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State v. Smith Appellant's Brief 1 Dckt. 43706

SARA B. THOMAS
State Appellate Public Defender
I.S.B. #5867

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
P.O. Box 2816
Boise, ID 83701
(208) 334-2712

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 43706
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR 2015-3098
v.	)	
	)	
DANIEL JOSEPH SMITH,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Dennis Smith appeals, contending the district court erred when it denied his motion for appointment of counsel on his motion for leniency pursuant to I.C.R. 35 (*hereinafter*, Rule 35). It erred in concluding Mr. Smith's motion was frivolous even though his motion was timely filed and supported by new and additional information which demonstrated that one of the factors the district court had considered in aggravation at the sentencing hearing was unfounded and other mitigating factors were present. As a result, Mr. Smith was asking the district court to reduce his sentence so that it was consistent with the prosecutor's recommendations, which the district court had exceeded both in terms of the length of the fixed portion of the sentence and whether to retain jurisdiction.

Since there is no bar, as a matter of law, to the district court granting the requested relief where new evidence is presented, Mr. Smith's motion is precisely the sort of motion a reasonable person would hire counsel to make pursuant to Rule 35. Therefore, it is not frivolous. As such, this Court should vacate the order denying Mr. Smith's Rule 35 motion for counsel and remand this case for further proceedings following the appointment of counsel.

Mr. Smith also contends that, even if the district court did not err in denying his motion for counsel, the new and additional information he was able to present with his Rule 35 motion demonstrated that a more lenient sentence was appropriate in his case. In that regard, this Court should reduce his sentence as it deems appropriate, or else, vacate the order denying his Rule 35 motion and remand for a new determination as to the appropriate sentence in Mr. Smith's case.

Statement of the Facts & Course of Proceedings

Mr. Smith requested the assistance of counsel to help him prepare and present his Rule 35 motion for leniency. (R., pp.131-40, 159-60).) The district court had imposed a unified sentence of seven years, with three years fixed, and refused to retain jurisdiction following Mr. Smith's plea of guilty to possession of methamphetamine.[1] (Tr., p.20, Ls.1-20.)[2]

[1] The district court also imposed a sentence of 180 days incarceration to be served concurrently with the sentence for the felony possession charge in regard to Mr. Smith's guilty plea to misdemeanor resisting arrest. (Tr., p.20, Ls.7-9.)

[2] While the transcripts in this case are provided in two separately bound and paginated volumes, all references to "Tr." herein are to the volume containing the transcript of the sentencing hearing held on October 1, 2015.

Mr. Smith was particularly concerned that, during sentencing, the district court considered the fact that he had lived a "reckless" lifestyle in 2014 and 2015 which had risked exposing other people to sexually transmitted diseases, including the HIV virus, as an aggravating factor. (*See* R., pp.142-43.) Specifically, the district court stated, "he engaged in reckless activity which resulted in certain sexually transmitted diseases, actually a number of them, and I found myself wondering between 2014 and his current arrest how many others were inflicted by this reckless behavior." (Tr., p.18, Ls.14-19; *see* Presentence Investigation Report (*hereinafter*, PSI), p.12 (discussing that behavior in the context of when he was diagnosed in 2015, Mr. Smith suspected that was the time he had been exposed to the diseases).) As such, Mr. Smith sought to present the new and additional information that, since being first diagnosed in 2015, "I have followed the recommendations of my doctors, have taken steps to prevent further spread of the disease, am correctly medicated and am continuing proper treatment recommended by health professionals." (R., p.143.)

He also wanted to address the district court's concern over his prior struggles with rehabilitative programming. (*See* Tr., p.18, Ls.18-12.) As such, he sought to present the new and additional information that his diagnosis, combined with his brother's suicide during his own relapse the day Mr. Smith had been arrested, had "a profound impact on my attitude and outlook on life. I have never been more determined to turn my back on a lifestyle that has cost myself and my family so much." (R., p.144.)

Finally, he was concerned that the district court had exceeded the prosecutor's recommendations for sentencing. (*See* R., p.142.) In exchange for Mr. Smith's guilty plea, the prosecutor had agreed to recommend a unified sentence of seven years, with

two years fixed, and to recommend that the district court retain jurisdiction. (*See, e.g.,* Tr., p.6, Ls.5-7.) As such, his Rule 35 motion asked the district court to reduce his sentence so that it conformed to the prosecutor's recommendations. (*See* R., p.146.)

The district court denied Mr. Smith's motion for appointment of counsel on his Rule 35 motion based on its conclusion that the motion was frivolous: "it appears a reasonable person with adequate means would not be willing to retain counsel at his or her own expense to conduct a further investigation into Defendant's claims." (R., p.160.) It then proceeded to deny his motion on the merits without a hearing. (R., pp.161-65.) Specifically, it decided that, because the current case represented Mr. Smith's fourth felony conviction, and because he had struggled with prior rehabilitative opportunities, the sentence as originally imposed was appropriate. (R., p.164.)

Mr. Smith had already filed a notice of appeal in this case timely from the judgment of conviction by the time the district court entered its order denying his Rule 35 motion. (*See* R., pp.149-52.)

ISSUE

Whether the district court erred when it denied Mr. Smith's Rule 35 motion without appointing counsel.

ARGUMENT

The District Court Erred When It Denied Mr. Smith's Rule 35 Motion Without Appointing Counsel

A. The District Court Erred By Denying Mr. Smith's Motion For Appointment Of Counsel On His Rule 35 Motion

Pursuant to I.C. § 19-852, "[a] criminal defendant has the statutory right to counsel at all critical stages of the criminal process, including pursuit of a Rule 35 motion." *State v. Ramsey*, 159 Idaho 635, 637 (Ct. App. 2015), *rev. denied*. Therefore, "when presented with a motion requesting appointed counsel to represent a defendant on a Rule 35 motion, the court is required to appoint counsel unless the court finds that the motion is frivolous." *State v. Wade*, 125 Idaho 522, 525 (Ct. App. 1994).

Whether a Rule 35 motion is frivolous is a question of law reviewed *de novo*. *Ramsey*, 159 Idaho at 637. To declare a Rule 35 motion frivolous, the court has to be able to say that the motion is one "a reasonable person with adequate means would not be willing to bring at his or her own expense." *Id.*; *cf.* I.C. §19-852(2)(c). However, a motion is not frivolous simply because it may ultimately fail on its merits. Idaho Rule of Professional Conduct 3.1 cmt.2. If there is a good faith argument on the merits or to modify or reverse the controlling legal principles, the argument is not frivolous. *Id*. Therefore, what a court is saying when it declares a Rule 35 motion to be "frivolous" is that the motion is "[l]acking a legal basis or legal merit." BLACK'S LAW DICTIONARY, 303 (3rd pocket ed. 2006).

Thus, a Rule 35 motion is only frivolous, lacking *legal* basis or *legal* merit, when the judge cannot grant the defendant the relief requested as a matter of law. For example, a Rule 35 motion may be frivolous because it is not timely filed. *See, e.g.,*

Ramsey, 159 Idaho at 637. A Rule 35 motion may also be frivolous if it is not accompanied by new or additional information. *See, e.g., Wade*, 125 Idaho at 525-26; *cf. State v. Huffman*, 144 Idaho 201, 203 (2007) (finding no abuse of discretion in the denial of a Rule 35 motion because no new information accompanied the motion).

Similarly, a Rule 35 motion may be frivolous if the basis for the claim has been previously raised and considered by the district court. *See, e.g., State v. Wolfe*, 158 Idaho 55, 63 (2015) (holding the defendant's Rule 35(a) challenge to subject matter jurisdiction was barred by the principle of *res judicata*); *State v. Carter*, 157 Idaho 900, 902 (Ct. App. 2014), *rev. denied* (explaining that the defendant's Rule 35 motion based on information that he had been attending treatment programs while incarcerated was frivolous because "the sentence specifically contemplated and intended for Carter to participate in 'intensive treatment' programming while incarcerated; to that end, the district court declined to follow the state's recommended fixed portion of the sentence, reducing it from two years to one year to allow Carter to enter the therapeutic community sooner."). Likewise, a Rule 35 motion may be frivolous if the relief requested is not within the scope of Rule 35. *See, e.g., State v. Clements*, 148 Idaho 82, 86-88 (2009) (holding that Rule 35(a) cannot be used to re-examine the underlying facts of the case); *State v. Garza*, 115 Idaho 32, 34 (Ct. App. 1988) (holding that Rule 35 is not an appropriate vehicle to raise a constitutional challenge to the conditions of confinement).

Unlike those cases, there was no bar, as a matter of law, to the district court granting the relief requested in Mr. Smith's Rule 35 motion. That means his motion was not lacking legal basis or legal merit. He filed his motion within 120 days of the

judgment of conviction. (R., pp.111-14 (judgment of conviction file stamped October 5, 2015); R., pp.149-52 (Rule 35 motion file stamped November 6, 2015). Therefore, his motion was timely from the judgment of conviction. *See* I.C.R. 35(b).

Mr. Smith provided new and additional information in support of his motion. (R., pp.142-44.) Specifically, he informed the district court that, since being first diagnosed in 2015, he had been following his doctors' advice on how to minimize his risk of passing on his diseases. (R., p.142; *compare* Tr., p.12, L.5 - p.15, L.19 (the defense's comments at the sentencing hearing, not mentioning Mr. Smith's diagnosis at all). That new evidence directly refuted the district court's speculation that Mr. Smith had been putting other people at risk of contracting those diseases starting in 2014, which it considered as an aggravating factor in imposing sentence. (*See* Tr., p.18, Ls.13-19 ("I found myself wondering . . . how many others were affected by this reckless behavior.").) That consideration, essentially of prior uncharged conduct, is only valid if Mr. Smith had been *knowingly* or *intentionally* putting others at risk. *See* I.C. § 39-608 ("Any person who exposes another in any manner with the intent to infect, or, knowing he or she is or has been afflicted . . . .") Purely reckless behavior (as opposed to reckless behavior despite knowing of the risk) is not enough to create criminal liability, and so, it is not a legitimate basis to justify a harsher sentence, particularly in a case unrelated to that conduct. Thus, Mr. Smith's information – that *since learning* of his diagnosis in 2015, the first moment he knew about his condition, he had been taking efforts to minimize his risk to spread the disease – was new information which changed the calculus on one of the factors the district court considered in aggravation when imposing sentence.

Furthermore, Mr. Smith presented new and additional information about his amenability to treatment to address the district court's stated concerns about his prior struggles with rehabilitative programming. (Tr., p.18, Ls.3-12.) As Mr. Smith explained, the combination of his diagnosis and his brother's suicide during his own relapse had brought home the potential devastating consequences of Mr. Smith's continued drug use, and so, he was motivated, now more than ever before, to engage in rehabilitative programming to overcome his addiction. (R., pp.143-44; *compare* Tr., p.12, L.5 - p.15, L.19.) That was new information because, while the fact of Mr. Smith's diagnosis and the fact that his brother had committed suicide were both mentioned in various places in the record, nowhere in the record was there an articulation of the fact that Mr. Smith's amenability to treatment had changed as a result of the combination of those facts. (*See generally* R., Tr.)

Rather, the arguments and recommendations in the record were focused on addressing the direct consequences of those two matters, such as getting Mr. Smith treatment for the depression resulting from his brother's death. (*See, e.g.,* PSI, pp.15-16 (noting Mr. Smith's desire to take charge of his health and obtain counselling vis-à-vis his brother's suicide.); PSI, p.270 (letter of support from Mr. Smith's father requesting counselling to help Mr. Smith deal with the issues in his life, including his brother's suicide).) Therefore, Mr. Smith's information about his change in his current amenability to treatment, the unique product of the combination of those recent events in his life, was additional information which had not been before the district court at sentencing. As such, Mr. Smith's motion was not frivolous for being unsupported by new or additional information. And, since that new information had not been presented

to the district court previously, Mr. Smith's motion was also not frivolous for having already been considered and taken into account by the district court.

Finally, Mr. Smith's request for leniency is exactly the sort of claim that Rule 35(b) was designed to facilitate: "The purpose of the Rule 35 motion is either to correct or reduce the sentence as imposed." *State v. Johnson*, 117 Idaho 650, 652 (Ct. App. 1990). Therefore, Mr. Smith's motion was not frivolous for being beyond the scope of Rule 35.

As there is no legal bar to his request for relief, Mr. Smith's motion raised precisely the type of claim a person with adequate means would hire an attorney to raise under Rule 35. Therefore, his motion is not frivolous. The district court's conclusion to the contrary allows the exception to swallow the rule and renders the statutory right to counsel in the Rule 35 context meaningless. It allows the district court to reject a motion for appointment of counsel because the district court has already decided to deny the motions on the merits of the argument put forward by the *pro se* petitioner. (*See* R., pp.159-65.) However, the Idaho Supreme Court has already explained why that sort of decision is not appropriate.

Specifically, it admonished the courts to "keep in mind that petitions and affidavits filed by a *pro se* petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the *pro se* petitioner simply does not know what are the essential elements of a claim." *Brown v. State*, 135 Idaho 676, 679 (2001) (superseded

by statute as stated in *Charboneau v. State*, 140 Idaho 789, 792 (2004)).[3] Furthermore, "[a]n indigent defendant who is incarcerated in the penitentiary would almost certainly be unable to conduct an investigation into facts not already contained in the court record. Likewise, a *pro se* petitioner may be unable to present sufficient facts [in support of his or her claim]. That showing will often require the assistance of someone trained in the law." *Swader v. State*, 143 Idaho 651, 654-55 (2007) (like *Brown*, discussing the reason counsel should be appointed in the similar scenario of post-conviction petitions). The Idaho Supreme Court's explanation of Idaho's statutory right to counsel mirrors what the United States Supreme Court has long since recognized in the constitutional context:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge to adequately prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Gideon v. Wainwright, 372 U.S. 335 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)). Therefore, denying a request for counsel in the Rule 35 context simply because the district court is going to rule against the defendant on the merits of his claim, as the district court did here, is wholly improper.

This is because, as both Supreme Courts recognized, it is not just in the investigation of potential claims that a *pro se* defendant will want and need the help of

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[3] *Brown* was specifically discussing the scope of I.C. § 19-852. *Brown*, 135 Idaho at 679. That is the same statute which is the source of the right to counsel on Rule 35 motions. *See Wade*, 125 Idaho at 525. Therefore, while post-conviction cases such as *Brown* were subsequently been removed from the scope of I.C. § 19-852, *Brown's* admonition about the scope of I.C. § 19-852 still applies to Mr. Smith's case.

counsel. Counsel's assistance is needed "at every step," which includes the presentation of the arguments. *Id*.; *see also Swader* 143 Idaho at 654-55 ("a *pro se* petitioner may be unable *to present* sufficient facts [in support of his or her claim]") (emphasis added). Therefore, regardless of what information a defendant may have in his possession, the assistance of counsel is still needed to flesh out the legal argument and collect and present other evidence to further support the claim. As such, the district court's assertion that the motion was frivolous because a reasonable person would not hire an attorney "to conduct further investigation into Defendant's claims" (R., p.160) is not a valid basis upon which to deny a motion for counsel. It is not at all clear that counsel could not have uncovered other information supporting or validating Mr. Smith's statements, had he been appointed to assist Mr. Smith with his motion. And even if Mr. Smith's claim needed no further investigation, counsel's assistance was still needed in the presentation of that claim. Besides, to deny appointment of counsel, the court has to declare *the motion itself* is frivolous, not just the need for further investigation. I.C. § 19-852(2)(c); *Ramsey*, 159 Idaho at 637.

That is the whole point of the right to counsel – to help a *pro se* defendant flesh out his claim and present it properly and persuasively to the Court. That assistance is what the district court denied to Mr. Smith despite his valid argument that the sentence, as initially imposed, was based on an erroneous understanding of the facts, and so, was excessive and should be reduced. A reasonable person with means would hire an attorney to present such a claim under Rule 35. Therefore, the district court erred by denying Mr. Smith's motion for appointment of counsel because his Rule 35 motion was not frivolous.

B. The District Court Abused Its Discretion By Denying Mr. Smith's Rule 35 Motion

Even if this Court determines the district court did not err by denying Mr. Smith's motion for counsel, it should still vacate the order denying Mr. Smith's Rule 35 motion. The new and additional evidence he was able to present with his motion demonstrated a more lenient sentence would better serve the goals of sentencing in his case.

A motion to alter an otherwise lawful sentence pursuant to Rule 35 is addressed to the sound discretion of the sentencing court, and is essentially a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Huffman*, 144 Idaho 201, 203 (2007). When petitioning for a sentence reduction pursuant to Rule 35, the defendant must show his sentence is excessive in light of new or additional information presented to the sentencing court. *Id*. "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994).

As discussed in depth in Section A, *supra*, Mr. Smith presented new and additional information in support of his Rule 35 motion, and that information justified a sentence reduction in his case. For example, the new information he presented in regard to his medical diagnosis changed the calculus on one of the factors the district court had considered to be aggravating in its initial sentencing determination. The new information negated that particular factor, since it showed that, so long as Mr. Smith had known of his conditions, he had been making efforts to avoid transmitting those conditions to others. (R., p.142.) As such, the district court abused its discretion by not reducing the term of the underlying sentence in light of the new information Mr. Smith

presented, such that the sentence would be consistent at least with the prosecutor's original sentencing recommendation.

Similarly, the additional information Mr. Smith presented about his amenability to treatment changed the calculus on whether a rehabilitation-focused sentence was likely to be successful. That additional information revealed that the confluence of recent events in his life had put him in a position where he was uniquely motivated to complete rehabilitative programming and change his lifestyle. (R., pp.143-44.) Since rehabilitation "should usually be the initial consideration in the imposition of the criminal sanction," *State v. McCoy*, 94 Idaho 236, 240 (1971), *superseded on other grounds as stated in State v. Theil*, 158 Idaho 103 (2015), Mr. Smith's new and additional information about his potential to be successful in rehabilitative programming reveals a more lenient sentence which would provide for such programming, like the prosecutor had recommended, would better serve all the goals of sentencing. Therefore, the district court also abused its discretion by not altering the sentence in light of the additional information Mr. Smith presented, such that the sentence would allow for the rehabilitative treatment in the rider program.

As a result, even if this Court finds no error in the decision to not appoint counsel, it should still reduce Mr. Smith's sentence as it deems appropriate, or else, it should vacate the order denying Mr. Smith's Rule 35 motion and remand for a determination of the appropriate sentence in Mr. Smith's case.

CONCLUSION

Mr. Smith respectfully requests that this Court vacate the order denying his Rule 35 motion and remand for further proceedings following appointment of counsel. Alternatively, he requests this Court reduce his sentence as it deems appropriate, or else, vacate the order denying his Rule 35 motion and remand for further proceedings.

DATED this 24th day of May, 2016.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of May, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

DANIEL JOSEPH SMITH
INMATE #69623
NCWC
1640 11TH AVENUE NORTH
NAMPA ID 83687

SAMUEL A HOAGLAND
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BRD/eas