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1/28/2020 2:33 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**Nos. 46773-2019 & 46774-2019**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case Nos.**
v.	)	**CR-2017-23286 & CR28-18-10018**
	)	
FORREST GLENN SHUNN,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN T. MITCHELL
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

COLLEEN D. ZAHN
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR PLAINTIFF-RESPONDENT

ANDREA W. REYNOLDS
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712
E-mail: documents@sapd.state.id.us

ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

RULES

STATEMENT OF THE CASE

Nature Of The Case

Forrest Glenn Shunn appeals from the district court's amended judgment reducing his sentences for grand theft and possession of methamphetamine.

Statement Of The Facts And Course Of The Proceedings

Shunn entered a shop and stole power tools, a heater and a light valued at $1,680. (46773 R., pp. 17, 22-25.) The state charged Shunn with burglary with a persistent violator enhancement. (46773 R., pp. 44-45.) Pursuant to a plea agreement he pled guilty to one count of grand theft and having violated a probation imposed in two previous cases (possession of methamphetamine and burglary). (46773 R., pp. 46-51, 58-59.) The district court imposed a sentence of 10 years with three years determinate to run consecutive to the previously imposed sentences for possession of methamphetamine and burglary, and suspended the sentences and ordered probation. (46773 R., pp. 56-60.)

Three months later police found Shunn in possession of methamphetamine and paraphernalia during a probation search. (46774 R., p. 10.) The state charged Shunn with possession of methamphetamine, with a persistent violator enhancement, and possession of paraphernalia. (46774 R., pp. 32-34.) Shunn pled guilty to possession of methamphetamine pursuant to a plea agreement with the state and admitted violating his probation. (46774 R., pp. 35-37.) The district court imposed a sentence of seven years with one year determinate, consecutive to previously imposed sentences. (46774 R., pp. 47-50.) The district court also revoked Shunn's probations related to his three immediately prior felony convictions. (46773 R., pp. 79-82.)

The district court later reduced the older possession of methamphetamine sentence to seven years with one year determinate, and reduced the grand theft sentence to ten years with two years determinate. (46774 R., pp. 61-63; 46773 R., pp. 93-96.) Shunn mailed a notice of appeal 49 days after entry of judgment and 22 days after entry of the amended judgment reducing his sentences. (46774 R., pp. 66-73; 46773 R., pp. 98-101.)

ISSUES

Shunn states the issues on appeal as:

I. Did the district court abuse its discretion when it sentenced Mr. Shunn in the 2018 case to a unified term of seven years, with one year fixed, to be served consecutively to the sentences imposed in the 2014, 2015, and 2017 cases?

II. Did the district court abuse its discretion in failing to treat the letters Mr. Shunn sent to the court as a pro se Idaho Criminal Rule 35 motion for reduction of sentence, and in failing to consider the additional information contained in those letters?

(Appellant's brief, p. 4.)

The state rephrases the issues as:

1. Because Shunn's appeal is timely only from the amended judgments reducing his sentences, may he only challenge the district court's decision to not reduce the sentences further?

2. Regardless of this court's jurisdiction, has Shunn failed to show that the sentences imposed and as reduced by the district court were excessive?

ARGUMENT

I.
Shunn's Appeal Is Timely Only From The Amended Judgments Reducing His Sentences

A. Introduction

The district entered judgment on September 4, 2018. (46773 R., pp. 79-82; 46774 R., pp. 47-50.) Shunn mailed his notice of appeal on October 23, 2018. (46773 R., p. 101; 46774 R., p.69.) Because Shunn did not mail his notice of appeal until 49 days after entry of the original judgment, this appeal is not timely from the original judgment and this Court lacks jurisdiction to consider any appellate challenge to that judgment.

B. Standard Of Review

"'A question of jurisdiction is fundamental; it cannot be ignored when brought to [the appellate courts'] attention and should be addressed prior to considering the merits of an appeal.'" State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003) (quoting H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors, 113 Idaho 646, 648, 747 P.2d 55, 57 (1987)). Whether a court has jurisdiction is a question of law, given free review. Kavajecz, 139 Idaho at 483, 80 P.3d at 1084.

C. Shunn's Untimely Notice Of Appeal Confers No Jurisdiction For This Court To Consider Any Challenge To The Original Judgment

An appeal from the district court "may be made only by physically filing a notice of appeal … within 42 days" of an appealable order. I.A.R. 14(a). A timely filed notice of appeal is a prerequisite to appellate jurisdiction. I.A.R. 21; State v. Payan, 128 Idaho 866, 920 P.2d 82 (Ct. App. 1996); State v. Fuller, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983). The failure to file a notice of appeal within the time limits prescribed by the

appellate rules requires "automatic dismissal" of the appeal. I.A.R. 21; see also State v. Tucker, 103 Idaho 885, 888, 655 P.2d 92, 95 (1982). Under the "mailbox rule," a pro se inmate's documents are deemed filed as of the date they are submitted to prison authorities for the purpose of mailing them to the court for filing. Munson v. State, 128 Idaho 639, 642, 917 P.2d 796, 799 (1996).

Therefore, where a notice of appeal is timely only from a particular order, the issues on appeal are confined to that order. State v. Dryden, 105 Idaho 848, 852, 673 P.2d 809, 813 (Ct. App. 1983); see also State v. Russell, 122 Idaho 488, 489 n.1, 835 P.2d 1299, 1300 n.1 (1992) (no appellate jurisdiction to consider original final judgment of conviction where appeal was only timely to challenge probation revocation); State v. Jensen, 138 Idaho 941, 943-944, 71 P.3d 1088, 1090-1091 (Ct. App. 2003) (no appellate jurisdiction to consider defendant's claim of double jeopardy where defendant's notice of appeal was only timely as to the order revoking his probation); Tucker, 103 Idaho at 888, 655 P.2d at 95 (no appellate jurisdiction to entertain the question of whether the district court could lawfully enhance defendant's sentence where the notice of appeal was filed after the order revoking probation was entered and more than one year from the date of the original sentence).

As set forth above, Shunn's notice of appeal was presented to prison authorities for filing with the court more than 42 days after entry of the initial judgment but less than 42 days from entry of the amended judgment. It is settled law that entry of an amended final order does not necessarily "extend the period for filing an appeal or begin that period anew." Payan, 128 Idaho at 867, 920 P.2d at 83. Rather, it makes an appeal timely only as to matters actually altered by the amendment; the appellate court does not have

jurisdiction to address matters unaffected by the amendments to the order. State v. Ciccone, 150 Idaho 305, 308, 246 P.3d 958, 961 (2010) ("when an amended judgment alters content other than the material terms from which a party may appeal, its entry does not serve to enlarge the time for appeal"); Payan, 128 Idaho at 867, 920 P.2d at 83. Thus, this Court has jurisdiction to consider challenges only to the changes made by the district court in the amended judgment. This Court lacks jurisdiction to consider Shunn's claims of error related to the original sentencing and entry of the original judgment. (Appellant's brief, pp. 5-8.)

II.
Shunn Has Failed To Show That The Sentences Reduced By The District Court Were Excessive

A. Introduction

After entering judgment, the district court reduced the 2014 possession of methamphetamine sentence to seven years with one year determinate, and reduced the grand theft sentence to ten with two years determinate. (46773 R., pp. 87-89, 93-96; 46774 R., pp. 55-57, 61-63.) It did so "*sua sponte*, using its own discretion under I.C.R. 35, and noting no I.C.R. 35 motion has been filed by counsel for FORREST GLEN SHUNN." (46773 R., p. 94; 46774 R., p. 62.) Shunn filed a notice of appeal timely from the entry of the order granting a reduction of sentence. (46773 R., pp. 98-101; 46774 R., pp. 66-73.)

On appeal Shunn contends the district court erred by not considering his hand-written letters (46773 R., pp. 83-86, 90-92, 96-97; 46774 R., pp. 51-54, 58-60, 64-65) as a Rule 35 motion and granting him a further reduced sentence. (Appellant's brief, pp. 8-11.) Shunn has failed to show an abuse of discretion.

B. Standard Of Review

"A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court." State v. Anderson, 163 Idaho 513, 517, 415 P.3d 381, 385 (Ct. App. 2015). "In presenting an I.C.R. 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 motion." State v. Burggraf, 160 Idaho 177, 180, 369 P.3d 955, 958 (Ct. App. 2016) (citing State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007)).

C. Shunn Has Shown No Abuse Of Discretion

To show an abuse of discretion, Shunn must demonstrate that the district court did not "correctly perceive[] the issue as one of discretion," did not act "within the outer boundaries of its discretion," did not act "consistently with the legal standards applicable to the specific choices available to it" or did not reach its decision "by the exercise of reason." Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018). Review of the record, however, shows that none of these factors apply in this case.

The district court initially sentenced Shunn to ten years with three years determinate for grand theft and seven years with three years determinate for the 2014 possession of methamphetamine conviction, consecutive to each other and the prior burglary and new possession of methamphetamine convictions, for cumulative sentences on all four felony convictions of 25 years with eight years determinate. (46774 R., pp. 47-50.) It did so because "a lot of resources" had been employed for Shunn's rehabilitation, and there wasn't "anything more to do" on community release. (Tr., p. 33, Ls. 5-8.) The district court recognized the latest possession of a controlled substance was "not all that concerning

from a public safety standpoint" but Shunn's "prior offenses" were concerning because they "hurt other people" and Shunn had "been consistently at it for quite some time." (Tr., p. 33, Ls. 7-11.)

The district court's analysis is amply supported by the record. Shunn's criminal record starts in 1992 and includes seven felony and two misdemeanor theft-related or burglary convictions, one escape felony conviction, and two felony controlled substance convictions. (PSI, pp. 1-2, 7-13 (page citations to confidential exhibits electronic file).) He was placed in mental health court in 2015 as a result of convictions for burglary and possession of a controlled substance. (PSI, pp. 2, 12-13.) He violated but was continued on probation in 2016. (PSI, p. 2.) In 2017 he violated again and the district court revoked probation and retained jurisdiction. (PSI, p. 2.) Despite Shunn's poor record of following prison rules during the retained jurisdiction, the district court placed him back on probation. (PSI, p. 2.) As set forth above, he violated this probation by committing a grand theft, was placed back on probation, and violated again by possessing methamphetamine and paraphernalia. (*Supra*, pp. 1-2.) This initial sentencing decision is not within this Court's appellate jurisdiction, but its reasonableness is demonstrated by the record.

After sentencing, the district court then reduced two of the sentences by reducing the fixed portion from three to one (possession of a controlled substance) and from three to two (grand theft), respectively. (46774 R., pp. 61-63.) The effect of this reduction was to make Shunn parole eligible (after credit for time served) in "approximately 2.6 years … as opposed to the approximate 5.4 years" as in the original sentences. (46774 R., p. 63.) The district court's decision to not further reduce the sentences was reasonable.

Shunn argues that the district court erred by not treating a letter he sent to the court as a Rule 35 motion and therefore abused its discretion by not considering information therein when deciding to reduce the sentences. (Appellant's brief, pp. 8-11.) This argument does not withstand analysis.

A district court may treat a defendant's letter as a motion. See, e.g., State v. Torres, 107 Idaho 895, 897, 693 P.2d 1097, 1099 (Ct. App. 1984). In Torres the defendant "sent the district judge a letter specifically requesting a 'Rule 35 Sentence Reduction'" within the time limits of I.C.R. 35. Id. Torres' counsel subsequently filed an amended Rule 35 motion outside of those time limits. Id. The state argued that the letter was not "cognizable" as a Rule 35 motion and therefore the district court lacked jurisdiction to consider the requested reduction in sentence. Id. Rejecting that argument, the Idaho Court of Appeals held that "the district judge did not err by treating Torres' letter as a motion for reduction of sentence under the Idaho Rule." Id. The applicable legal standard is that "a letter to a trial court from a defendant *can be* treated as some type of motion." Sayas v. State, 139 Idaho 957, 960, 88 P.3d 776, 779 (Ct. App. 2003) (emphasis added).

In this case the district court stated it was "using its own discretion under I.C.R. 35" and specifically noted "no I.C.R. 35 motion has been filed *by counsel*." (46774 R., p. 56 (emphasis added).) Nothing in the district court's order addressed the letter Shunn sent to the district court four days previously. (46774 R., pp. 51-57.) Shunn had sent letters to the court before which had not been treated as motions and at least one letter had simply been forwarded to counsel. (46774 R., p. 4; see also 46774 R., p. 61-63 (letter filed same day as order reducing sentence); Conf. Doc., pp. 1-23 (additional letters sent by Shunn).) The letter sent within 14 days of the judgment terminating probation bears no caption or

other designation as a motion. (46774 R., p.51.) The district court did not abuse its discretion by not treating the letter as a Rule 35 motion.

Shunn contends the district court "abused its discretion in failing to treat Mr. Shunn's letters as a pro se Rule 35 motion, and in failing to consider the 'fresh information' Mr. Shunn provided to the court in support of his request for a reduction of his sentences." (Appellant's brief, p. 11.) First, Shunn claims the district court abused its discretion by not considering the letter a motion because in the letter Shunn asks for retained jurisdiction and asserts he can present additional argument at a Rule 35 hearing. (Appellant's brief, pp. 8-11; see 46674 R., pp. 51-52.) However, he has failed to show legally or factually why a statement of preference for retained jurisdiction and an off-hand reference to Rule 35 is sufficient to remove the court's discretion to consider what is facially a letter to be a letter, and not a motion. The contents of the letter alone are insufficient to show that the district court abused its discretion by not treating the letter as a Rule 35 motion.

Second, because the letter was not a motion, and therefore no motion was pending, the district court did not abuse its discretion by not "consider[ing]" the information in the letter. The district court was not required to "consider" information submitted in a letter without a pending motion.

Even more basically, however, the record does not establish that the district court did not "consider" the information in the letter. The district court's order amending the sentence only notes that "no I.C.R. 35 motion has been filed by counsel." (46774 R., p. 56.) Nothing in the record states that the district court did or did not read the letter or "consider" its contents in deciding to reduce the sentence on its own motion.

Finally, even if the district court had read the letter, it would not have abused its discretion by not "consider[ing]" the information Shunn claims it should have considered because review of the record shows that information was not relevant to any reduction of sentence.

At the sentencing the district court asked Shunn about his "current medications." (Tr., p. 31, L. 2.) Shunn stated that he was taking an anti-schizophrenic (Geodon or Ziprasidone), an anti-depressant (Effexor or Venlafaxine), and "they were trying to add Haldol," an anti-psychotic. (Tr., p. 31, Ls. 3-6.) The court asked where Shunn was being treated before going into custody and he named the two mental health providers he had been seeing. (Tr., p. 31, Ls. 7-12.) The district court then asked whether Shunn had been "on [his] medications when [he] committed" the new possession of methamphetamine crime. (Tr., p. 31, Ls. 13-15.) Shunn answered, "No," that he "stopped just right at that time" because the "side effect knocks you out." (Tr., p. 31, Ls. 16-20.) He denied discontinuing taking his medication, however, but he "just didn't take it when [he] used meth." (Tr., p. 31, Ls. 21-23.) Later, as the district court was pronouncing sentence, it stated it could not "rationalize" Shunn's decision to "discontinue [his] mental health medications." (Tr., p. 33, Ls. 13-15.) Shunn stated, "It was just for that moment, sir." (Tr., p. 33, Ls. 16-17.)

In his letter Shunn asserted that he was making positive changes in his life such as attending AA and church, wanted to treat his mental health issues, and "[begged] for one last chance and the rider to prove I'm serious about change!!" (46674 R., pp. 51-52.) Also in the letter he claimed that when, at sentencing, he talked about stopping taking his medications he was actually referring to a pain medication for a pinched nerve that he quit

taking for fear it would interact with his psychiatric medication and he would "not ever" quit taking his psychiatric medications, which he needed "now more than ever." (46674 R., pp. 51-52.)

It is quite clear from the transcript that Shunn represented to the district court that he did not take his psychiatric medications when he was using methamphetamine because he knew, apparently through experience, that this practice causes side-effects. His attempt to claim that he meant to convey something almost entirely different from what he said was not "new information" that showed his sentence to be excessive.

The district court did not abuse its discretion. First, it did not abuse its discretion by not treating the letter as a Rule 35 motion. Second, it did not abuse its discretion if it did not consider the letter as evidence, because there was no Rule 35 motion pending that the evidence would have supported. Third, Shunn has failed to show that the district court did not consider the letter in relation to its *sua sponte* reduction of the sentences. Finally, Shunn has failed to show that his claim that he meant something other than what he said at sentencing was "new information" meriting a greater reduction in sentence than the reduction awarded by the district court.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order reducing Shunn's sentence.

DATED this 28th day of January, 2020.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of January, 2020, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

ANDREA W. REYNOLDS
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd