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### State v. Rico Appellant's Brief Dckt. 46187

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 46187-2018
Plaintiff-Respondent,	)	
	)	CANYON COUNTY NO. CR14-17-21798
v.	)	
	)	
ROY DEVALLE RICO, JR.,	)	APPELLANT’S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Roy D. Rico, Jr., was found guilty of felony driving under the influence (“DUI”) with a persistent violator sentencing enhancement. The district court sentenced him to thirty years, with six years fixed. The district court later denied his Idaho Criminal Rule 35 (“Rule 35”) motion for leniency. Mr. Rico appeals, and he asserts 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. Rico with a felony DUI and two misdemeanors for obstructing an officer and possession of an open alcohol container in a car. (R., pp.29–30, 31–32, 74–76, 77–

79.) The State also charged Mr. Rico as a persistent violator of the law. (R., pp.34–35, 80–81.) Mr. Rico pled not guilty and went to trial. (R., pp.37, 83–95.) The jury found him guilty of the DUI and two misdemeanor offenses. (R., pp.93, 142–43.) Mr. Rico then pled guilty to the felony enhancement for the DUI and the persistent violator charge. (R., pp.94–95, 144–45.)

At sentencing, the State recommended an aggregate sentence of life imprisonment, with ten years fixed. (Tr., p.274, Ls.9–12.) Mr. Rico requested that the district court retain jurisdiction (a “rider”) or sentence him to three years fixed with the indeterminate time left to the district court’s discretion. (Tr., p.287, Ls.6–14.) The district court imposed a sentence of thirty years, with six years fixed for the felony DUI. (Tr., p.300, Ls.14–20.) The district court imposed 223 days in county jail for the misdemeanor offenses, with 223 days credit for time served. (Tr., p.297, Ls.9–13.)

Mr. Rico timely appealed from the district court’s judgment of conviction. (R., pp.159–60, 161–63.) Mr. Rico then filed a Rule 35 motion. (Aug. R., pp.3–8.) The district court denied the motion. (Aug. R., p.9.)

### ISSUES

- I. Did the district court abuse its discretion when it imposed a unified sentence of thirty years, with six years fixed, upon Mr. Rico, for a felony DUI?
- II. Did the district court abuse its discretion when it denied Mr. Rico’s Rule 35 motion?

## ARGUMENT

### I.

#### The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Thirty Years, With Six Years Fixed, Upon Mr. Rico, For A Felony DUI

“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. Rico’s sentence does not exceed the statutory maximum. *See* I.C. § 19-2514 (five year minimum, life maximum for persistent violator). Accordingly, to show that the sentence imposed was unreasonable, Mr. Rico “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 district court’s decision to retain jurisdiction is also reviewed for an abuse of discretion. *State v. Jones*, 141 Idaho 673, 677 (Ct. App. 2005). “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." *Id.* at 676. "[P]robation is the ultimate objective of a defendant who is on retained jurisdiction." *Id.* at 677. "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.*

Here, Mr. Rico asserts the district court 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 or a rider in light of the mitigating factors, including his alcoholism, family support, commitment to sobriety and treatment, and acceptance of responsibility.

Thirty-eight-year-old Mr. Rico has battled alcoholism for over half his life. He started drinking alcohol at age eighteen. (Presentence Investigation Report ("PSI"),<sup>1</sup> p.39.) His alcohol abuse was brought on by his parents' separation. (PSI, p.36.) Mr. Rico's father left, and Mr. Rico found it difficult to forgive him. (PSI, p.36.) Since then, Mr. Rico has struggled with his sobriety, but he has had periods of success. (Tr., p.284, Ls.14–16, 19–21.) Recently, Mr. Rico had a hard time dealing with his mother's death in 2009 and his divorce in 2014. (Tr., p.268, L.23–p.269, L.4, p.271, Ls.3–4; PSI, p.37.) He unfortunately turned to alcohol to cope. (Tr., p.268, L.23–p.269, L.7.) A sentencing court should 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." *State v. Nice*, 103 Idaho 89, 91 (1982). In this case, Mr. Rico's alcohol abuse supports a lesser sentence or a rider.

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<sup>1</sup> Citations to the PSI refer to the seventy-page electronic document with the trial exhibits and confidential exhibits.

Mr. Rico's family support also supports a more lenient sentence. *State v. Shideler*, 103 Idaho 593, 594–95 (1982) (family support and good character as mitigation); *see State v. Ball*, 149 Idaho 658, 663–64 (Ct. App. 2010) (district court considered family and friend support as mitigating circumstance). Two of Mr. Rico's sisters testified at sentencing. One sister stated that she was "not here to make any excuse for him of course," but she wanted the district court to know that he is "a really, really good person and a very good, good father to his daughter" when sober. (Tr., p.268, Ls.14–15, 19–22.) She testified that she believed Mr. Rico needed counseling and "Jesus in his life." (Tr., p.269, Ls.11–12.) She also told the district court that his family was "here to support him all the way." (Tr., p.269, Ls.15–16.) Mr. Rico's other sister testified that, "when he's not under the influence, he's a good person" and "a good hard worker." (Tr., p.272, Ls.20–22.) She reiterated that their family was "always there for him to support him." (Tr., p.272, L.23.) She agreed that Mr. Rico needed counseling. (Tr., p.273, Ls.1–3.) In addition to his sisters, Mr. Rico's ex-wife and mother of his daughter wrote a letter of support to the district court. (Aug. R., p.2; *see* PSI, p.37.) She explained that their daughter was "having a hard time dealing with her father being in jail." (Aug. R., p.2.) She said it was "very hard" to see their daughter "heartbroken" and "hurt." (Aug. R., p.2.) She also recognized that Mr. Rico's alcohol use "got worse" after his mother's death. (Aug. R., p.2.) She agreed that Mr. Rico needed counseling, treatment, and medication for his depression. (Aug. R., p.2.) She asked for a more lenient sentence. (Aug. R., p.2.) Mr. Rico's family support stands in favor of mitigation.

Further, Mr. Rico is ready for treatment and accepts responsibility for his actions. At sentencing, Mr. Rico informed the district court:

I just would like to take responsibility for what happened the day I got locked up here in jail. I did not mean for that to happen whatsoever. And I'm glad – I thank God that no one got hurt because the last thing I want to do is hurt anybody.

I want to thank my family for being here. And I'm sorry to put them through all this. I know it's a heartache on them, especially my daughter.

(Tr., p.288, Ls.5–13.) Mr. Rico also stated that he had depression since he was eighteen and had been using alcohol to self-medicate. (Tr., p.288, Ls.14–16.) He recognized that he was an alcoholic. (Tr., p.289, Ls.10–11.) He explained:

I believe to me alcohol is a drug because I've been struggling since I was 18, and I just haven't found that factor to not get rid of it because I know you can't get rid of it. But I know there's help out there, and I want help. I'll do whatever it takes for that.

(Tr., p.289, Ls.11–14.) Along the same lines, Pastor Good with the Valley Christian Fellowship wrote that Mr. Rico “had been showing a sincere dedication to change the direction of his life and to pursue real life change that is rooted in a genuine Christian faith and lifestyle.” (Aug. R., p.1.) Due to Mr. Rico’s “impressive commitment to change,” Pastor Good hoped that the district court “could choose a sentencing option that would serve justice and enable Mr. Rico to move forward personally as well.” (Aug. R., p.1.) Moreover, Mr. Rico was very grateful for the jail library because he was able to educate himself on his mental health. (Tr., p.288, Ls.19–24.) He was also grateful for his past riders, but he wanted another rider with the “more aggressive” “Cincinnati program.” (Tr., p.289, Ls.6–8.) Mr. Rico’s remorse, acceptance of responsibility, focus on sobriety, and willingness to engage in treatment support a lesser sentence.

In summary, Mr. Rico maintains the district court failed to exercise reason and thus abused its discretion by imposing an excessive sentence. Proper consideration of the mitigating circumstances warranted a more lenient sentence or a rider.

## II.

### The District Court Abused Its Discretion When It Denied Mr. Rico'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. Rico provided new and additional information to the district court that showed his sentence was excessive. In his Rule 35 motion, Mr. Rico stated that he was “a good inmate and was recently hired as a barber.” (Aug. R., p.4.) He included a certificate of his barber training. (Aug. R., p.8.) Mr. Rico also wrote a letter to the district court. (Aug. R., pp.6–7.) In this letter, he stated, “I am most certainly aware of the severity of my crime and remorseful of my actions. I am fully committed to my rehabilitation from alcoholism.” (Aug. R., p.6.) He informed the district court that he had no violent, theft, or drug offenses. (Aug. R., p.6.) His offenses were attributable to his alcoholism. (Aug. R., p.6; *see also* PSI, pp.29–35.) He also

stated that he hoped for leniency to provide financial and emotional support for his daughter. (Aug. R., p.6.) Finally, he explained that he was currently housed in Texas due to overcrowding in Idaho prisons, and he hoped for a reduced sentence so he could participate in treatment in Idaho. (Aug. R., pp.6–7.) Mr. Rico maintains this new and additional information demonstrates that he received an excessive sentence. He submits the district court did not adequately weigh this information and therefore abused its discretion by denying his Rule 35 motion.

### CONCLUSION

Mr. Rico respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he respectfully requests that this Court vacate the district court's judgment of conviction or its order denying his Rule 35 motion and remand this case for a new sentencing hearing or a Rule 35 motion hearing.

DATED this 15<sup>th</sup> day of March, 2019.

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

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15<sup>th</sup> day of March, 2019, 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