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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. TYLER JOSEPH FOX, Defendant-Appellant.	)	NO. 46532-2018 Kootenai County Case No. CR-2017-9518 RESPONDENT'S BRIEF

Issue

Has Fox failed to show any basis for reversal of the district court's order denying his Rule 35 motion for a reduction of sentence?

Fox Has Failed To Establish Any Basis For Reversal Of The District Court's Order Denying His Rule 35 Motion

In June 2017, during a probation/parole "house visit," officers found Fox in possession of four syringes, a "metal spoon with a white residue," and a clear plastic bag containing methamphetamine. (R., pp.13-14, 65.) The state charged Fox with possession of

methamphetamine, with a persistent violator enhancement, and possession of drug paraphernalia. (R., pp.53-55.) Pursuant to a binding Rule 11 plea agreement, Fox pled guilty to possession of methamphetamine, the state dismissed the remaining charge and the enhancement, and the parties stipulated to a unified sentence of seven years, with three years fixed, "with a rider." (R., pp.65, 67-71.) The district court imposed the agreed-upon sentence of seven years, with three years fixed, and retained jurisdiction. (R., pp.72-77.) Following the period of retained jurisdiction, the district court relinquished jurisdiction. (R., pp.80-84.) Fox filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.85-86, 92-93.) Fox filed a notice of appeal timely only from the district court's order denying his Rule 35 motion. (R., pp.95-98.)

Fox asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence in light of "the progress [he] made after sentencing." (Appellant's brief, pp.2-3.) Fox's claim of an abuse of sentencing discretion is barred by the doctrine of invited error.

A party is estopped, under the doctrine of invited error, from complaining that a ruling or action of the trial court that the party invited, consented to or acquiesced in was error. State v. Castrejon, 163 Idaho 19, 21, 407 P.3d 606, 608 (Ct. App. 2017) (review denied Jan. 4, 2018) (citations omitted). This doctrine applies to sentencing decisions as well as to rulings during trial. Id. The purpose of the invited error doctrine is to prevent a party who caused or played an important role in prompting a trial court to take a certain action from later challenging that action on appeal. Id. at 22, 407 P.3d at 609 (citing State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999)).

As part of the binding Rule 11 plea agreement in this case, Fox stipulated to the sentence he received. (R., pp.65, 69.) The pretrial settlement offer, which was accepted and signed by Fox, specifies the following "[a]greed sentence recommendation: BINDING RULE 11 FOR A SENTENCE OF 3+4(7) WITH A RIDER." (R., p.69 (capitalization original).) At sentencing, the district court imposed the agreed-upon sentence of seven years, with three years fixed, and retained jurisdiction. (R., pp.66, 72-77.) Because Fox received the very sentence to which he agreed, he cannot claim on appeal that it is excessive or that the district court abused its discretion by declining to reduce his sentence. Therefore, Fox's claim of an abuse of sentencing discretion is barred by the doctrine of invited error and the district court's order denying Fox's Rule 35 motion for a reduction of sentence should be affirmed.

Even if his claim is not barred by the invited error doctrine, Fox has still failed to establish any basis for reversal of the district court's order denying his Rule 35 motion. In State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007), the Idaho Supreme Court observed that a Rule 35 motion "does not function as an appeal of a sentence." The Court noted that where a sentence is within statutory limits, a Rule 35 motion is merely a request for leniency, which is reviewed for an abuse of discretion. Id. Thus, "[w]hen 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." Id. Absent the presentation of new evidence, "[a]n appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence." Id. Accord State v. Adair, 145 Idaho 514, 516, 181 P.3d 440, 442 (2008).

Fox did not appeal the judgment of conviction in this case. (R., pp.85-86.) At the Rule 35 hearing, Fox merely recapped the programming he completed while on his rider and stated

that he was "trying to get back into" a "diversionary program" and that he hadn't received any "new DOR's" beyond the three DOR's he incurred while on his rider. (5/10/18 Tr., p.6, Ls.13-19; p.11, Ls.10-12; PSI, pp.8-9.[1]) None of this was "new" information before the district court. The "new" programming Fox claimed to have completed included "prerelease," approximately half of the six-module "Sabesa (phonetic spelling)" drug program, and "almost 70 percent" of the Thinking for a Change program. (5/10/18 Tr., p.6, L.13 – p.7, L.12 (parenthetical notation original).) However, these are exactly the same programs that Fox participated in during his rider – the APSI indicates that Fox completed the "Pre-release" program, as well as three of the six modules (or approximately half) of the "CBI-SA" (phonetically "Sabesa") substance abuse program and 17 of the 25 lessons (or almost 70 percent) of the Thinking for a Change program, before he received his recommendation for relinquishment. (PSI, pp.7-9, 12.) As such, the district court was aware, at the time of the jurisdictional review hearing, of Fox's participation and progress in these programs. Fox's short period of acceptable behavior and possible future enrollment in a prison program is likewise not "new" information that supports a reduction of sentence, as this is precisely what is expected of inmates, and information with respect to Fox's desire to participate in additional programing and his "vow to not get [another] write up" was before the district court at the time of the jurisdictional review hearing. (PSI, pp.30-31; R., p.79).

Because Fox presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentence was excessive. Having failed to make such a

[1] PSI page numbers correspond with the page numbers of the electronic file "Confidential Documents - Appeal Volume 1 2-14-2019 16.22.6 21180347 04B153DE-50A2-4A02-B7FD-0AAF5F2EFCFD.pdf."

showing, he has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion for a reduction of sentence.

Conclusion

The state respectfully requests this Court to affirm the district court's order denying Fox's Rule 35 motion for reduction of sentence.

DATED this 23rd day of August, 2019.

__/s/_Lori A. Fleming_____
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of August, 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:

REED P. ANDERSON
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__/s/_Lori A. Fleming_____
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