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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46856-2019
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-17-38880
v.)	
)	
GRACE ANNE BURRINGTON,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**HONORABLE JONATHAN MEDEMA
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

After Grace A. Burrington pled guilty to burglary, the district court sentenced her to ten years, with two years fixed. The district court also entered a no contact order with the burglary victim. Ms. Burrington later moved to terminate the no contact order, and the district court denied her motion. She also moved to reduce her sentence, and the district court denied that motion as well. Ms. Burrington now appeals. She argues the district court abused its discretion by denying her motion to terminate the no contact order, imposing an excessive sentence, and denying her motion to reduce her sentence.

Statement of Facts and Course of Proceedings

In April 2018, the State charged Ms. Burrington by Information with aggravated battery and use of a deadly weapon for shooting her ex-boyfriend, Sam Kimball, in the arm with a handgun. (R., pp.58–59; *see* Presentence Investigation Report (“PSI”),¹ p.9.) Pursuant to a plea agreement, Ms. Burrington pled guilty to an amended charge of burglary. (R., pp.99, 112–13, 117–18.) The State agreed to recommend probation with an underlying sentencing of ten years, with three years fixed. (R., pp.99, 112.)

At sentencing, in January 2019, the district court found Ms. Burrington breached the plea agreement by failing to timely participate in the PSI. (Tr. Vol. I,² p.30, Ls.21–25.) As such, the State was no longer bound by its recommendation. (Tr. Vol. I, p.30, Ls.22–25.) The State

¹ Citations to the PSI refer to the 1,149-page electronic document with the confidential exhibits.

² There are two transcripts on appeal. The first, cited as Volume I, contains the entry of plea, motion hearing, and sentencing hearing. This transcript does not contain line numbers, and the page numbers are in the bottom center of each page. Undersigned counsel has counted line numbers to provide a reference to the Court. The second transcript, cited as Volume II, contains a hearing on Ms. Burrington’s motion to modify the no contact order. This transcript contains line and page numbers.

recommended a harsher sentence of ten years, with four years fixed. (Tr. Vol. I, p.32, Ls.6–9.) Ms. Burrington requested probation or a period of retained jurisdiction, with an underlying sentence of ten years, with two years fixed. (Tr. Vol. I, p.44, Ls.4–7, p.50, Ls.13–20.) The district court sentenced Ms. Burrington to ten years, with two years fixed, and declined to retain jurisdiction or place her on probation. (Tr. Vol. I, p.63, Ls.17–24, p.64, Ls.1–3; *see also* R., pp.136–38.) The district court also issued a no contact order with Mr. Kimball for ten years. (Tr. Vol. I, p.64, L.13–p.65, L.3; *see* Sealed Exs., pp.8–9.)

On January 28, 2019, the district court entered the judgment of conviction, and, on March 8, 2019, Ms. Burrington filed a notice of appeal. (R., pp.136–38, 140–43.) On March 29, 2019, Ms. Burrington moved for a reduction in her sentence pursuant to Idaho Criminal Rule 35 (“Rule 35”). (R., pp.173–79.) In early April 2019, Ms. Burrington moved for the district court to terminate her no contact order with Mr. Kimball. (R., p.182.) In mid-April 2019, the district court held a hearing on Ms. Burrington’s motion to terminate the no contact order and denied her request. (Tr. Vol. II, p.10, L.21–p.11, L.11.) On May 7, 2019, Ms. Burrington submitted additional information in support of her Rule 35 motion. (R., pp.191–94.) On May 29, 2019, the district court denied Ms. Burrington’s Rule 35 motion. (R., pp.209–13.)

ISSUES

- I. Did the district court abuse its discretion by denying Ms. Burrington's motion to terminate the no contact order?
- II. Did the district court abuse its discretion by imposing an excessive sentence of ten years, with two years fixed, on Ms. Burrington for burglary?
- III. Did the district court abuse its discretion by denying Ms. Burrington's Rule 35 motion?

ARGUMENT

I.

The District Court Abused Its Discretion By Denying Ms. Burrington’s Motion To Terminate The No Contact Order

Ms. Burrington submits the district court abused its discretion when it denied her motion to terminate her no contact order (“NCO”) with Mr. Kimball.

Pursuant to I.C. § 18-920(1), the district court may issue an order “forbidding contact with another person” if the district court “finds that a no contact order is appropriate” for the offense. I.C. § 18-920(1). Idaho Criminal Rule 46.2 governs the issuance and modification of NCOs. I.C.R. 46.2(a)–(b). “The decision whether to modify a no contact order is within the sound discretion of the district court.” *State v. Cobler*, 148 Idaho 769, 771 (2010). On review of a discretionary decision, the Court considers whether the district court: “(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.” *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018).

Here, Ms. Burrington argued for the NCO’s termination for two reasons: (1) to discuss child custody issues with Mr. Kimball³ and (2) to obtain “off compound” work approval. In her written motion, Ms. Burrington argued:

I cannot work off compound or get community clearance preventing me from going to the work center because of the NCO in place. I would greatly appreciate

³ Ms. Burrington and Mr. Kimball have two young children together. (PSI, p.10.) At the time of the PSI, Mr. Kimball had custody. (PSI, p.10.) As recognized by the district court, the NCO did not prevent Ms. Burrington from attending court proceedings with Mr. Kimball, so Ms. Burrington could participate in child custody proceedings without violating the NCO. (Tr. Vol. II, p.10, L.21–p.11, L.5; *see also* Sealed Exs., p.8.) As such, Ms. Burrington does not pursue this basis for termination on appeal.

the opportunity for Judge Medema to consider lifting the NCO while I am in custody so I can benefit from obtaining outside employment.

(R., p.182.) At the hearing, Ms. Burrington explained her reasons for wanting termination of the NCO:

There are few factors that . . . play into that. First of all, I'm trying to file a child custody modification, and it would be helpful, I think, if [Mr. Kimball] and I could discuss the kids, as well as having a no contact order prevents me from obtaining employment off compound. I don't have off compound approval. Having a no contact order means that I can't go to the work center, and I can't work at Symms or Lucky Peak and make gainful employment while I'm incarcerated.

(Tr. Vol. II, p.9, Ls.8–18.) In response, the State objected to the NCO's termination. (Tr. Vol. II, p.9, L.24–p.10, L.11.)

Ms. Burrington maintains the district court did not exercise reason by denying her motion to terminate the NCO. As for work release, the district court determined:

The department of correction runs their programs. If they decide that people who have no contact orders simply aren't eligible for the work center, then, that's their decision. That's not mine, but it's not a reason for me to lift the no contact order, and so I'll deny that request.

(Tr. Vol. II, p.11, Ls.6–11.) Ms. Burrington asserts the district court did not exercise reason because Ms. Burrington's ability to work while in custody would have helped her develop new skills and rehabilitate, allowed her to demonstrate her ability to succeed under community supervision, and provided some income for her to pay fines and fees. Therefore, she submits the district court did not exercise reason and abused its discretion by denying her motion to terminate the NCO.

II.

The District Court Abused Its Discretion By Imposing An Excessive Sentence Of Ten Years, With Two Years Fixed, On Ms. Burrington For Burglary

“It is well-established that ‘[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.’” *State v. Pierce*, 150 Idaho 1, 5 (2010) (quoting *State v. Jackson*, 130 Idaho 293, 294 (1997) (alteration in original)). The district court’s decision to retain jurisdiction is also reviewed for an abuse of discretion. *State v. Jones*, 141 Idaho 673, 677 (Ct. App. 2005). Similarly, “[t]he choice of probation, among available sentencing alternatives, is committed to the sound discretion of the trial court” *State v. Landreth*, 118 Idaho 613, 615 (Ct. App. 1990).

Here, Ms. Burrington’s sentence does not exceed the statutory maximum. *See* I.C. § 18-1403 (one-year minimum, ten-year maximum for burglary). Accordingly, to show the sentence imposed was unreasonable, Ms. Burrington “must show that the sentence, in light of the governing criteria, is excessive under any reasonable view of the facts.” *State v. Strand*, 137 Idaho 457, 460 (2002).

“‘Reasonableness’ of a sentence implies that a term of confinement should be tailored to the purpose for which the sentence is imposed.” *State v. Adamcik*, 152 Idaho 445, 483 (2012) (quoting *State v. Stevens*, 146 Idaho 139, 148 (2008)).

In examining the reasonableness of a sentence, the Court conducts an independent review of the entire record available to the trial court at sentencing, focusing on the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public; (3) possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

Stevens, 146 Idaho at 148. “A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution.” *State v. Delling*, 152 Idaho 122, 132 (2011).

Here, Ms. Burrington asserts the district court did not exercise reason and thus abused its discretion by imposing an excessive sentence under any reasonable view of the facts. Specifically, she contends the district court should have placed her on probation or retained jurisdiction in light of the mitigating factors, including her substance abuse issues, amenability to treatment, and acceptance of responsibility and remorse.

First, Ms. Burrington's substance abuse issues, the impact of her substance abuse on her behavior, and her need for treatment are strong factors in mitigation. A sentencing court should give "proper consideration of the defendant's alcoholic problem, the part it played in causing [the] defendant to commit the crime and the suggested alternatives for treating the problem." *State v. Nice*, 103 Idaho 89, 91 (1982). The impact of substance abuse on the defendant's criminal conduct is "a proper consideration in mitigation of punishment upon sentencing." *State v. Osborn*, 102 Idaho 405, 414 n.5 (1981). Here, ██████████ Ms. Burrington abused alcohol as a teenager, but got sober as a young adult. (PSI, p.207.) She also used marijuana, methamphetamine, and prescription pills. (PSI, p.207.) Unfortunately, Ms. Burrington relapsed on methamphetamine, alcohol, and heroin in the year prior to the instant offense, which was also her first felony. (PSI, pp.6-7, 207.) Ms. Burrington was in active withdrawal while in custody pending sentencing. (PSI, p.207.)

Now, Ms. Burrington is committed to her sobriety, amenable to treatment, and remorseful. Acceptance of responsibility, remorse, and regret are all factors in favor of mitigation. *State v. Shideler*, 103 Idaho 593, 595 (1982). While in jail, Ms. Burrington took "literally every class that's available to her so that she can better herself." (Tr. Vol. I, p.51, Ls.17-18.) She took classes in anger management, cognitive awareness, healthy relationships, domestic violence, offender corrections, PREA education, and offender responsibility. (PSI,

pp.1105–12.) Ms. Burrington also secured a bed at Sober Living through Rising Sun and set up treatment for PTSD and substance abuse with Ascent. (Tr. Vol. I, p.52, Ls.21–23.) At sentencing, she explained:

I would just like to thank you for this time. Being incarcerated, I have learned a lot. I've learned a lot about myself. I've made huge strides, taken advantage of all the resources available to me in there: signing up for classes, being an inmate worker, getting involved in as much as I can.

(Tr. Vol. I, p.52, Ls.14–20.) Along with her plan for success on probation, Ms. Burrington also expressed remorse and accepted responsibility:

I am eager to prove to you, everyone in this courtroom, the community, the victims in this case, but, most importantly, myself, that I can successfully complete probation. And, most importantly, I would like to offer my remorse, not only to the victim, but to the community, you, everyone affected. I know there's many loved ones, including our children, who have been affected by this case, and I am committed to working on myself and becoming the best mother that I can.

....

And I just would like to thank you and apologize for wasting everyone's time. Apologize for my actions. I do take full accountability for everything that I have done to get us here, for how much I've hurt [Mr. Kimball], all of our family, loved ones. Many, many people have been hurt because of my actions, and I will live with that every day for the rest of my life, but I know that he is in so much more pain, and I just want everyone to know that I do truly have remorse.

(Tr. Vol. I, p.52, L.24–p.53, L.9.) Ms. Burrington also enjoys prosocial activities, such as volunteering and participating in community events. (PSI, p.8.) In addition, she has a supportive fiancé who is sober. (PSI, pp.1101–03.) Ms. Burrington's substance abuse issues, its past influence on her behavior, and her current acceptance of responsibility, remorse, and amenability to treatment support a period of retained jurisdiction or the opportunity to be placed on probation.

In light of the above mitigators, Ms. Burrington argues the district court did not exercise reason at sentencing. These mitigating factors—Ms. Burrington's recent substance abuse issues,

renewed commitment to sobriety, amenability towards treatment, and acceptance of responsibility and remorse—support a more lenient sentence, including probation or a period of retained jurisdiction. These factors also demonstrate Ms. Burrington can succeed in the community under proper control and supervision. Accordingly, Ms. Burrington submits the district court abused its discretion by imposing an excessive sentence of ten years, with two years fixed, without retaining jurisdiction or suspending the sentence for probation.

III.

The District Court Abused Its Discretion By Denying Ms. Burrington’s Rule 35 Motion

“A Rule 35 motion for reduction of sentence is essentially a plea for leniency, addressed to the sound discretion of the court.” *State v. Carter*, 157 Idaho 900, 903 (Ct. App. 2014). In reviewing the grant or denial of a Rule 35 motion, the Court must “consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence.” *Id.* The Court “conduct[s] an independent review of the record, having regard for the nature of the offense, the character of the offender and the protection of the public interest.” *State v. Burdett*, 134 Idaho 271, 276 (Ct. App. 2000). “Where an appeal is taken from an order refusing to reduce a sentence under Rule 35,” the Court’s scope of review “includes all information submitted at the original sentencing hearing and at the subsequent hearing held on the motion to reduce.” *State v. Araiza*, 109 Idaho 188, 189 (Ct. App. 1985). “When 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).

Here, Ms. Burrington provided new and additional information to support a reduction in her sentence. In her Rule 35 motion, Ms. Burrington stated:

I am thankful for my current sentence given the circumstances in my case and I am making the most of my time. I have utilized all resources available to me [and] am eager to start classes once I am within 12 months of my parole eligibility date. I am employed at Keefe full time and have not received any corrective or disciplinary actions in the 5 months I have been incarcerated. I feel that I have made extensive progress internally [and] am determined to continue to make changes within myself. My mental health has improved dramatically since my history of substance abuse [and] I am thankful for the improvements made. I want the opportunity to receive the treatment I need and apply the knowledge gained to all aspects of life, not just in a prison setting. I have numerous sources of support and an extensive plan in place to ensure my success.

(R., p.174; *see also* R., p.192.) Ms. Burrington included a letter from her case manager that confirmed she had no disciplinary issues. (R., p.176.) She also verified her employment as an inmate worker. (R., p.195.) In addition, she provided documentation to prove her completion of programming, participation in the church, and acceptance to Rising Sun. (R., pp.197–200.) A case manager stated that Ms. Burrington had not missed any classes and always came prepared with completed assignments. (R., p.200.) In another letter, Ms. Burrington explained, “I have come to terms with a need for complete and total change in my life. I know that what I need most currently is programming.” (R., p.177.) She wanted to participate in rehabilitation, counseling, process groups, and substance abuse treatment. (R., p.177.) In particular, Ms. Burrington was interested in the rider program to have intense programming in a group setting. (R., pp.193–94.) Ms. Burrington wrote that she started to repair her relationships with her family. (R., p.177; *see also* R., p.192.) She also wrote that she took forty-four courses, participated in AA/NA, obtained a sponsor, completed self-help books, led bible study, and attended weekly church services. (R., p.177.) Further, Ms. Burrington reiterated her acceptance of responsibility and “full accountability” for her circumstances. (R., p.179.) She informed the district court that her “greatest motivation” were her two children, and she wanted to be in their lives. (R., p.179.) She hoped to go back to school as well. (R., p.192.) In light of this information, she requested a

reduction in her sentence to one year fixed plus nine years indeterminate, a period of retained jurisdiction, or drug court. (R., pp.175, 192, 194.)

Based on this new and additional information, Ms. Burrington argues the district court did not exercise reason and thus abused its discretion by denying her Rule 35 motion. This new and additional information showed Ms. Burrington's sentence was excessive and supported a sentence reduction, including a period of retained jurisdiction or probation.

CONCLUSION

For the NCO, Ms. Burrington respectfully requests this Court vacate or reverse the district court's order denying her motion to terminate the NCO and remand for further proceedings. For the sentencing and Rule 35 issues, Ms. Burrington respectfully requests this Court reduce her sentence as it deems appropriate. In the alternative, she respectfully requests this Court vacate her judgment of conviction and remand this case to the district court for a new sentencing hearing. Alternatively, she respectfully requests this Court reverse or vacate the district court's order denying her Rule 35 motions and remand this case to the district court for a new Rule 35 motion hearing.

DATED this 7th day of November, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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

JCS/eas