed a more lenient sentence, including probation or a period of retained jurisdiction.

Second, the likelihood of Mr. Barona-Hernandez's removal from the United States is a mitigating circumstance. "[T]he effect on immigration status is an appropriate consideration for a trial court in fashioning a sentence or considering Rule 35 relief." *State v. Tinoco-Perez*, 145 Idaho 400, 402 (Ct. App. 2008). Here, Mr. Barona-Hernandez came to the United States from Mexico City at age fourteen for a better life and education. (PSI, p.7.) His attorney believed that Mr. Barona-Hernandez applied for the Deferred Action for Childhood Arrivals ("DACA") program at some point. (Tr., p.49, Ls.13–18.) However, an immigration and customs enforcement ("ICE") officer advised the presentence investigator that Mr. Barona-Hernandez was an illegal alien with an ICE detainer. (PSI, p.8.) His attorney advised that Mr. Barona-Hernandez would be deported for this offense. (Tr., p.51, Ls.23–25.) This likelihood of removal from the United States stands in favor of mitigation, such as probation. A lesser sentence would accelerate removal proceedings, which in turn would lessen the cost to Idaho taxpayers to incarcerate Mr. Barona-Hernandez.

Third, Mr. Barona-Hernandez has been gainfully employed for most of his adult life. *See State v. Mitchell*, 77 Idaho 115, 118 (1955) (recognizing gainful employment as a mitigating factor); *see also State v. Shideler*, 103 Idaho 593, 594–95 (1982) (employment and desire to advance within company were mitigating circumstances). Mr. Barona-Hernandez is a skilled autobody technician. (PSI, pp.9–10.) His immigration status, however, sometimes made it difficult to find work. (R., p.181.) A friend and former employer described Mr. Barona-Hernandez as a hard worker with a great attitude. (R., p.181.) He wrote that Mr. Barona-Hernandez would "always go above and beyond" the job expectations. (R., p.181.) He also wrote that Mr. Barona-Hernandez would come over to his house, and they had met each

other's families. (R., p.181.) Regarding the instant offense, his friend/former employer explained:

I would have never expected Jose, my friend and prior co-worker, to be caught with drugs. It is my firm belief that Jose is not a drug dealer or drug abuser. I am certain that if he was able to retain employment without his immigration status being a factor, he would have never have made the choice to get in to a car with drugs. Working in an auto body shop can be very lucrative if one is skilled at it, and Jose is. When he wasn't able to make the kind of money he needed to live in Edmonds the good old-fashioned way, he made a poor decision. But he is not a drug dealer.

(R., p.181.) Mr. Barona-Hernandez's work history supports a lesser sentence.

Finally, Mr. Barona-Hernandez has expressed remorse for his actions and accepted responsibility, including deportation. Acceptance of responsibility, remorse, and regret are all factors in favor of mitigation. *Shideler*, 103 Idaho at 595. At sentencing, Mr. Barona-Hernandez stated in part:

During this last year of detention, I've realized what really matters in life, and my absence is affecting my family and others. I take full responsibility for my actions, and I realize the seriousness of it. I'm truly sorry for the pain that I caused, and I humbly ask to get another chance to make my family proud and make wise decisions in the future.

(Tr., p.56, L.22–p.57, L.4.) In addition, he explained in the presentence investigation report that his eight-year-old daughter with his ex-wife and his family were most important to him. (PSI, pp.8, 12.) He wrote:

I dedicated my life to my family and my daughter[,] I never been in trouble before[,] I feel disappointed that I let down my self [sic] and family[,] I feel like they dontt deserve to be put through this pain because that's not what they thought me [sic] and that's not who I am. I want to be there for my daughter and support her through everything so she doesn't have to ever go through this, I want my family to be proud of me so I plan to stay out of trouble for good. I'm not a bad person and I plan to dedicate my life to work and my family. This opened my eyes and . . . this is not the place I want to be and I will make better choices[.]

(PSI, pp.13–14.) In light of these statements of remorse and acceptance of responsibility, along with the other mitigating factors discussed above, Mr. Barona-Hernandez maintains the district court did not exercise reason and thus abused its discretion by imposing an excessive sentence. Proper consideration of these mitigating circumstances supports a more lenient sentence, such as probation or a period of retained jurisdiction.

II.

The District Court Abused Its Discretion When It Denied Mr. Barona-Hernandez’s Rule 35 Motion

“A Rule 35 motion for reduction of sentence is essentially a plea for leniency, addressed to the sound discretion of the court.” *State v. Carter*, 157 Idaho 900, 903 (Ct. App. 2014). In reviewing the grant or denial of a Rule 35 motion, the Court must “consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence.” *Id.* The Court “conduct[s] an independent review of the record, having regard for the nature of the offense, the character of the offender and the protection of the public interest.” *State v. Burdett*, 134 Idaho 271, 276 (Ct. App. 2000). “Where an appeal is taken from an order refusing to reduce a sentence under Rule 35,” the Court’s scope of review “includes all information submitted at the original sentencing hearing and at the subsequent hearing held on the motion to reduce.” *State v. Araiza*, 109 Idaho 188, 189 (Ct. App. 1985). “When 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.” *State v. Huffman*, 144 Idaho 201, 203 (2007).

Here, Mr. Barona-Hernandez presented new and additional information to support his Rule 35 motion. Although some of the information was not new, such as his absence of a

criminal record, strong employment history, autobody technician skills, and the PSI probation recommendation, he provided additional information from his roommate prior to his arrest. (R., pp.194–96.) Mr. Barona-Hernandez’s roommate wrote that she had known him for two years. (R., p.196.) She explained that he always had an autobody job and was very responsible paying his bills and taking care of his daughter. (R., p.196.) She further explained that he quit his most recent autobody job to start his own repair shop. (R., p.196.) She described Mr. Barona-Hernandez as kind and always willing to help his family and friends. (R., p.196.) In light of this new and additional information of Mr. Barona-Hernandez’s character and work history, the district court failed to exercise reason and therefore abused its discretion by denying his Rule 35 motion. The district court should have reduced his sentence.

CONCLUSION

Mr. Barona-Hernandez respectfully requests this Court reduce his sentence as it deems appropriate. Alternatively, he respectfully requests this Court vacate his judgment of conviction and remand his case for a new sentencing hearing. In the alternative, he respectfully requests this Court vacate the district court’s order denying his Rule 35 motion and remand his case for further proceedings.

DATED this 26th day of October, 2018.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of October, 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

JCS/eas