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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 46498-2018
)	
v.)	KOOTENAI COUNTY NO. CR-2018-4805
)	
LARRY BURTON PENKUNIS,)	APPELLANT’S REPLY BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

The district court sentenced Larry B. Penkunis to twenty-five years, with twelve years fixed, for delivery of a controlled substance. Pursuant to Idaho Criminal Rule 35 (“Rule 35”), Mr. Penkunis moved for a reduction in his fixed time to six years. The district court partially granted his motion and reduced his fixed time to ten years.

Mr. Penkunis appealed, and he argued the district court abused its discretion by failing to further reduce his fixed time. The State responded. This Reply Brief is necessary to address the State’s argument that the district court lost jurisdiction to reduce Mr. Penkunis’s sentence.

Statement of Facts and Course of Proceedings

Mr. Penkunis articulated the statement of facts and course of proceedings in his Appellant's Brief. (App. Br., pp.1–2.) They are not repeated here, but are incorporated by reference.

ISSUE

Did the district court abuse its discretion by failing to further reduce Mr. Penkunis's fixed time upon his Rule 35 motion for leniency?

ARGUMENT

The District Court Abused Its Discretion By Failing To Further Reduce Mr. Penkunis's Fixed Time Upon His Rule 35 Motion For Leniency

On appeal, Mr. Penkunis argued the district court did not exercise reason by failing to give more weight to the new and additional information in support of his Rule 35 motion. (App. Br., pp.3–6.) The State responded, in part, that the district court lost jurisdiction to rule on his motion because the district court decided the motion 116 days after he filed it and 170 days after the judgment of conviction. (Resp. Br., pp.3–4.) Mr. Penkunis disagrees, and he submits the district court had jurisdiction.

According to Rule 35, a defendant has 120 days from the judgment of conviction to file a Rule 35 motion. I.C.R. 35(b). Rule 35 also provides that “[t]he court may correct a sentence within 120 days after the filing of a judgment of conviction” I.C.R. 35(b). The policies of the 120-day limitation are to protect “judges against repeated importunities by those sentenced” and to ensure “that the court does not usurp the responsibilities of parole officials by retaining jurisdiction indefinitely and acting on the motion in light of the movant's conduct in prison.”

State v. Chapman, 121 Idaho 351, 353 (1992) (quoting *United States v. Smith*, 650 F.2d 206, 208 (9th Cir. 1981)). However, the 120-day limitation is not immutable:

[A] district court does not lose jurisdiction to act upon a timely-filed motion under Rule 35 merely because the 120-period expires before the judge can reasonably consider and act upon the motion. Allowing a trial court to rule within a “reasonable” time will allow the court to fulfill its own duties, yet will prevent cases in which the defendant files a timely Rule 35 motion at the very end of the 120-day period, for instance on the 119th day, leaving the court with only one day to rule on the motion. A strict interpretation would, in such a case, be highly impractical and would most often cause the trial court to lose jurisdiction without ever having a chance to consider the motion.

Chapman, 121 Idaho at 353–54. In short, “a district court must rule within a reasonable time after the expiration of the 120-day period for filing a Rule 35 motion.” *State v. Veloquio*, 141 Idaho 154, 155 (Ct. App. 2005). The district court loses jurisdiction if the delay is unreasonable, and reasonableness is evaluated in light of the purposes of the 120-day limit and the reasons for the district court’s delay in the specific case. *Id.* “Delays ranging from five months to one year after the expiration of the 120-day period have been deemed reasonable, while delays ranging from eight months to two years have been deemed unreasonable.” *State v. Simpson*, 131 Idaho 196, 197 (Ct. App. 1998).

Here, any delay in the district court’s ruling on Mr. Penkunis’s Rule 35 motion was reasonable. Mr. Penkunis filed a timely Rule 35 motion fifty-four days after the district court entered his judgment of conviction. (R., pp.472–73, 495.) Two days later, the district court notified Mr. Penkunis of its intent to dismiss his motion. (R., pp.497–99.) Twenty-three days later, Mr. Penkunis objected to the district court’s intent to dismiss and informed the district court that he intended to present information on his criminal history and to testify about his participation in treatment and programs in prison. (R., p.500.) The district court scheduled a telephonic hearing for forty-six days after Mr. Penkunis had initially filed his Rule 35 motion.

(*See R.*, p.504.) Then, the day before the hearing, the State filed documents under seal on Mr. Penkunis’s criminal history and prior judgments. (Conf. Aug. 5/23/19.) At the hearing, Mr. Penkunis asked for continuance to go over these documents. (2nd Aug. R., p.1.) The State had no objection. (2nd Aug. R., p.1.) The district court granted the continuance. (2nd Aug. R., p.1.) Ten days later, Mr. Penkunis filed notice of the hearing for two months later. (2nd Aug. R., pp.2–3.) As such, the hearing took place 116 days after Mr. Penkunis initially filed his Rule 35 motion. (*See generally* Tr. Vol. II.¹) The district court orally ruled on the motion at the hearing and entered the order five days later. (Tr. Vol. II, p.26, Ls.21–23; Aug. R., p.1.)

In light of this procedural background, the district court’s delay in ruling on Mr. Penkunis’s motion was entirely reasonable. Mr. Penkunis’s Rule 35 motion hearing was originally scheduled for 100 days after the district court’s judgment of conviction. This was well within the 120-day limit. This hearing was then continued for 70 more days. The continuance, however, was entirely due to the State’s last-minute filing and Mr. Penkunis’s need to review those documents—to which the State had no objection. There is no indication in the record that the hearing was not scheduled as soon as practicable after Mr. Penkunis’s review and in accordance with the district court’s calendar. Ultimately, the district court orally ruled on the motion 116 days after its filing and 170 days after the judgment of conviction. This slight delay does not undermine the time limit policies because (1) this was Mr. Penkunis’s first, and timely filed, Rule 35 motion and (2) Mr. Penkunis had a significant fixed term so this short delay would not “usurp” the parole board’s responsibilities. *Chapman*, 121 Idaho at 353. More importantly, the State is simply incorrect in claiming that “nothing in the record provides justification for the delay.” (Resp. Br., p.4.) The State’s eleventh-hour filing and, as a result, Mr. Penkunis’s need for

¹ There are two transcripts on appeal. The first, cited as Volume I, contains the sentencing and entry of plea hearings. The second, cited as Volume II, contains the Rule 35 motion hearing.

time to review the State's filing provides more than sufficient justification for the delay. Therefore, Mr. Penkunis submits any delay was reasonable, and the district court did not lose jurisdiction to rule on Mr. Penkunis's Rule 35 motion.

CONCLUSION

Mr. Penkunis respectfully requests this Court reduce his sentence as it deems appropriate. Alternatively, he respectfully requests this Court vacate the district court's order granting his Rule 35 motion in part and remand his case to district court for further proceedings.

DATED this 6th day of August, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of August, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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E-Service: ecf@ag.idaho.gov

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

JCS/eas