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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 47234-2019
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-19-5838
v.)	
)	APPELLANT'S BRIEF
SEAN ANDREW,)	
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Sean Andrew appeals from the district court's Judgment of Conviction and Commitment. Mr. Andrew was sentenced to unified sentences of five years, with two years fixed, and five years indeterminate, to be served consecutively, for his two witness intimidation convictions. He asserts that the district court abused its discretion in sentencing him to excessive sentences without properly considering the mitigating factor that exist in his case. Furthermore, Mr. Andrew asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence.

Statement of the Facts & Course of Proceedings

On March 5, 2019, an Information was filed charging Mr. Andrew with aggravated assault, two counts of intimidating a witness, use of deadly weapon during the commission of a crime, and violation of a no contact order. (R., pp.21-23.) Later, an Information, Part II, was filed adding a persistent violator enhancement. (R., pp.40-41.) The charges were the result of a report to police that Mr. Andrew had approached his wife with a hammer in a threatening way. (PSI, p.141.)¹ He also allegedly made phone calls attempting to influence the testimony of his wife and another witness. (PSI, pp.142-43.)

Mr. Andrew entered guilty pleas to the two counts of witness intimidation. (R., p.43.) Pursuant to plea negotiations, the remaining charges were dismissed. (R., p.54.) At sentencing, the State recommended unified sentences of three years, with two years fixed, and five years indeterminate, to be served consecutively. (Tr., p.42, Ls.18-22.) Defense counsel requested sentences of five years, with either one or two years fixed, to be served concurrently; a sentence that would allow Mr. Andrew to participate in work release. (Tr., p.52, Ls.1-13.) The district court imposed unified sentences of five years, with two years fixed, and five years indeterminate, to be served consecutively. (R., pp.52-56.)

Mr. Andrew filed a Notice of Appeal timely from the district court's Judgment of Conviction and Commitment. (R., pp.58-59.) He also filed a timely Motion for Reduction of Sentence. (R., p.63.) The motion was denied. (Augmentation: Order Denying Motion for Reconsideration.)²

¹ For ease of reference, the electronic file containing the Presentence Investigation Report and attachments will be cited as "PSI" and referenced pages will correspond with the electronic page numbers contained in this file.

² A Motion to Augment was filed contemporaneously with this Appellant's Brief.

ISSUES

- I. Did the district court abuse its discretion when it imposed, upon Mr. Andrew, unified sentences of five years, with two years fixed, and five years indeterminate, to be served consecutively, following his plea of guilty to two counts of witness intimidation?
- II. Did the district court abuse its discretion when it denied Mr. Andrew's Idaho Criminal Rule 35 Motion for a Reduction of Sentence?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed, Upon Mr. Andrew, Unified Sentences Of Five Years, With Two Years Fixed, And Five Years Indeterminate, To Be Served Consecutively, Following His Plea Of Guilty To Two Counts Of Witness Intimidation

Mr. Andrew asserts that, given any view of the facts, his unified sentences are excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held 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. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Andrew does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Andrew must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility

of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978), *overruled on other grounds by State v. Coassolo*, 136 Idaho 138 (2001)).

Appellate courts use a four-part test for determining whether a district court abused its discretion: Whether the trial 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). Mr. Andrew asserts that the district court failed to give proper consideration to the mitigating factors that exist in his case and, as a result, did not reach its decision by an exercise of reason.

Specifically, he asserts that the district court failed to give proper consideration to his admitted substance abuse problem and desire for additional treatment. Idaho courts have previously recognized that substance abuse and a desire for treatment should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982). Mr. Andrew admits that he has substance abuse issues and abuses marijuana and methamphetamine. (PSI, p.155.) Although he was receiving treatment and was discharged for non-compliance, he recognizes that he needs additional treatment. (PSI, p.155.) He has tried to stop using on his own, but was unable. (PSI, p.155.) Mr. Andrew was diagnosed with Stimulant Use Disorder – Amphetamine Type, Severe – Early Remission in a Controlled Environment and Cannabis Use Disorder, Moderate – Early Remission in a Controlled Environment. (PSI, pp.162, 172.) It was recommended that he participate in Level 2.1 Intensive Outpatient Treatment. (PSI, pp.157, 171.)

Idaho courts have previously recognized that Idaho Code § 19-2523 requires the trial court to consider a defendant's mental illness as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581 (1999). Mr. Andrew has been previously diagnosed with attention deficit/hyperactivity disorder, anxiety disorder, and major depression. (PSI, p.161.) He was prescribed Prozac while in the Ada County Jail. (PSI, pp.154, 161.)

Additionally, Mr. Andrew has accepted responsibility for committing the instant offenses. In *State v. Alberts*, 121 Idaho 204 (Ct. App. 1991), the Idaho Court of Appeals reduced the sentence imposed, "In light of Alberts' expression of remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character." *Id.* 121 Idaho at 209. At the sentencing hearing, Mr. Andrew noted that, "I did make the phone calls. And I did say, you know, tell them I didn't threaten you. I did. I take responsibility for that." (Tr., p.57, Ls.15-17.)

Based upon the above mitigating factors, Mr. Andrew asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his substance abuse, desire for continued treatment, mental health issues, and acceptance of responsibility, it would have crafted a less severe sentence and ordered the sentences to be served concurrently.

II.

The District Court Abused Its Discretion When It Denied Mr. Andrew's Rule 35 Motion For A Reduction Of Sentence

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App.

1994) (citing *State v. Forde*, 113 Idaho 21 (Ct. App.1987) and *State v. Lopez*, 106 Idaho 447 (Ct. App. 1984)). “The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable.” *Id.* (citing *Lopez*, 106 Idaho at 450). “If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.* (citing *State v. Hernandez*, 121 Idaho 114 (Ct. App. 1991)). “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, 159 P.3d 838, 840 (2007).

Mr. Andrew asserts that the district court failed to give proper weight and consideration to the new or additional information supplied in support of his Rule 35 motion and, as a result, did not reach its decision by an exercise of reason. In the brief in support of his Rule 35 motion, Mr. Andrew informed the district court that he has not been a disciplinary problem while in prison. (Augmentation: Brief in Support of Defendant’s Motion for Reconsideration of Sentence.) He asserts that in light of this additional information and the mitigating factors mentioned in section I, which need not be repeated, but are incorporated by reference, the district court abused its discretion in denying his Rule 35 motion.

CONCLUSION

Mr. Andrew respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that the order denying his Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 27th day of January, 2020.

/s/ Elizabeth Ann Allred
ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2020, I caused a true and correct copy of the foregoing APPELLANT’S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

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

EAA/eas