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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 47006-2019**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR-FE-2012-8173**
	)	
SUZANA MARIE CONNOR,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE RICHARD D. GREENWOOD
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Suzana Marie Connor appeals from the district court's judgment of conviction and denial of Connor's Rule 35 motion. Connor argues that the district court erred by refusing to allow her to file a concededly late motion to suppress, abused its sentencing discretion, and also abused its discretion by denying her Rule 35 motion.

Statement Of The Facts And Course Of The Proceedings

In June 2012, the Boise City Police arrested Suzana Marie Connor for driving under the influence. (PSI, p.3.) "At the jail [Connor] refused the breath test and her blood was drawn." (PSI, p.3.) The "results indicated [Connor's] blood alcohol content was .292." (PSI, p.4.)

The state charged Connor with felony DUI. (R., pp.43-44.[1]) The district court released Connor on bond. (R., p.42.) Connor pled not guilty, and the district court expressly instructed her to remain in contact with her attorney. (R., p.55.)

The district court scheduled a jury trial for February 27, 2013. (R., p.56.) Connor absconded to India "to avoid prosecution." (PSI, p.16.) An officer arrested Connor on August 8, 2018—more than five years after her original trial date. (Supp. R., p.20.)

On September 6, 2018, Connor filed a motion to suppress the 2012 blood draw. (Supp. R., pp.40-41.) The district court denied the suppression motion as untimely and found that Connor had failed to show good cause or excusable neglect to toll the deadline. (Supp. R., p.123.)

Connor pled guilty, preserving the right to appeal the district court's rulings. (Supp. R., pp.141-43, 154.) The district court imposed a unified sentence of ten years with two and one half

[1] Consistent with Connor's opening brief, the state cites the record in Case No. 41489 as "R." and the materials used to supplement that record for this appeal as "Supp. R."

years fixed, and denied Connor's subsequent Rule 35 motion to reduce the sentence. (Supp. R., pp.154-55; Aug., pp.21-26.)

Connor timely appealed. (Supp. R., pp.185-89.)

ISSUES

Connor states the issues on appeal as:

I. Did the district court err when it denied Ms. Connor's motion to enlarge time to file suppression motions?

II. Did the district court abuse its discretion when it imposed a unified sentence of ten years, with two and one-half years fixed, upon Ms. Connor following her plea of guilty to felony DUI?

III. Did the district court abuse its discretion when it denied Ms. Connor's Idaho Criminal Rule 35 Motion?

(Appellant's brief, p.6.)

The state rephrases the issues as:

I. Has Connor failed to show the district court abused its discretion when it found she did not show good cause or excusable neglect for filing her suppression motion more than five years late?

II. Has Connor failed to show the district court abused its sentencing discretion?

III. Has Connor failed to show the district court abused its discretion by denying her Rule 35 motion?

ARGUMENT

I.
Connor Has Failed To Show The District Court Abused Its Discretion When It Denied Her Motion To Suppress As Untimely

A. Introduction

The district court did not abuse its discretion when it found Connor failed to show good cause or excusable neglect for filing her motion to suppress more than five years late. Connor filed her motion to suppress late only because she voluntary chose to abscond to India for five years to avoid prosecution. That is neither good cause nor excusable neglect.

B. Standard Of Review

A district court's decision as to whether a movant has shown good cause or excusable neglect to file a suppression motion late is reviewed for an abuse of discretion. See State v. Alanis, 109 Idaho 884, 888, 712 P.2d 585, 589 (1985).

C. Connor Failed To Show The Good Cause Or Excusable Neglect Necessary To File Her Suppression Motion More Than Five Years Past The Deadline

The district court properly found that Connor failed to present a valid reason for the district court to toll the deadline for her motions to suppress. All pretrial motions "must be filed within 28 days after the entry of a plea of not guilty." I.C.R. 12(d). But a district court, "for good cause shown or for excusable neglect, may relieve a party of failure to comply" with the 28-day deadline. I.C.R. 12(d); see State v. Dice, 126 Idaho 595, 598, 887 P.2d 1102, 1105 (Ct. App. 1994) ("Idaho Criminal Rule 12(d) clearly requires either good cause or excusable neglect to be shown by a party who has missed the prescribed deadlines.").

As the Idaho Supreme Court has explained (albeit in a different context),"[i]n ascertaining whether good cause exists, there is no bright-line test; the question of whether legal excuse has

been shown is a matter for judicial determination based upon the facts and circumstances in each case." Martin v. Hoblit, 133 Idaho 372, 375, 987 P.2d 284, 287 (1999); see State v. Clark, 135 Idaho 255, 260, 16 P.3d 931, 936 (2000) (observing "there is not a fixed rule for determining good cause" and that whether good cause exists "is a matter for judicial determination upon the facts and circumstances of each case"). Similarly, Idaho's appellate courts have not defined "excusable neglect" in the context of Rule 12(b) motions but have commented on its meaning in similar contexts: "Neglect must be excusable and, to be of that caliber, must be conduct that might be expected of a reasonably prudent person under the same circumstances." Cuevas v. Barraza, 146 Idaho 511, 515, 198 P.3d 740, 744 (Ct. App. 2008); see Thomas v. Stevens, 78 Idaho 266, 271, 300 P.2d 811, 813 (1956) (defining "excusable neglect" as "such neglect as might be expected of a reasonably prudent person under the same circumstances; mere indifference or inattention will not excuse").

Here, the district court did not abuse its discretion when it found Connor showed neither good cause nor excusable neglect for filing her motion to suppress more than five years late. The district court found that Connor "voluntarily absented" herself and "hid herself fairly well" for a period of at least five years. (Tr., p.18, Ls.10-21, p.20, Ls.16-23.) Connor does not challenge those findings on appeal. (Appellant's brief, p.7 ("Ms. Connor acknowledges that she was voluntarily absent from the State of Idaho for approximately five years.").) Connor's voluntary decision to go into hiding cannot constitute "good cause" for the five year delay—especially in light of the district court's express order for Connor to remain in contact with her attorney. And, by definition, Connor's decision to purposefully avoid her criminal prosecution does not constitute neglect at all, see Neglect, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/neglect (last visited February 13, 2020) (defining "neglect" as "to leave

undone or unattended to especially through carelessness"), much less the kind of neglect "that might be expected of a reasonably prudent person under the same circumstances," Barraza, 146 Idaho at 515, 198 P.3d at 744.

Connor argues that she has shown good cause because the law, like many other things, changed during her five year absence. (Appellant's brief, pp.9-11.) She is wrong for at least two reasons. First, the decisions Connor claims changed the law were not published until after her trial would have occurred but for her decision to abscond. (Supp. R., p.6); see Missouri v. McNeely, 569 U.S. 141 (2013); State v. Wulff, 157 Idaho 416, 337 P.3d 575 (2014). Hiding from the court until the law favors your position can hardly be described as "good cause." Second, even where courts toll deadlines based on a change in the law, one must act within a reasonable period of time after the change to enjoy the benefit of tolling. See, e.g., Garza v. Burnett, 321 P.3d 1104, 1108 (Utah 2013) ("[W]e hold that when a change in controlling law extinguishes an individual's cause of action, equity will toll the statute of limitations to afford the plaintiff a *reasonable period of time after the change in law* to bring his claims.") (emphasis added). Here, however, Connor filed her motion to suppress more than five years after the U.S. Supreme Court decided McNeely and nearly four years after the Idaho Supreme Court decided Wulff. (Supp. R., p.40.)

Connor also suggests she showed good cause by raising a meritorious constitutional argument. (Appellant's brief, p.11.) But even assuming Connor raised a meritorious argument for suppression under the current law, that is not—in and of itself—good cause. See Dice, 126 Idaho at 598, 887 P.2d at 1105 ("Allowing untimely motions to be heard because they appear meritorious eviscerates the purpose of the rule."). Because Connor filed her motion to suppress more than five years after it was due under Rule 12(d) and failed to show good cause or excusable neglect for her delay, the district court properly denied her motion to suppress as untimely.

II.
Connor Has Failed To Show The District Court Abused Its Sentencing Discretion

A. Introduction

The district court did not abuse its sentencing discretion when it imposed a unified sentence of ten years with two and a half years fixed. The district court considered the necessary sentencing factors and determined that a "lesser sentence would be depreciating the seriousness of the crime, would not provide adequate protection to the community," and would not provide Connor the supervision she needs. (Tr., p.92, L.16 – p.100, L.14.)

B. Standard Of Review

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 6 (2008).

C. The District Court Did Not Abuse Its Sentencing Discretion

The district court did not abuse its discretion when it imposed a unified sentence of ten years with two and a half years fixed. It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id.

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. Id. The district court has the discretion to weigh those objectives and give them

differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (holding district court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, "[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court." Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

Here, Connor concedes that the sentence imposed fits within the statutory limit. (Appellant's brief, p.12.) Connor thus has the burden of proving her sentence excessive under any reasonable view of the facts. See McIntosh, 160 Idaho at 8, 368 P.3d at 628. She cannot do so.

Connor's sentence is reasonable. The district court considered "the safety of the community" as well as "punishment, rehabilitation, deterrence of the individual who committed the offense, and deterrence to the general public." (Tr., p.92, L.16 – p.93, L.6.) The district court found Connor does "not have a very good history of taking accountability for [her] conduct" and specifically rejected Connor's attempt to blame her attorney for her five-year absence. (Tr., p.94, L.16 – p.95, L.16.) The district court also found that Connor is a "danger" to the community given her willingness to drive while intoxicated, as demonstrated by her lengthy record of DUI's. (Tr., p.97, L.14 – p.98, L.23.) And the district court explained why it imposed a sentence with a lengthy indeterminate period: "I agree with you, that a long supervisory period is appropriate in your case because, as you recognize, you do tend to be a little better off or behave a little better when you're under supervision." (Tr., p.100, Ls.5-10.)

Even on appeal, Connor refuses to take accountability for her conduct, arguing that she absconded in an attempt to deal with problems her children were facing. (Appellant's brief, p.13.) While the problems Connor describes are serious, they do not justify leaving the country in the face of a felony prosecution. Moreover, Connor's explanation on appeal for why she left the country leaves out that she also left the country to avoid prosecution. (See PSI, pp.5, 16-17 (claiming she "moved her husband and four children to India to avoid prosecution" because her attorney advised her to do so).)

Connor also points to familial support and her remorse as mitigating factors. (Appellant's brief, pp.13-14.) But all of the information she relies on was contained in the PSI or stated at the sentencing hearing, all of which the district court considered in fashioning Connor's sentence. (See, e.g., Tr., p.62, Ls.2-3 ("We are here following the preparation of a presentence report which I have read.").) The district court properly found, at least implicitly, that Connor's familial support and remorse did not outweigh the need to protect the community: "[T]he lesser sentence would be depreciating the seriousness of the crime, would not provide adequate protection to the community, and I think you need the time-out." (Tr., p.100, Ls.5-14.)

III.
Connor Has Failed To Show The District Court Abused Its Discretion When It Denied Her Rule 35 Motion

A. Introduction

The district court did not abuse its discretion when it denied Connor's Rule 35 motion. First, Connor's evidence that she has behaved well in prison *after* the district court imposed her sentence does not show her sentence was excessive. Second, Connor presented evidence showing she has anemia but did not present any evidence to show why that supports her request for leniency. Nothing in the record indicates she cannot receive treatment for her anemia in prison, and the

document she submitted actually suggests that she *can* receive treatment in prison. Third, Connor used a letter from a case manager to highlight inconsistencies between her two GAIN assessments. But that was not "new information" for purposes of the Rule 35 motion because the district court had both GAIN assessments at the time of sentencing. Because Connor failed to present the district court with evidence supporting her claim for leniency, the district court did not abuse its discretion when it denied her Rule 35 motion.

B. Standard Of Review

"If a sentence is within the statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and [this Court] review[s] the denial of the motion for an abuse of discretion." State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007).

C. The District Court Properly Denied Connor's Rule 35 Motion

Connor has failed to show the district court abused its discretion when it denied her Rule 35 motion. To prevail on appeal, Connor 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." Huffman, 144 Idaho at 203, 159 P.3d at 840. Connor claims she presented new information in the form of good behavior in prison, including attending classes. (Appellant's brief, p.16.) But a district court is not required to reduce a sentence based on good behavior in prison, which is, after all, the expectation. See State v. Cobler, 148 Idaho 769, 773, 229 P.3d 374, 378 (2010) ("[T]he district court did not abuse its discretion in giving little or no weight to Cobler's good behavior while in prison."); State v. Copenhaver, 129 Idaho 494, 496, 927 P.2d 884, 886 (1996) ("The district court further did not abuse its discretion in refusing to view Copenhaver's

good behavior in prison between his sentencing and the Rule 35 hearing as a mitigating factor."). Connor's potential reward for good behavior in prison is parole, not a reduced sentence.

Connor also points to her anemia as a basis for leniency. (Appellant's brief, p.16.) But all she provided to support her claim were notes from the medical staff at the prison showing "a slight improvement in [her] anemia" one month and then no improvement in her anemia the next month. (Aug., pp.13-14.) The note also strongly implies that Connor could receive any necessary treatment at the prison. (Aug., p.13 ("You will be scheduled to discuss treatment options.").) And nothing in the documentation Connor provided indicates that Connor could not receive the necessary treatment in prison. (See Aug, pp.13-14.) Connor's anemia, which by all indications could be treated in prison, did not require the district court to reduce Connor's sentence.

Connor also argues that she asserted new information in the form of a letter from a case manager describing inconsistencies in the two GAIN assessments. (Appellant's brief, p.16.) But the case manager's summary of parts of both GAIN assessments does not constitute "new information" for purposes of Rule 35 because the district court had both GAIN assessments at the time of sentencing. (See PSI, pp., 28-35; Sealed, pp.1-10.) The case manager's letter thus cannot be the basis of a request for leniency under Rule 35. See State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007) (affirming denial of Rule 35 motion "because [the defendant] failed to present new information the district court could properly consider").

Even if the case manager's letter did constitute new evidence, the district court reasonably found that the case manager's letter did not show Connor was a good candidate for probation. (Aug., pp.24-25.) The district court pointed out that Connor had absconded from prosecution for more than five years and that she had a lengthy history of DUI's. (Aug., pp.24-25.) The district

court concluded that "granting the leniency Ms. Connor requests would greatly discount the severity of the offenses committed." (Aug., pp.24-25.)

Connor also argues that the district court erred by not considering supplemental information she provided the district court to support her Rule 35 motion. (Appellant's brief, pp.17-18.) Connor's original Rule 35 Motion included a letter from Connor's case manager explaining a discrepancy in her GAIN assessment, a letter from a case manager correcting her LSI score, a letter from her case manager explaining her participation in classes, and a letter from a case manager describing Connor's behavior. (Aug., pp.3-20.) Connor later provided supplemental information including medical notifications sent to Connor from the prison staff, a letter written by the program manager at the prison detailing Connor's "progress" at the prison, and a letter describing a treatment program called Human Supports. (Aug., pp.13-19.)

Citing State v. Izaguirre, 145 Idaho 820, 186 P.3d 676 (Ct. App. 2008), Connor argues the district court abused its discretion by failing to consider the supplemental information. (Appellant's brief, pp.17-18.) This case is different than Izaguirre. In Izaguirre, the Idaho Court of Appeals held that the district court abused its discretion when it expressly refused to consider relevant evidence the defendant submitted to support a Rule 35 motion. 145 Idaho at 824, 186 P.3d at 680. Here, however, the district court did not expressly refuse to consider any evidence. At worst, the record is unclear as to whether the district court considered the supplemental information Connor submitted. The district court did not specifically identify any of the documents Connor submitted to support her Rule 35 motion, and all of the documents Connor submitted as supplemental information fit into one or both of the descriptions the district court used in its order to describe Connor's evidence. (Aug., pp.21-26 (describing Connor's evidence

as "communications she has received since incarceration from IDOC staff" and "information and documents that allege Ms. Connor would be a good candidate for a rider").)

Because it is not clear from the record that the district court failed to consider Connor's supplemental documentation, Connor has failed to show the district court abused its discretion. Moreover, to the extent the district court did fail to consider the supplemental documentation, any error is harmless because, as explained above, none of the supplemental information provided by Connor supports her claim for leniency.

CONCLUSION

The state respectfully requests this Court affirm Connor's judgment and the district court's denial of Connor's Rule 35 motion.

DATED this 18th day of February, 2020.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of February, 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:

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/s/ Jeff Nye
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