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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 46710-2019
)	
v.)	JEROME COUNTY NO. CR-2017-5405
)	
OLIVIA BAXTER,)	APPELLANT'S
)	REPLY 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 motion for a reduction of sentence, as well as a motion for appointment of counsel, both of which the district court denied. Ms. Baxter appealed, asserting the district court erred when it

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

In its Respondent's Brief, the State contends the district court correctly denied the motion for appointment of counsel, because the Rule 35 motion was frivolous and not a proceeding a reasonable person with adequate means would be willing to bring at her own expense. (*See* Resp. Br., pp.3, 5.) The State argues Ms. Baxter's Rule 35 motion was frivolous because it was untimely, and even if it were considered timely, it was frivolous because she did not provide any new or additional information to support the motion. (*See* Resp. Br., pp.3-5.)

This Reply Brief is necessary to show that Ms. Baxter's Rule 35 motion was timely, and she presented new and/or additional information in support of the motion.

Statement of the Facts and Course of Proceedings

The Statement of the Facts and Course of Proceedings were previously articulated in Ms. Baxter's Appellant's Brief, and are incorporated herein by reference thereto.

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. While the district court denied Ms. Baxter's motion for the appointment of counsel

because she had not raised any new issues or provided any additional information, Ms. Baxter actually presented new and additional information in support of her Rule 35 motion, and the motion was therefore not frivolous.

1. Ms. Baxter's Rule 35 Motion Was Timely

Under the mailbox rule, Ms. Baxter's motion was timely. The State argues, "Because [Ms.] Baxter's Rule 35 motion was not filed until December 10, 2018—151 days after the district court entered its order relinquishing jurisdiction, it was not timely and was therefore frivolous." (Resp. Br., p.3.)

Rule 35 provides that a district court "may reduce a sentence within 120 days after the filing of a judgment of conviction," and "may also reduce a sentence upon revocation of probation or upon motion made within fourteen (14) days after the filing of the order revoking probation." I.C.R. 35(b). The Idaho Court of Appeals has held that the mailbox rule, which "deems a pro se inmate's document filed as of the date it was submitted to prison authorities for the purpose of mailing to the court for filing," applies to Rule 35 motions filed by pro se inmates. *State v. Johnson*, 152 Idaho 56, 62-63 (Ct. App. 2011). "The policy behind the mailbox rule is that, once a prisoner submits documents to prison authorities for filing with the court, the prisoner no longer has control over his or her documents." *Id.* at 62-63. The *Johnson* Court reasoned that, "Just as a prisoner loses control over a notice of appeal or an application for post-conviction relief once it has been delivered to prison authorities for mailing, the same prisoner has no control over a Rule 35 motion once it has been submitted for mailing." *Id.* at 63.

In the instant case, Ms. Baxter signed the Rule 35 motion, as well as the Certificate of Mailing denoting she had delivered the motion to prison authorities for the purposes of mailing the motion, on November 8, 2018. (R., p.162.) By the State's count, this was "119 days after

the district court entered its order relinquishing jurisdiction.” (Resp. Br., p.3.) Put otherwise, under the mailbox rule Ms. Baxter filed her Rule 35 motion within the 120-day period, and the motion was timely. *See* I.C.R. 35(b).

The State contends Ms. Baxter “did not submit a prison mail log as evidence of the date that she delivered the motion to prison officials.” (Resp. Br., p.3.) The State essentially argues Ms. Baxter did not establish that she timely submitted her documents for mailing to prison authorities. To the extent *Johnson* suggests a certificate of mailing, alone, is not sufficient to prove a pro se inmate timely submitted documents for mailing to prison authorities, the proper remedy would be to reverse the district court’s denial of Ms. Baxter’s motions and remand for a determination of whether she submitted her motions to prison authorities within the Rule 35 time limits. *See Johnson*, 152 Idaho at 62-63.

2. Ms. Baxter Presented New And/Or Additional Information In Support Of The Rule 35 Motion

Ms. Baxter presented new and/or additional information in support of the Rule 35 motion. The State argues, “Even if [Ms.] Baxter’s Rule 35 motion were considered timely under the mailbox rule, the motion was still frivolous because she failed to provide any new or additional information to support the motion.” (Resp. Br., p.3 (footnote omitted).) According to the State, “in denying [Ms.] Baxter’s Rule 35 motion and her motion to appoint counsel, the district court noted that [Ms.] Baxter ‘essentially assert[ed] the same reasoning’ at the time of her probation violation disposition hearing; the court specifically found that [Ms.] Baxter had failed

to provide any new or additional information in support of her Rule 35 motion.” (Resp. Br., p.4 (footnote omitted).)¹

The Idaho Supreme Court has held that “[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.” *State v. Huffman*, 144 Idaho 201, 203 (2007). “An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information.” *Id.*

Ms. Baxter asserts that she presented new information in support of her Rule 35 motion. In the Rule 35 motion, 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 also wrote, “I spend my days going to classes and talking to my daughter before and after she goes to school.” (R., p.161.) Because Ms. Baxter described those classes as taking place “since I got my time imposed,” i.e., after the district court relinquished jurisdiction and executed her sentence, the classes necessarily occurred after the probation violation disposition hearing referenced by the district court and the State. (*See*

¹ After noting, “A transcript of the disposition hearing is not included in the record on appeal,” the State argues, “Because [Ms.] Baxter has failed to make the transcript of the disposition hearing a part of the record on appeal, this Court must presume that the transcript supports the district court’s decision.” (Resp. Br., p.4 n.2.)

This argument by the State fails to mention the Idaho Supreme Court precedent discouraging indigent appellants in criminal sentencing-type cases from seeking such hearing transcripts, which are not immediate in time to the decision challenged on appeal. *See State v. Brunet*, 155 Idaho 724 (2013) (holding, after the State objected to the appellant’s request for plea and sentencing hearing transcripts from a year before the relinquishing jurisdiction decision on appeal, and the Court denied the request, that there was no violation of the appellant’s constitutional’s rights when the Court denied the request).

R., pp.151-57.) Thus, the information on Ms. Baxter's classes and other activities was new information.

Further, Ms. Baxter asserts that, even assuming (without conceding) she did not provide any *new* information in support of her Rule 35 motion, she nonetheless has provided a basis for this Court to find that the denial of the motion was an abuse of discretion. At the least, the information on 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), was *additional* information as contemplated by *Huffman*.

The Idaho Supreme Court has indicated that additional information also serves as a basis for an appellate court to find that a denial of a Rule 35 motion was an abuse of discretion. For example, in *State v. Adair*, 145 Idaho 514 (2008), the Court, citing *Huffman*, stated that, "absent the presentation of new evidence, an appeal from a Rule 35 motion merely asks this Court to review the underlying sentence. Without additional information being presented, there is no basis for this Court to find that the denial of the Rule 35 motion was an abuse of discretion." *Adair*, 145 Idaho at 517 (citation omitted). The *Adair* Court, because "[n]o additional information was provided to the trial court to indicate that the sentence was excessive," decided that "[t]he trial court operated without its discretion when it denied [the defendant's] Rule 35 motion for reduction of sentence." *Id.*

Because the Idaho Supreme Court in *Huffman* and *Adair* recognized "additional information" (alongside "new information") as a way to show that a sentence is excessive in support of a Rule 35 motion, *Huffman*, 144 Idaho at 203, *Adair*, 145 Idaho at 517, Ms. Baxter submits that additional information serves as a basis for an appellate court to find that a district court's denial of a Rule 35 motion was an abuse of discretion. Thus, because Ms. Baxter

presented additional information in support of her Rule 35 motion, she has provided a basis for this Court to find that the denial of the motion was an abuse of discretion.

Despite the State's arguments, Ms. Baxter's Rule 35 motion was timely, and she presented new and/or additional information in support of the motion. The Rule 35 motion was therefore not frivolous. The district court erred when it denied Ms. Baxter's 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. Contrary to the State's argument, Ms. Baxter presented new and additional information (or at the least, additional information) in support of the Rule 35 motion, as addressed in the Appellant's Brief and in Section I of the Argument above, and incorporated herein. This new and/or additional information shows that Ms. Baxter's sentence is excessive, and the district court therefore abused its discretion when it denied her Rule 35 motion.

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, 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.

Alternatively, in light of *Johnson*, Ms. Baxter respectfully requests that this Court reverse the district court's order denying her motions, and remand for a determination of whether she submitted her motions to prison authorities within the Rule 35 time limits.

DATED this 25th day of July, 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 July, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY 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