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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46710-2019
Plaintiff-Respondent,)	
)	JEROME COUNTY NO. CR-2017-5405
v.)	
)	
OLIVIA BAXTER,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Olivia Baxter pleaded guilty to felony possession of a controlled substance (methamphetamine). The district court imposed a unified sentence of five years, with three years fixed, suspended the sentence, and placed Ms. Baxter on probation for a period of three years. After Ms. Baxter admitted to violating her probation, the district court revoked probation and retained jurisdiction. The district court subsequently relinquished jurisdiction and executed Ms. Baxter's sentence. Ms. Baxter filed an Idaho Criminal Rule 35 ("Rule 35") motion for a reduction of sentence, as well as a motion for appointment of counsel, both of which the district court denied. On appeal, Ms. Baxter asserts the district court erred

when it denied her motion for appointment of counsel, and abused its discretion when it denied her Rule 35 motion.

Statement of the Facts & Course of Proceedings

Ms. Baxter called the Jerome County Sheriff's Office to report a prowler on her property, and the responding deputies thought her sudden movements and other behavior indicated she was under the influence of a controlled substance. (*See R.*, pp.16-17.) After the deputies detained Ms. Baxter, they contacted her felony probation officer. (*See R.*, p.17.) The probation officer requested the deputies search Ms. Baxter's residence pursuant to her probation waiver. (*See R.*, p.17.) Inside the residence, the deputies found a container with a green leafy substance inside, baggies containing a yellow and gray powdery substance, water bong, straws and a bottle with white powdery residue, and other items. (*See R.*, pp.17-18.) The white powdery residue tested presumptively positive for methamphetamine. (*See R.*, p.18.)

The State charged Ms. Baxter by Information with possession of a controlled substance (methamphetamine), felony, I.C. § 37-2732(c)(1), possession of a controlled substance (marijuana), misdemeanor, I.C. § 37-2732(c)(3), and possession of drug paraphernalia, I.C. § 37-2734A, misdemeanor. (*R.*, pp.60-61.) Pursuant to a plea agreement, Ms. Baxter agreed to plead guilty to felony possession of methamphetamine, and the State agreed to dismiss the other charges.¹ (*R.*, pp.71-72.) The district court imposed a unified sentence of five years, with three

¹ Under the plea agreement, Ms. Baxter also agreed to admit to violating her probation in a separate case, Jerome County No. CR 2017-2007. (*See R.*, pp.71-72.) In No. CR 2017-2007, Ms. Baxter had pleaded guilty to felony assault or battery upon certain personnel. (*See No. CR 2017-2007 Presentence Report*, pp.1-2, 5.) In this case, Ms. Baxter waived the preparation of a new presentence report. (*R.*, pp.71-72.)

years fixed, suspended the sentence, and placed Ms. Baxter on probation for a period of three years.² (R., pp.88-92.)

The Jerome County Drug Court accepted Ms. Baxter. (R., pp.97-98; *see* R., pp.73-79.) Later, the drug court issued a Drug Court Termination Order. (R., pp.119-20.) The State filed a Motion to Revoke Probation. (R., pp.123-24.) Ms. Baxter admitted to violating her probation by being discharged from drug court. (R., p.140; *see* R., pp.125-27.) The district court ordered a mental health evaluation under I.C. § 19-2522. (R., pp.145-46; Psychological Report, May 21, 2018.)³ The district court subsequently revoked Ms. Baxter's probation and retained jurisdiction. (R., pp.151-54.)

A few weeks after Ms. Baxter arrived at her "rider" facility, rider program staff recommended the district court relinquish jurisdiction. (*See* Addendum to the Presentence Investigation, pp.1, 4.)⁴ The district court then relinquished jurisdiction and executed Ms. Baxter's sentence. (R., pp.155-57.)

Ms. Baxter later filed, *pro se*, a Motion for Correction or Reduction of Sentence, ICR 35. (R., pp.159-62.) Ms. Baxter asserted her sentence should be reduced in light of her readiness to move forward with her life, her classes and other activities since being incarcerated, and her family situation. (*See* R., pp.160-61.) Ms. Baxter requested the reduction of her sentence from a "3 to 5 year sentence to a 2 to 3 years sentence or a release date of June 04, 2019 when retain[ed] jurisdiction would have ended." (R., p.162.) She also filed a Motion and Affidavit in Support for Appointment of Counsel. (R., pp.163-66.)

² The sentence was to run concurrently with the sentence imposed in No. CR 2017-2007. (R., p.88.)

³ The Psychological Report appears in the 55-page PDF version of the Confidential Exhibits.

⁴ The Addendum to the Presentence Report also appears in the Confidential Exhibits.

The district court issued an Order Denying Defendant’s Motion for Rule 35 and Motion for Appointment of Counsel. (R., pp.167-70.) The district court determined: “After considering Baxter’s request for leniency, and in the exercise of discretion, the Court finds insufficient reason to grant leniency and alter the sentence previously imposed.” (R., p.170.) Additionally, the district court “finds that the sentence imposed was not unreasonable based on the facts and circumstances surrounding the offense; that the sentence imposed was pursuant to a plea agreement followed by the Court; and that Baxter was afforded numerous opportunities prior to the imposition of sentence.” (R., p.170.) Thus, the district court denied Ms. Baxter’s Rule 35 motion. (R., p.170.)

The district court also denied Ms. Baxter’s motion for appointment of counsel, “because Baxter has failed to raise any new issues or bring forth any additional information for the Court to consider.” (R., p.170.)

Ms. Baxter filed, pro se, a Notice of Appeal timely from the district court’s Order Denying Defendant’s Motion for Rule 35 and Motion for Appointment of Counsel. (R., pp.171-74; *see* R., pp.200-03 (Amended Notice of Appeal).)

ISSUES

- I. Did the district court err when it denied Ms. Baxter’s motion for appointment of counsel?
- II. Did the district court abuse its discretion when it denied Ms. Baxter’s Idaho Criminal Rule 35 Motion for a reduction of sentence?

ARGUMENT

I.

The District Court Erred When It Denied Ms. Baxter's Motion For Appointment Of Counsel

Ms. Baxter asserts that the district court erred when it denied her motion for appointment of counsel. “A criminal defendant has the statutory right to counsel at all critical stages of the criminal process, including pursuit of a Rule 35 motion. *State v. Smith*, 161 Idaho 162, 164 (Ct. App. 2016) (citing I.C. §§ 19-851 & 19-852; I.C.R 44; *State v. Wade*, 125 Idaho 522, 523 (Ct. App. 1994)). “However, a district court may deny appointment of counsel if it finds the motion is frivolous.” *Id.* (citing I.C. § 19-852(2)(c)). “A motion is frivolous if a reasonable person with adequate means would not be willing to bring the motion at his or her own expense.” *Id.* (citing I.C. § 19-852(2)(c)). Whether a motion is frivolous for purposes of appointment of counsel is a question of law, which an appellate court reviews de novo. *Id.* (citing *State v. Carter*, 157 Idaho 900, 902 (Ct. App. 2014)).

“In presenting a Rule 35 motion, a 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 motion.” *Id.* (citing *State v. Huffman*, 144 Idaho 201, 203 (2007)). “Thus, any colorable merit to a Rule 35 motion must arise from new or additional information presented in the motion or accompanying documentation that would create a basis for reduction of the sentence.” *Id.* (citing *Wade*, 125 Idaho at 525). “A Rule 35 motion that does not present such new information is not one that a reasonable person with adequate means would bring before the district court at his or her own expense and is, therefore, frivolous.” *Id.* (citing *Carter*, 157 Idaho at 903). “Moreover, a Rule 35 motion is frivolous if the basis for the claim was previously considered by the district court.” *Id.* (citing *Carter*, 157 Idaho at 902-03).

The district court denied Ms. Baxter's motion for the appointment of counsel "because Baxter has failed to raise any new issues or bring forth any additional information for the Court to consider." (R., p.170.) However, Ms. Baxter actually presented new and additional information in support of her Rule 35 motion, and the motion was therefore not frivolous. For example, Ms. Baxter explained: "I am ready to move forward with my life. I am ready to start probation, get help in groups, get a job, and be a parent again." (R., p.160.) She also stated, "I have plans to go to school and start a career. I want to stay in drug counseling and succeed. I can't get that in prison." (R., p.160.) Ms. Baxter further discussed how she would "receive paper certification from classes at the beginning of the new year," and had "also been folding laundry as a volunteer since I arrived at P.W.C.C." (R., p.161.)

Additionally, Ms. Baxter stated: "I have taken a few classes since I got my time imposed. I have finished life skills, communication skills, and team building skills classes. I have also been going to 'DBT', diagnosed behavioral treatment classes/groups, which I plan to finish before my release." (R., p.161.) She related, "I spend my days going to classes and talking to my daughter before and after she goes to school." (R., p.161.)

Ms. Baxter also stated: "My mom [h]as been suffering from pancreatic cancer for the past year and [a] half. I would like to help her and spend more time with her." (R., p.161.) Moreover, Ms. Baxter's daughter was "now 7 and already in the 2nd grade." (R., p.161.) Ms. Baxter provided further details: "We are very close. It breaks my heart I cannot be there to raise her." (R., p.161.)

Considering Ms. Baxter presented the above new and additional information on her readiness to move forward with her life, her classes and other activities since being incarcerated,

and her family situation, Ms. Baxter's Rule 35 motion was not frivolous. *See Smith*, 161 Idaho at 164. Thus, the district court erred when it denied her motion for appointment of counsel.

II.

The District Court Abused Its Discretion When It Denied Ms. Baxter's Rule 35 Motion For A Reduction Of Sentence

Ms. Baxter asserts that the district court abused its discretion when it denied her Rule 35 motion for a reduction of sentence, in view of the new and additional information presented in support of the motion. "A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe." *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994) (citation omitted). "The denial of a motion for modification of a sentence will not be disturbed absent a showing that the court abused its discretion." *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.* "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction." *Id.*

Ms. Baxter asserts her sentence is excessive in view of the new and additional information presented in support of the motion. Specifically, the new and additional information on Ms. Baxter's readiness to move forward with her life, her classes and other activities since being incarcerated, and her family situation, as addressed in Section I of the Argument above and incorporated herein, show that Ms. Baxter's sentence is excessive. Thus, the district court abused its discretion when it denied Ms. Baxter's Rule 35 motion for a reduction of sentence.

CONCLUSION

For the above reasons, Ms. Baxter respectfully requests that this Court vacate the order denying her Rule 35 motion and motion for appointment of counsel, and remand for further proceedings following appointment of counsel. Alternatively, Ms. Baxter respectfully requests that this Court reduce her sentence as it deems appropriate.

DATED this 25th day of April, 2019.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th 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
E-Service: ecf@ag.idaho.gov

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

BPM/eas