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### State v. Burningham Appellant's Brief Dckt. 46301

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 46301-2018
	)	
v.	)	ADA COUNTY NO. CR01-16-38655
	)	
DANIEL TODD BURNINGHAM,	)	
	)	APPELLANT'S BRIEF
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to Idaho Criminal Rule 35 (“Rule 35”), Daniel T. Burningham moved for reconsideration of his ten-year sentence for aggravated assault with a deadly weapon enhancement. The district court denied his motion. Mr. Burningham appeals.

Statement of Facts and Course of Proceedings

The State charged Mr. Burningham with aggravated assault with a handgun and the deadly weapon sentencing enhancement. (R., pp.36–37.) Mr. Burningham pled not guilty and

went to trial. (R., p.43; *see also* R., pp.98–103 (jury trial).) The jury found him guilty as charged. (R., p.134.)

At sentencing, the State recommended a sentence of ten years, with two years fixed. (Tr., p.12, Ls.6–7.) Mr. Burningham requested the district court retain jurisdiction or place him on probation, with an underlying sentence of six years, with two years fixed. (Tr., p.17, Ls.2–6.) The district court imposed a sentence of ten years, with three years fixed. (Tr., p.26, Ls.7–14; *see also* R., pp.148–50 (judgment of conviction).)

Almost four months later, Mr. Burningham moved for reconsideration of his sentence pursuant to Rule 35. (R., p.157.) He also filed a pro se Rule 35 motion with supporting documents. (R., pp.158–70.) He requested the district court reduce his sentence to six years, with two years fixed. (R., p.162.) The district court issued an order denying his motion. (R., pp.176–77.) Mr. Burningham timely appealed. (R., pp.179–80.)

### ISSUE

Did the district court abuse its discretion when it denied Mr. Burningham’s Rule 35 motion?

### ARGUMENT

#### The District Court Abused Its Discretion When It Denied Mr. Burningham’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. Burningham showed his sentence was excessive in light of the new and additional information contained in his Rule 35 motion. At sentencing, the district court expressed concern about Mr. Burningham’s past behavior, understanding of the severity of the offense, and amenability to treatment. (*See Tr.*, p.23, Ls.1–p.25, L.19.) Mr. Burningham addressed those concerns in his Rule 35 motion. He informed the district court that he was working on his mental health, remaining productive while incarcerated, and preparing for success upon his release. For example, he submitted several requests for “TFAC and ART,” but these programs were unavailable until he was one year away from parole eligibility. (*R.*, p.159; *see also R.*, p.163.) In addition, he reviewed self-help workbooks and talked with other inmates in various treatment programs. (*R.*, p.160.) He kept “regular and positive” contact with his family and potential employers. (*R.*, p.160.) He had at least two employment options upon his release. (*R.*, pp.160–61.) He also was interested in the inmate worker program and waiting for an opening. (*R.*, pp.159, 167, 169.) To this end, he applied to the food services program and held certificates in food handling and culinary arts. (*R.*, p.160.) Along with his interest in treatment and work, Mr. Burningham informed the district court that he had no significant behavioral problems in prison. (*R.*, p.159.) He saw himself “as infinitely more well equipped to handle, and

more importantly, avoid altogether, hostile and antisocial activities and behaviors that culminated in my crime and arrest.” (R., p.161.) He further explained, “I [foresee] a productive and positive rehabilitation and relapse prevention as outlined by positive curriculum established by treatment personnel.” (R., p.161.) This new and additional information showed the district court’s sentencing decision of ten years, with three years fixed, was excessive. The district court did not exercise reason and thus abused its discretion by denying Mr. Burningham’s Rule 35 motion.

CONCLUSION

Mr. Burningham respectfully requests this Court reduce his sentence as it deems appropriate. Alternatively, he respectfully requests this Court reverse or vacate the district court’s order denying his Rule 35 motion and remand this case for further proceedings.

DATED this 11<sup>th</sup> day of April, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11<sup>th</sup> day of April, 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  
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/s/ Evan A. Smith  
EVAN A. SMITH  
Administrative Assistant

JCS/eas