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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	Nos. 47058-2019 & 47059-2019
Plaintiff-Respondent,)	
)	Bonneville County Case Nos.
v.)	CR-2017-11587 & CR10-18-12341
)	
CODY RYAN NELSON,)	
)	RESPONDENT’S BRIEF
Defendant-Appellant.)	
_____)	

ISSUE

Has Nelson failed to establish that the district court abused its discretion by declining to further reduce his sentence pursuant to his Rule 35 motion in docket number 47058 and denying his Rule 35 motion for reduction of sentence in docket number 47059?

ARGUMENT

Nelson Has Failed To Establish That The District Court Abused Its Sentencing Discretion

A. Introduction

In November 2017, Nelson “pushed a shopping cart full of merchandise valued at \$218.08 out of the doors of Walmart ... without paying or attempting to pay for the items in the

cart.” (47058 R., pp. 18-19.) The state charged Nelson with burglary in docket number 47058 (“the 2017 case”). (47058 R., pp. 43-44.) Pursuant to a plea agreement, Nelson pled guilty and the state agreed to recommend probation and to “not oppose a withheld judgment.” (47058 R., pp. 60-61, 63-66.) On August 29, 2018, the district court withheld judgment and placed Nelson on supervised probation for four years. (47058 R., pp. 74-78.)

Less than two months later, in October 2018, officers searched Nelson’s residence and found two rifles, a loaded handgun, methamphetamine residue, drug paraphernalia, the carcasses of “a bull moose [and] four deer (two fresh and two older animals)” (UPSI, p. 2¹ (parenthetical notation original)), and a “hunting video,” dated September 14, 2018, in which Nelson “is in the back seat of [a] van ... with the sliding door open,” shooting at deer, while his ██████████ son “appears to be driving” (47059 R., p. 14). Officers noted that Nelson did not have a tag or a license to hunt, and Nelson admitted that he again hunted and killed a deer on October 17, 2018. (47059 R., pp. 14-15.) The state charged Nelson, in docket number 47059 (“the 2018 case”), with unlawful possession of firearms, possession of methamphetamine, hunting from a motorized vehicle, hunting while privileges revoked, hunting without a license, hunting without a game tag, and two counts of felony unlawful killing, possession, or waste of wildlife. (47059 R., pp. 40-43, 47.) In the 2017 case, Nelson’s probation officer filed a report of violation alleging that Nelson had violated the conditions of his probation by hunting without a license and possessing two rifles and a .22 pistol. (47058 R., pp. 81-82.)

In December 2018, an officer located Nelson – who had “[m]ultiple” outstanding felony warrants – “sitting in a van, which was attempting to tow [Nelson’s] vehicle.” (UPSI, p. 3.) The

¹ UPSI page numbers correspond with the page numbers of the electronic file “Confidential Record.pdf.”

officer instructed Nelson to exit the van, but Nelson did not comply and instead “immediately turned the vehicle on.” (47058 R., p. 93.) The officer “drew [his] weapon and yelled at [Nelson] to turn the vehicle off.” (47058 R., p. 93.) Nelson replied, ““Kids are in the car, pull the fucking trigger!”” (47058 R., p. 93.) Nelson then drove away, travelling “at a high rate of speed on the winter condition roads,” with five of his children in the vehicle. (47058 R., pp. 93-94.) The officer “began to pursue” Nelson; however, Nelson continued to drive recklessly in populated areas and “almost went off the road,” and the officer ultimately discontinued the pursuit. (47058 R., pp. 93-94.) Nelson’s probation officer subsequently filed an addendum to the report of violation in the 2017 case, alleging that Nelson had also violated the conditions of his probation by committing the new crimes of fleeing or attempting to elude a police officer, five counts of felony injury to a child, criminal conspiracy, “accessory-harbors and protects a person who committed a felony,” and driving without privileges. (47058 R., pp. 87-88.)

Pursuant to a global plea agreement, Nelson pled guilty, in the 2018 case, to unlawfully killing a bull moose, unlawful possession of a firearm, and possession of methamphetamine, and admitted that he violated his probation in the 2017 case by possessing firearms, hunting without a license, and committing the new crimes to which he pled guilty in the 2018 case. (47058 R., pp. 104-07, 111; 47059 R., pp. 50-53; Tr., p. 23, L. 2 – p. 25, L. 3.) In exchange, the state dismissed the remaining charges in the 2018 case, dismissed three separate 2019 cases, and agreed to recommend that Nelson’s sentences in the 2017 and 2018 cases “run concurrently.” (47058 R., pp. 104-05; 47059 R., pp. 50-51.) The district court revoked Nelson’s probation and the withheld judgment in the 2017 case and imposed a unified sentence of 10 years, with four years fixed for the burglary. (47058 R., pp. 120-22.) In the 2018 case, the district court imposed concurrent unified sentences of five years, with two years fixed, for unlawfully killing a bull

moose and for unlawful possession of a firearm, and seven years, with two years fixed, for possession of methamphetamine. (47059 R., pp. 60-63.) Nelson filed a timely Rule 35 motion for reduction of sentence in each case and requested that the district court either retain jurisdiction or reduce the fixed portion of his sentence in the 2017 case to two years. (47058 R., pp. 116-17; 47059 R., pp. 66-67; Tr., p. 71, Ls. 17-20.) The district court denied Nelson's request for a rider, but partially granted his motion by reducing his sentence in the 2017 case to a unified sentence of 10 years, with three years fixed. (47058 R., pp. 129-30; 47059 R., pp. 91-92.) Nelson filed notices of appeal, timely the district court's order partially granting his Rule 35 motion in the 2017 case, and timely from the district court's order denying his Rule 35 motion in the 2018 case. (47058 R., pp. 131-34; 47059 R., pp. 93-96.)

Nelson asserts that the district court abused its discretion by declining to further reduce his sentence in the 2017 case, and by denying his Rule 35 motion for reduction of sentence in the 2018 case, because the psychological evaluator opined that Nelson would benefit from treatment via a specialty court or the retained jurisdiction program. (Appellant's brief, pp. 6-8.) Nelson has failed to establish an abuse of discretion.

B. Standard Of Review

The denial of a Rule 35 motion for reduction of sentence is reviewed for an abuse of discretion. State v. Dabney, 159 Idaho 790, ___, 367 P.3d 185, 193 (2016). In conducting a review of the grant or denial of a Rule 35 request for leniency, the appellate court applies the same criteria used for determining the reasonableness of the original sentence. State v. Anderson, 163 Idaho 513, 517, 415 P.3d 381, 385 (Ct. App. 2015). 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. Schiermeier, 165

Idaho 447, ___, 447 P.3d 895, 902 (2019); Anderson, 163 Idaho at 517, 415 P.3d at 385 (citing State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982)).

In State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007), the Idaho Supreme Court observed that a Rule 35 motion “does not function as an appeal of a sentence.” The Court noted that where a sentence is within statutory limits, a Rule 35 motion is merely a request for leniency. Id.; State v. Burggraf, 160 Idaho 177, 180, 369 P.3d 955, 958 (Ct. App. 2016). Thus, “[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.” Dabney, 159 Idaho at ___, 367 P.3d at 193 (quoting Huffman, 144 Idaho at 203, 159 P.3d at 840).

C. Nelson Has Shown No Abuse Of The District Court’s Discretion

Application of these legal standards to the facts of this case shows no abuse of discretion. First, the district court applied the correct legal standards. (Tr., p. 80, L. 17 – p. 81, L. 2.) It noted that, after Nelson was placed on probation in this case, “within a very short time he had completely disregarded the rules of probation.” (Tr., p. 81, Ls. 6-10.) Nelson failed to engage in treatment as ordered, he possessed a firearm and illegal drugs, he committed several “additional crime[s],” and he “ha[d] his children ... breaking the law themselves, where they were driving the van while he was shooting arrows out of his van at a deer.” (Tr., p. 81, Ls. 10-19.) Then, “when the police went to arrest him on a warrant for violating those things,” Nelson fled from law enforcement “with his own children in the car,” driving recklessly and “speeding through the neighborhood streets, crossing busy streets,” and “putting a number of completely innocent people at risk.” (Tr., p. 81, L. 20 – p. 82, L. 2.) The court stated that it “did not think that probation was an option based upon [Nelson’s] performance.” (Tr., p. 82, Ls. 9-13.)

The district court considered the psychological evaluation Nelson submitted in support of his Rule 35 motions, and specifically noted that “it’s [the psychological evaluator’s] recommendation to this Court that a trial of treatment in problem-solving court/retained jurisdiction is worthwhile.” (Tr., p. 80, Ls. 20-22; p. 82, Ls. 19-24; p. 83, Ls. 13-19.) The court recognized, however, that the psychological evaluator “is only looking at one facet of what the Court is. [The evaluator] is looking at [Nelson’s] rehabilitative concerns, which is very appropriate. However, he is not looking at the protection of society, he is not looking at deterrence, and he is not looking at punishment.” (Tr., p. 83, Ls. 20-25.) The court stated, “[I]f we only take into account your needs, then certainly treatment is what you need, and you need either treatment in custody or out of custody.” (Tr., p. 83, L. 25 – p. 84, L. 3.) The court found, “based upon the other factors of sentencing,” that Nelson “cannot receive the treatment out of custody, because the risk to society, as well as the deterrent effect, is not appropriate, nor of benefit.” (Tr., p. 84, Ls. 4-7.)

The district court’s decisions are supported by the record. Nelson performed abysmally while on probation in this case. He failed to report for supervision, committed multiple new crimes, and attempted to avoid accountability for his noncompliance by eluding the police, endangering others as he fled from law enforcement. (UPSI, pp. 1-4; 47058 R., pp. 81-82, 87-88.) Both Nelson’s probation officer and the presentence investigator recommended that Nelson “be sentenced to prison.” (UPSI, p. 4; 47058 R., p. 88.) The psychological evaluator reported that Nelson’s current risk to reoffend is “high,” and that Nelson requires “significant correction while in supervised status,” as well as “significant supervision and support to ensure compliance and mitigate risk to the community.” (UPSI, p. 67.) The evaluator acknowledged that “[i]ncarceration will ensure the safety of the public while he is in a prison environment,” and

advised that, “after whatever period of incarceration is given to the defendant,” the recommendations in the psychological evaluation “for a successful return to the community” will “remain intact.” (UPSI, p. 67.) Nelson’s continuing disregard for the law and the conditions of probation, his failure to rehabilitate in the community or to be deterred by prior legal sanctions, and the danger he presents to society support the district court’s decision to not retain jurisdiction or further reduce Nelson’s sentence pursuant to his Rule 35 motions.

On appeal, Nelson argues that “a period of retained jurisdiction would best serve all the goals of sentencing” because the psychological evaluator advised that treatment via a problem-solving court or the retained jurisdiction program would be beneficial. (Appellant’s brief, p. 7.) Nelson acknowledges, however, that “[d]uring the Rule 35 hearing, [his] trial counsel conceded that probation was not an appropriate option at this point in time.” (Appellant’s brief, p. 7, n. 7 (citing Tr., p. 70, Ls. 11-16).) “There can be no abuse of discretion in a trial court’s refusal to retain jurisdiction if the court already has sufficient information upon which to conclude that the defendant is not a suitable candidate for probation.” State v. Brandt, No. 41197, 2014 WL 1612676, at *1 (Idaho Ct. App. Apr. 22, 2014). Nelson’s abysmal performance on probation and the risk he presents to the community, together with his trial counsel’s agreement, at the Rule 35 hearing, that Nelson was not an appropriate candidate for probation, support the district court’s decision to not retain jurisdiction. Nelson has not shown that the district court abused its discretion.

“When a court reasonably determines that other sentencing objectives outweigh the goal of rehabilitation, the court does not abuse its discretion in denying a motion for leniency under Rule 35.” State v. Bailey, 161 Idaho 887, 898, 392 P.3d 1228, 1239 (2017) (quoting State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998)). In denying Nelson’s Rule 35 request,

the district court adhered to its belief that the objectives of protection of society and deterrence were the overriding factors in this case. The district court's decisions to not retain jurisdiction or further reduce Nelson's sentence pursuant to his Rule 35 motions were reasonable in light of Nelson's continued criminal offending, his refusal to abide by the conditions of probation, his demonstrated unwillingness to engage in mandatory rehabilitative treatment while in the community, his failure to be deterred, and the danger he presents to the community. Nelson has failed to establish that the district court abused its discretion.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order granting, in part, Nelson's Rule 35 motion in docket number 47058, and the district court's order denying Nelson's Rule 35 motion for reduction of sentence in docket number 47059.

DATED this 22nd day of January, 2020.

/s/ Kenneth K. Jorgensen
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of January, 2020, served a true and correct copy of the attached RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

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