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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46108
Plaintiff-Respondent,)	
)	Jerome County Case No.
v.)	CR-2017-3150
)	
JOSE LUIS BARONA-HERNANDEZ,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Barona-Hernandez failed to establish that the district court abused its discretion, either by imposing a unified sentence of 12 years, with three years fixed, upon his guilty plea to possession of a controlled substance with intent to deliver, or by denying his Rule 35 motion for a reduction of sentence?

Barona-Hernandez Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Barona-Hernandez pled guilty to possession of a controlled substance with intent to deliver and the district court imposed a unified sentence of 12 years, with three years fixed. (R.,

pp.174-77.) Barona-Hernandez filed a notice of appeal timely from the judgment of conviction. (R., pp.18587.) He also filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.193-96, 217-20.)

Barona-Hernandez asserts his sentence is excessive in light of his status as a first-time felon, immigration status, employment history, acceptance of responsibility, and purported remorse. (Appellant's brief, pp.3-7.) The record supports the sentence imposed.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. 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. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, "[a] sentence fixed within the limits

prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The maximum prison sentence for possession of a controlled substance with intent to deliver is life in prison. I.C. § 37-2732(a)(1)(A). The district court imposed a unified sentence of only 12 years, with three years fixed, which falls well within the statutory guidelines. (R., pp.174-77.) Furthermore, Barona-Hernandez’s sentence is reasonable in light of the risk he presents to the community, his failure to accept responsibility for his actions, and the seriousness of the offense.

Barona-Hernandez was a passenger in a car driven by Alvaro Lopez that was pulled over for a signal violation. (PSI, p.4.¹) After a drug dog alerted on the vehicle officers searched it and found 35.8 grams of cocaine, 4.4 grams of methamphetamine, 213.2 grams of methamphetamine in capsules, 22.5 grams of empty capsules, various drug paraphernalia, and packaging materials. (PSI, p.5.) Barona-Hernandez admitted to the arresting officer that the drugs were his and that he was on his way to Las Vegas to sell them at a music festival/rave party. (PSI, pp.4-5; 4/16/18 Tr., p.30, L.16 – p.35, L.17.) When asked by the officer what the capsules contained, Barona-Hernandez “stated that there was a little bit of meth, a little bit of coke, ... Vitamin 12, acetone, [and] a little bit of brown sugar as well.” (4/16/18 Tr., p.34, Ls.8-13.) According to Barona-Hernandez, he included brown sugar in the mixture he put in the capsules to make the capsules appear to be “MDMA or Ecstasy” because “it was easier for the kids that he was selling it to to think it was Ecstasy.” (4/16/18 Tr., p.34, Ls.14-25.) Barona-Hernandez stood to make approximately \$6000 from the sale of the pills. (4/16/18 Tr., p.35,

¹ PSI page numbers correspond with the page numbers of the electronic file “Confidential Exhibit Appeal Volume 1.pdf.”

L.21 – p.36, L.3.) The street value of the cocaine he possessed was between \$2000 and \$3000. (4/16/18 Tr., p.36, Ls.4-16.)

While Barona-Hernandez does not have a prior criminal record, the evidence in this case showed he had been selling illegal drugs for at least six months prior to his arrest. (4/16/18 Tr., p.37, L.9 – p.41, L.16, p.58, Ls.9-14.) Barona-Hernandez denied that was the case, however, and, in stark contrast to his admissions on the day of his arrest, he told the presentence investigator and the district court that the drugs that were found in the vehicle actually belonged to Lopez and were “just intended for a large group of friends for recreational purpose[s] only.” (PSI, p.6; 4/16/18 Tr., p.56, Ls.5-10.) The district court was unpersuaded by Barona-Hernandez’s denials of responsibility, noting that, although Barona-Hernandez had been gainfully employed, it appeared from the evidence that he quit his job to “engage in the sale and distribution of controlled substances.” (4/16/18 Tr., p.57, L.23 – p.58, L.14.) It also appeared to the court that Barona-Hernandez was “involved in the manufacturing of controlled substances” because he was “very familiar with the makeup of the approximate[ly] 1,500 pills that [he was] intending to distribute” to others in Las Vegas under the pretense that the pills were “Ecstasy” when, in fact, they contained methamphetamine. (4/16/18 Tr., p.58, L.15 – p.60, L.3; see also p.34, Ls.8-25, p.36, L.17 – p.37, L.8.) The court considered Barona-Hernandez’s lack of a prior criminal record, his immigration status, and his employment history but concluded in light of the quantity of drugs and the information in the PSI that indicated Barona-Hernandez was “actively engaged in the distribution” of them that anything other than a prison sentence “would depreciate the seriousness of the offense” and would be contrary to the court’s obligation to “protect the community.” (4/16/18 Tr., p.57, L.23 – p.61, L.14.) The state submits that Barona-Hernandez has failed to establish an abuse of discretion, for reasons more fully set forth by the district court

in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (4/16/18 Tr., p.57, L.5 – p.61, L.20 (Appendix A).)

Barona-Hernandez next asserts the district court abused its discretion by denying his Rule 35 motion in light of the information he provided in support of that motion. (Appellant’s brief, pp.7-8.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Barona-Hernandez 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. Barona-Hernandez has failed to satisfy his burden.

Barona-Hernandez provided no new information in conjunction with his Rule 35 motion that demonstrated his sentence was excessive. He merely reiterated his status as a first-time felon, employment history, employable skills, and the presentence investigator’s recommendation for probation. (R., pp.193-95.) Barona-Hernandez did submit a letter from his roommate; however, the information contained in the letter was merely duplicative of the information that was before the district court at the time of sentencing. (R., p.196; PSI, pp.8-13.) In fact, the district court found as much, explaining in its order denying Barona-Hernandez’s Rule 35 motion that Barona-Hernandez “has not provided this Court with any new information not presented to the Court at the time of sentencing.” (R., p.218.) Because Barona-Hernandez presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentence was excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court’s order denying his Rule 35 motion.

Conclusion

The state respectfully requests this Court to affirm Barona-Hernandez's conviction and sentence and the district court's order denying Barona-Hernandez's Rule 35 motion for a reduction of sentence.

DATED this 20th day of November, 2018.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of November, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

1 Aside from a group of friends from Seattle where I
 2 attended the --
 3 THE COURT: I need you to slow down since you
 4 are reading so my reporter can get everything.
 5 THE DEFENDANT: Okay. I agreed to the ride
 6 along a friend. Our destination was Vegas for only
 7 vacation time, and any substance found under my
 8 possession were just intended for a large group of
 9 friends for recreational purpose only. I accept the
 10 blame for giving into my confession.
 11 I have spent most of my life in the
 12 United States, and I never been in trouble. I'm a
 13 hard working father, and I always had a job. I
 14 graduated high school and earned an auto body
 15 technician degree. I work all my life. I have no
 16 criminal record history. Never been in trouble
 17 before.
 18 I'm a nonviolent and nonaggressive
 19 person. I fully respect the courts and others. I
 20 had no intention of corrupting the peace or
 21 integrity of the state of Idaho or anybody within.
 22 During this last year of detention, I've
 23 realized what really matters in life, and my absence
 24 is affecting my family and others. I take full
 25 responsibility of my actions, and I realize the

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1 record. I do see that you seem to be employed for a
 2 number of years in the auto field; however, it is
 3 interesting to note that you apparently quit your
 4 last job in September of 2016 which would be a
 5 little over 6 months prior to this arrest.
 6 Certainly, there is a significant question for the
 7 Court as to what your source of income was once you
 8 quit your job.
 9 Certainly, if I look at the text messages
 10 beginning in January, which is 3 to 4 months after
 11 you quit your employment, it does appear that for at
 12 least a period of 6 months, you were willing to
 13 engage in the sale and distribution of controlled
 14 substances.
 15 It also appears to me that you were
 16 involved in the manufacturing of controlled
 17 substances because, certainly, you seem to be very
 18 familiar with the makeup of the approximate 1,500
 19 pills that you were intending to distribute,
 20 deliver. Whether it was with or without money, you
 21 were still willing to distribute those narcotics to
 22 others in Las Vegas.
 23 It is troubling for me that according to
 24 your statements in the affidavit of probable cause
 25 and in the presentence investigation report your

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1 seriousness of it. I'm truly sorry for the pain
 2 that I caused, and I humbly ask to get another
 3 chance to make my family proud and make wise
 4 decisions in the future. Thank you, Your Honor.
 5 THE COURT: Thank you.
 6 All right. The Court for purposes of
 7 sentencing does consider the four goals of
 8 sentencing. Certainly, given the nature of
 9 underlying offense, protection of society is this
 10 Court's primary concern. It's not to suggest that
 11 the Court doesn't consider the related goals of
 12 rehabilitation, retribution, and deterrence, but
 13 protection of society is still this Court's concern.
 14 The Court also does consider those
 15 factors under 19-2521 to determine whether probation
 16 or some form of incarceration is appropriate.
 17 Certainly, the Court recognizes that under 19-2521
 18 there are certain factors that the Court considers
 19 in recommending imposition of a sentence and that
 20 there are certain discretionary factors that the
 21 Court considers as to whether or not probation is
 22 appropriate.
 23 Certainly, I think -- I recognize, sir,
 24 from reviewing the presentence investigation report
 25 that other than this case, you don't have a prior

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1 version of events is that you were taking
 2 responsibility for Mr. Lopez because Mr. Lopez was
 3 afraid that he would lose his children. You
 4 apparently gave no consideration to your own family.
 5 You gave no consideration to your own child as to
 6 what these offenses could be. It was clear to me,
 7 from reviewing the text messages and your
 8 familiarity of the product that was in the vehicle,
 9 that you were actively engaged in the distribution
 10 of the controlled substances.
 11 When I look at the PSI further, you know,
 12 I look here that -- under the section concerning
 13 substances and substance abuse, it appears to me
 14 that you did not report using any of the drugs that
 15 were found in your possession. You did not see that
 16 you yourself has a need for treatment. According to
 17 you, the only drugs you use is marijuana and that
 18 you don't want to stop using drugs, that you're not
 19 an addict, and it certainly appears to me that --
 20 I doubt that you're distributing
 21 controlled substances out of the goodness of your
 22 own heart. I think that certainly, it appears to
 23 me, that you were doing it for financial reasons,
 24 not because you had some addiction that yourself
 25 needed those substances for. And the fact that you

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1 were willing to misrepresent to others what those
2 pills contained certainly, to me, is very
3 problematic.
4 It seems to me -- and I think I
5 understand the recommendation of the Department.
6 They look at you as being a low risk. They look at
7 you that you seem to have, for a period of time,
8 stable employment. You seemed to have a stable home
9 life. By all accounts, this would appear to be a
10 circumstance that -- at least in the eyes of
11 probation and parole that maybe they don't view
12 these circumstances occurring again. Certainly that
13 is a factor for this Court to consider. And I think
14 they also factored in the fact that given your legal
15 status that certainly this offense will result in
16 your deportation.
17 The concern that I have, given the
18 information I have in the PSI, the information I
19 have as far as the quantity of the drugs, the
20 information that I have in your communications in
21 your phone certainly indicate to me that if the
22 Court were to grant probation at this time that that
23 would depreciate the seriousness of the offense.
24 The Court also does believe that if the
25 Court were to retain jurisdiction that certainly

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1 \$288 for the Jerome County Prosecuting Attorney's
2 Office.
3 The Court -- there is credit for time
4 served of 306 days. That is calculated from June
5 15, 2017, to April 16, 2018. The defendant does
6 have 42 days from the file stamp from within which
7 to appeal. If the defendant cannot afford the cost
8 of the appeal, he may proceed in forma pauperis.
9 Direct the clerk to enter judgment. There is no
10 bail to exonerate. Order the return of the PSIs and
11 deletion of any electronic copies, and the Court
12 will order the defendant committed back to the
13 sheriff for delivery to the State Board of
14 Corrections.
15 Anything further?
16 MR. PITTARD: Nothing further.
17 THE COURT: Good luck to you, sir.
18 (Recess.)
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1 that is not a proper use of that resource because
2 the Court is aware that once you have completed that
3 program that you would be immediately deported and,
4 therefore, there is no ability for this Court or the
5 Department to further supervise you, and, in my
6 view, that would be a waste of that resource.
7 Yes, I recognize that the State incurs a
8 great deal of taxpayer funds to house those in the
9 penitentiary setting; however, the cost of that is
10 of not concern to this Court. This Court's
11 obligation is to protect the community, and so I do
12 not believe that either probation or retained
13 jurisdiction are appropriate under the
14 circumstances.
15 So as to the charge of delivery of a --
16 or possession of a controlled substance with the
17 intent to deliver, a felony, the Court will impose a
18 sentence of 15 years, 3 years fixed, 12 years
19 indeterminate. The Court will impose total court
20 costs. The Court will impose a fine of \$1,000.
21 The defendant shall submit to a DNA
22 sample and right thumbprint. The Court will order
23 \$100 DNA analysis. The Court will also order law
24 enforcement agency reimbursement in the amount of
25 \$488. That would be \$200 for ISP Forensic Services,

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