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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	Nos. 46452-2018 & 46453-2018
Plaintiff-Respondent,)	
)	Kootenai County Case Nos.
v.)	CR-2016-12518 & CR-2017-7644
)	
SHAUN PATRICK KELLY,)	
)	RESPONDENT’S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Kelly failed to show any basis for reversal of the district court’s orders denying his Rule 35 motions for reduction of sentence?

Kelly Has Failed To Establish Any Basis For Reversal Of The District Court’s Orders Denying His Rule 35 Motions

Kelly pled guilty to delivery of methamphetamine, with an infliction of great bodily injury enhancement, and to unlawful possession of a firearm in docket number 46452, and to felony eluding a peace officer in docket number 46453, and – at a consolidated sentencing

hearing – the district court imposed consecutive sentences of life, with 25 years fixed for delivery of methamphetamine with infliction of great bodily injury; five years fixed for unlawful possession of a firearm; and five years fixed for felony eluding a peace officer. (45563/45564 R., Vol. II, pp.35-36; Vol. III, pp.9-11, 104-05, 136-38.) The judgments of conviction were entered on October 17, 2017. (45563/45564 R., Vol. III, pp.9, 136.) Kelly appealed and the Idaho Court of Appeals affirmed his convictions and sentences. (46452 R., pp.30-31; 46453 R., pp.19-20.)

On February 13, 2018 – 119 days after the judgments of conviction were entered, Kelly filed a timely Rule 35 motion for reduction of sentence in each case. (46452 R., pp.22-23; 46453 R., pp.11-12.) A hearing was held on the motions on July 6, 2018, and the district court entered orders denying the motions on July 13, 2018 – 269 days after judgment and 150 days after the motions were filed. (46452 R., pp.32, 35-36; 46453 R., pp.21, 24-25.) Kelly filed notices of appeal timely only from the district court’s orders denying his Rule 35 motions. (46452 R., pp.37-40; 46453 R., pp.26-29.)

Kelly asserts that the district court abused its discretion by denying his Rule 35 motions for reduction of sentence in light of his desire to participate in rehabilitative programs. (Appellant’s brief, pp.4-5.) There are two reasons why Kelly’s argument fails. First, Kelly’s Rule 35 motions for reduction of sentence were not timely ruled upon. Second, Kelly has failed to establish any basis for reversal of the district court’s orders denying his Rule 35 motions.

The district court failed to rule upon Kelly’s Rule 35 motions while it was vested with jurisdiction. Rule 35 provides both that a district court may reduce a sentence within 120 days after judgment and that a motion for reduction may be made within 120 days after judgment. The Idaho Supreme Court has held that a trial court has jurisdiction to rule on a Rule 35 motion

within a “reasonable time” after the expiration of the 120 days. State v. Chapman, 121 Idaho 351, 352, 825 P.2d 74, 75 (1992). If, however, the trial court fails to rule upon the motion “within a reasonable time after the expiration of the 120-day period, the trial court loses jurisdiction.” Id. In addition, it is the movant’s responsibility to “precipitate action on a Rule 35 motion within a reasonable time frame, or otherwise provide an adequate record and justification for the delay, to avoid the risk of the trial court losing jurisdiction.” Chapman, 121 Idaho at 354, 825 P.2d at 77; see also State v. Payan, 132 Idaho 614, 619, 977 P.2d 228, 233 (Ct. App. 1998) (citing State v. Day, 131 Idaho 184, 186, 953 P.2d 624, 626 (Ct. App. 1998)); State v. Simpson, 131 Idaho 196, 197 n.2, 953 P.2d 636, 637 n.2 (Ct. App. 1998).

Kelly filed his Rule 35 motions on February 13, 2018 – 119 days after judgment. (45563/45564 R., Vol. III, pp.9, 136; 46452 R., p.22; 46453 R., p.11.) More than three months later, on May 29, 2018, a Rule 35 hearing was set for June 8, 2018. (46453 R., p.9.) That hearing was vacated, however, and re-set for July 6, 2018, when the hearing was finally held. (46453 R., p.9.) The district court subsequently entered its orders denying the motions on July 13, 2018 – 269 days after judgment and 150 days after the motions were filed. (46452 R., pp.32, 35-36; 46453 R., pp.21, 24-25.) Because nothing in the record justifies such a lengthy delay, the court had no jurisdiction, five months after the motions were filed and more than eight months after the entry of judgment, to rule on the motions. The district court’s orders denying Kelly’s Rule 35 motions for reduction of sentence should be affirmed because the court lost jurisdiction, due to the passage of time, to grant the motions.

Even if Kelly’s motions were considered timely ruled upon, he has still failed to establish any basis for reversal of the district court’s orders denying his Rule 35 motions. 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, Kelly 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. Kelly has failed to satisfy his burden.

Kelly provided no new information in support of his Rule 35 motions. (46452 R., pp.22-23; 46453 R., pp.11-12.) At the hearing on his Rule 35 motions, Kelly merely reiterated that he would like the opportunity to participate in rehabilitative programs and “to change.” (7/6/18 Tr., p.6, L.20 – p.7, L.14.) Information with respect to Kelly’s desire to participate in rehabilitative probations and to change the way he had been living his life was before the district court at the time of sentencing. (10/12/17 Tr., p.23, Ls.19-23; PSI, pp.12, 18-19.) Because Kelly presented no new evidence in support of his Rule 35 motions, he failed to demonstrate in the motions that his sentences were excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court’s orders denying his Rule 35 motions for reduction of sentence.

Even if this Court considers the merits of Kelly’s claims, he has still failed to establish an abuse of discretion. At the Rule 35 hearing, the district court articulated its reasons for denying Kelly’s Rule 35 motions for reduction of sentence. (7/6/18 Tr., p.9, L.14 – p.10, L.18.) The state submits that Kelly has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the Rule 35 hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm the district court's orders denying Kelly's Rule 35 motions for reduction of sentence.

DATED this 11th day of June, 2019.

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

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of June, 2019, served a true and correct copy of the attached RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

BEN P. MCGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER
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/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

sentencing. The Court was presented a lot of evidence at the sentencing hearing, and, frankly, through the course of the case.

I cannot say that the sentence was excessive. I think that Mr. Kelly will always present a risk to the public and the citizens of our community. His criminal history bears that out, and I would ask the Court to not disturb the judgment.

Thank you.

THE COURT: Thank you.

Last word, Mr. Walsh?

MR. WALSH: I think the Court's fully advised.

THE COURT: Thank you.

Well, I am not inclined to grant your relief requested. I hear what you're saying about rehabilitation and addressing your addiction, and certainly, Mr. Kelly, I believe your addiction is addressed, at least in part, by being in prison.

With respect to sentencing factors, the primary factor for me in this case, as I announced at the sentencing hearing, is the protection of the public. You are a very dangerous man. The crimes that you committed were heinous, and as the State pointed out, while we were pending the case with respect to --

well, the second degree case that ended up being pled down with respect to the death of another person, you were committing more crimes and putting the public in danger by your erratic driving and stealing vehicles and other things.

The Court of Appeals has upheld the decision in terms of deeming it not excessive, and I know that that's not really the basis for your motion today, but I made the decision that I made in sentencing, recognizing that you are a dangerous man, that you need to spend most of the rest of your life behind bars, and society needs to be protected from you.

So I am going to deny the motion in my discretion. Certainly it is your option to raise the motion, and I respect that. I have no problem with your bringing the motion, but as I indicated, I am going to deny it.

Anything further, Mr. Walsh?

MR. WALSH: No, Your Honor. Thank you.

THE COURT: Mr. Whitaker?

MR. WHITAKER: Your Honor, would you like an order on that?

THE COURT: Yes, I would, please.

MR. WHITAKER: Nothing further.