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State v. Alloway Appellant's Brief Dckt. 46245

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 46245-2018
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR01-16-42881
v.	)	
	)	
BOBBY LEE ALLOWAY,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Mr. Alloway appeals from the district court's order denying his Idaho Criminal Rule 35 motion for a reduction of sentence. He asserts that the district court abused its discretion when, in light of his rehabilitative efforts, it denied his Rule 35 motion.

Statement of Facts and Course of Proceedings

The State charged Mr. Alloway by indictment with three counts of lewd conduct with a minor under sixteen, eight counts of sexual abuse of a minor under sixteen, and two counts of felony injury to children, related to his conduct with his two stepdaughters when they were

between the ages of ten and thirteen years old.[1] (R., pp.10–13.) Mr. Alloway pled guilty to two counts of felony injury to children for hitting the girls,[2] neglecting the girls, calling the girls derogatory names, or giving the girls alcohol and cigarettes, or for allowing his wife to do those things. (R., pp.101–8; Tr., p.6, L.13–p.7, L.11, p.19, L.1–p.21, L.8.) As part of his plea, he agreed to participate in the presentence investigation and a psychological evaluation. (R., p.103; Tr., p.6, L.13–p.7, L.11.) In exchange, the State dismissed the remaining charges, agreed to only argue the facts of the charges he pled to at sentencing, and agreed to recommend concurrent unified terms of ten years, with two years fixed. (R., p.103; Tr., p.6, L.16–p.7, L.11.) Mr. Alloway would be free to argue for a lower sentence. (Tr., p.7, Ls.18–20; 103.)

At sentencing, the State asked that the court follow the plea agreement. (Tr., p.28, Ls.23–24.) Defense counsel said, "I believe it's a fair resolution as well." (Tr., p.29, Ls.15–16). He then went on to discuss how incarceration, a retained jurisdiction, and probation would all be fair, and "[s]o while I appreciate the State's view of this case and what the State believes is the appropriate sentence now, I would ask the Court to consider that along with other options including community-based supervision as an alternative to that as a retained jurisdiction." (Tr., p.34, L.21–p.35, L.11.) During his allocution, Mr. Alloway told the court:

> Since I've been incarcerated, like my attorney said, I've reached out and been in contact with Balance Recovery, which offers CSC, MRT, relapse prevention; Brighter Futures, which is where I was going to counseling before I became incarcerated. They have—are willing to accept me back. I've had the support of Pure [sic] Wellness Community Support Center both dealing with relapse prevention and mental health issues, as well as other organizations. Good

[1] The girls' mother was charged as Mr. Alloway's codefendant.

[2] At the plea colloquy, Mr. Alloway stated that both he and his wife had at times spanked the girls, that he had not stopped their mother from giving one of the girls alcohol and cigarettes, that the girls may have overheard derogatory names or language, and that a belt was threatened but, to his knowledge, never used. (Tr., p.20, Ls1-18.) At sentencing, however, defense counsel said that Mr. Alloway had only pled guilty to neglect, but had not himself physically disciplined the girls. (Tr., p.30, Ls.17-25.)

> Samaritan Homes has accepted me, the Ustick House through Rising Sun has accepted me. I haven't heard back from Providence House, but they did send me an application, which I filled out.
>
> And I'm just tired of all this. I want a chance to prove to myself that I can do what I stated I would do in my PSI. And I also have the support of the Catholic church, which I just recently got back in touch with.
>
> And I basically just place my life in your hands and whatever you decide, I'll accept. I do accept responsibility for allowing harm to come to the girls and all.
>
> I have been aware of some of my mental health issues and I was seeking treatment for that. Through these evaluations I learned of some issues that I wasn't aware of and I will be seeking treatment for them as well.
>
> So, like I said, I place my life in your hands and whatever you see fit. I only pray that you find it worthy to give me this chance to prove myself in a probation setting.

(Tr., p.35, L.18–p.36, L.24; *see also* Tr. p.32, L.15–p.33, L.7 (defense counsel at sentencing discussing Mr. Alloway's efforts to get probation-based options for housing, treatment, and support lined up).)

The court followed the State's recommendation and sentenced Mr. Alloway to concurrent unified terms of ten years, with two years fixed, on each count. (R., pp.129–31.)

Mr. Alloway filed a timely Rule 35 motion requesting leniency. (R., pp.133–34.) In his motion, he explained:

> Since his sentence was imposed, the defendant has participated in 'brighter futures,' 'sage recovery,' 'P.E.E.R. Wellness,' and has applied to Good Samaritan houses. Clearly, he is taking his rehabilitation seriously and further demonstrates his ability to be successful in community based treatment. His rehabilitative efforts warrant an act of leniency by this Court toward the defendant.

(R., p.134.) The court denied the motion, stating that,

> While the Court is encouraged by any rehabilitative measures taken by Defendant, after reviewing all submitted materials, the Court cannot find that Defendant's original sentence was unduly harsh or excessive, and Defendant has not presented any new evidence or authority for the Court to consider that was not considered during the original sentencing. Thus, Defendant has failed to demonstrate that he is entitled to relief pursuant to Rule 35.

(R., p.142.) Mr. Alloway filed a notice of appeal timely from the denial of his Rule 35 motion. (R., pp.144–46.)

ISSUE

Did the district court abuse its discretion when, in light of Mr. Alloway's rehabilitative efforts, it denied his Rule 35 motion?

ARGUMENT

The District Court Abused Its Discretion When, In Light Of Mr. Alloway's Rehabilitative Efforts, It Denied His Rule 35 Motion

The court may reduce an otherwise lawful sentence "if the sentence originally imposed was unduly severe." *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994); I.C.R. 35. Even if the sentence was not excessive when pronounced, a defendant can prevail on a Rule 35 motion if the sentence is excessive in view of new or additional information presented with the motion for reduction. *Id.*

"The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id*. This Court will conduct an independent review of the record, taking into account "the nature of the offense, the character of the offender, and the protection of the public interest." *State v. Miller*, 151 Idaho 828, 834 (2011). The Court reviews the district court's sentencing decision for an abuse of discretion, which occurs if the district court imposed a sentence that is unreasonable "under any reasonable view of the facts." *State v. Strand*, 137 Idaho 457, 460 (2002); *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). "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." *Miller*, 151 Idaho at 834.

Mr. Alloway asserts that his unified sentence of ten, with two years fixed, was excessive in light of the new information he provided in his Rule 35 motion. Although Mr. Alloway told the court at sentencing that he had gotten in contact to with various rehabilitation programs (Tr., p.35, Ls.18–24 (explaining that he had "reached out and been in contact with Balance Recovery, which offers CSC, MRT, relapse prevention; Brighter Futures, which is where I was going to counseling before I became incarcerated. . . ."), his Rule 35 motion contained additional information showing that Mr. Alloway had followed through by actually participating in those programs (R., p.134 ("Since his sentence was imposed, the defendant has participated in 'brighter futures,' [and] 'sage recovery,' . . ."). In light of that new information, the district court abused its discretion by not reducing Mr. Alloway's sentence.

CONCLUSION

Mr. Alloway respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 13th day of February, 2019.

/s/ Maya P. Waldron
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of February, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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

MPW/eas