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### State v. Fontno Appellant's Brief Dckt. 47528

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 47528-2019
Plaintiff-Respondent,	)	
	)	KOOTENAI COUNTY NO. CR28-18-12541
v.	)	
	)	
RAYMOND FONTNO, JR.,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Raymond Fontno, Jr. pled guilty to possession of a controlled substance, and the district court initially retained jurisdiction. He appeals the district court's subsequent relinquishment of jurisdiction, and the court's partial denial of his Rule 35 Motion.

Statement of the Facts & Course of Proceedings

In August 2018, Officer Calderwood of the Post Falls Police Department was called to assist Probation and Parole Department officers in a search of a residence in Post Falls.

(R., pp.13-16.) During that search, he found a backpack containing drug paraphernalia indicative of heroin use, along with “a plastic baggy containing a brown sticky substance[, which, b]ased on [his] training and experience in law enforcement, [he] believed” was heroin. (R., p.15.) After the contents were identified as belonging to Mr. Fontno, he was placed under arrest. (R., pp.15-16.) An Information was subsequently filed with one count of possession of a controlled substance with intent to deliver. (R., pp.30-31.)

The following month, Mr. Fontno agreed to plead guilty; in exchange, the State agreed to file an amended Information reducing his charge to simple possession of a controlled substance, and to recommend imposition of a five-year sentence, with two years fixed. (R., p.35.)<sup>1</sup> The court accepted his guilty plea and proceeded immediately to sentence him on that plea. (Tr, p.11, Ls.13-22; p.15, Ls.2-9.) The court sentenced Mr. Fontno to seven years fixed, with no indeterminate time, consecutive to the sentence in a previous case, and retained jurisdiction. (Tr., p.21, Ls.1-4; R., pp.38-40.)

Five months into Mr. Fontno’s retained jurisdiction, the court held a jurisdictional review hearing. (R., pp.42-44.) The State asked the court to follow the recommendations from IDOC and relinquish jurisdiction. (Tr., p.37, Ls.1-20.) Mr. Fontno asked the court to continue retaining jurisdiction. (Tr., p.37, L.23 – p.38, L.3.) Counsel for Mr. Fontno said that IDOC’s request that the court relinquish jurisdiction was “probably the first relinquishment recommendation that I’ve seen where the defendant was not a disciplinary problem.” (Tr., p.38, Ls.6-8.) Counsel recognized the relinquishment recommendation came “from his poor attitude and poor attempts in the programming,” but suggested Mr. Fontno would “approach the programming with a

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<sup>1</sup> This plea agreement also encompassed probation violation allegations from a separate case; however, this appeal does not involve that case.

different perspective” if the court continued retaining jurisdiction. (Tr., p.38, Ls.15-16.) Counsel also mentioned that not only had Mr. Fontno not been a disciplinary problem, “he was actually placed on the Honors Team.” (Tr., p.39, Ls.17-18.) Mr. Fontno told the court that he “put in a lot of effort into that rider, put in a lot of effort to stay out of trouble.” (Tr., p.40, Ls.20-21.) He described how this relinquishment recommendation “blind-sided” him and “didn’t make a whole lot of sense” because he had been told by both his case manager and facilitator that he was “doing wonderful, don’t do anything different, keep up the good work.” (Tr., p.40, L.21 – p.41, L.24.) He asked the court for the “opportunity to go back and finish” because he had learned many new skills and wanted an opportunity to put those new skills into practice. (Tr., p.41, L.25 – p.42, L.4.) The court agreed to let Mr. Fontno attempt to show his attitude had changed, provided he could also show the court how he was going to set himself up for success if he were placed on probation. (p.42, L.24 – p.43, L.11.) The court continued retaining jurisdiction. (R., pp.47-48.)

One day before the court’s jurisdiction ended, another review hearing was held. (R., pp.51-52.) The State again recommended relinquishment of jurisdiction. (Tr., p.50, Ls.9-12.) Counsel for Mr. Fontno recommended probation, with a “probation review within a couple weeks” to show how Mr. Fontno was set up for continued success in the community. (Tr., p.52, Ls.14-17.) Mr. Fontno asked the court to place him on probation and give him an opportunity to use the skills he had learned while on the rider. (Tr., p.53, L.16 – p.54, L.6.) The court said Mr. Fontno’s “consistent infractions” were not “the most egregious infractions,” but he had not followed the court’s instructions to have treatment options set up before the end of the rider. (Tr., p.54, L.16 – p.55, L.5.) Ultimately, the court agreed with the recommendation from IDOC and relinquished jurisdiction. (Tr., p.54, Ls.7-15; R., pp.47-48.)

Fourteen days after the court relinquished jurisdiction, Mr. Fontno filed a Rule 35 motion. (R., pp.56-58.) Mr. Fontno requested a hearing to produce testimony and “potentially documentation in support of [his] request” for a sentence reduction. (R., p.58.) A hearing was held on that motion at the end of the year. (R., pp.77-78.)<sup>2</sup> During that hearing, Mr. Fontno introduced two letters as exhibits that discussed his acceptance into the residential treatment program the court had previously said was required. (R35 Tr., p.10, Ls.8-25; Exhibits, pp.1-2.) Mr. Fontno testified that he had applied for that program “the week that [he] got” to the retained jurisdiction program. (R35 Tr., p.5, Ls.1-13.) He testified that he applied to that program because he recognized the need to have a structured program in place because he hadn’t been successful in the past due to the lack of structure. (R35 Tr., p.5, Ls.15-22.) He expressed his desire to enter that program and “use the skills that [he] learned on the rider;” but if the court wasn’t willing to give him that opportunity, he asked for “a reduction on [his] fixed time and something added to” the indeterminate portion of his sentence. (R35 Tr., p.6, Ls.2-15.) The State objected to any modification of his sentence, continuing its recommendation of imposition. (R35 Tr., p.9, Ls.8-23.) The court then said it would “grant the Rule 35 motion in part and deny it in part.” (R35 Tr., p.11, Ls.3-4.) It denied the request to be placed on probation in the treatment program. (R35 Tr., p.11, Ls.4-6.) But it reduced the sentence from seven years fixed, to seven years, with five years fixed, still consecutive to his other sentence. (R35 Tr., p.11, Ls.6-14; R., p.79.)

Mr. Fontno appealed timely from both the order relinquishing jurisdiction and the order on his Rule 35 motion. (R., pp.65-68.)

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<sup>2</sup> The December 2, 2019 Rule 35 hearing transcript will be cited to as, “R35 Tr.”

## ISSUES

- I. Did the district court abuse its discretion when it relinquished jurisdiction and refused to place Mr. Fontno on probation following his plea of guilty to possession of a controlled substance?
- II. Did the district court abuse its discretion when it denied Mr. Fontno's Idaho Criminal Rule 35 motion for a reduction of sentence in light of his acceptance into a residential treatment program?

## ARGUMENT

### I.

#### The District Court Abused Its Discretion When It Relinquished Jurisdiction and Did Not Place Mr. Fontno On Probation Following His Rider

##### A. Introduction

Mr. Fontno asserts that, given any view of the facts, the district court abused its discretion by relinquishing jurisdiction and not placing him on probation.

##### B. Standard Of Review

“The decision to relinquish jurisdiction or grant probation is committed to the district judge’s discretion.” *State v. Le Vague*, 164 Idaho 110, 113 (2018) (internal quotation marks omitted); *See also State v. Reed*, 163 Idaho 681, 684 (Ct. App. 2018) (“The decision to place a defendant on probation or whether, instead, to relinquish jurisdiction over the defendant is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion.”).

When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of *four* essentials. 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) (emphasis in original). “A court’s decision to relinquish jurisdiction will not be deemed an abuse of discretion if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate.” *State v. Hansen*, 154 Idaho 882, 889 (Ct. App. 2013).

C. Mr. Fontno’s Performance On The Rider Warranted Suspension Of His Sentence And An Opportunity For Probation

Mr. Fontno asserts the district court abused its discretion by relinquishing jurisdiction and not placing him on probation. Specifically, he asserts that the district court failed to exercise reason in relinquishing jurisdiction, given his relative success on his rider.

While on his rider, Mr. Fontno’s case manager said, “Mr. Fontno had minimal disciplinary interventions while at NICI,” something that continued after he was returned to the rider program. (APSI, pp.3, 12-13.) However, the court told Mr. Fontno he had been given an opportunity to change what it had described as a problem with his attitude, but that it felt “[n]othing has changed over the course of nearly seven months now” after reading the documents from the rider program. (Tr., p.42, Ls.22-23; *see generally* Tr., p.42, Ls.7-23; APSI, p.3.) But while the record may show Mr. Fontno did not initially appear enthusiastic or committed to the rider program, it also shows he did eventually embrace it and made tremendous progress.

Mr. Fontno told the district court he was surprised by the comments in the APSI because he had requested feedback from both his case manager and programming facilitator about how he was doing. (Tr., p.41, Ls.2-3, 10-13) The facilitator told him, “[Y]ou’re doing just fine, you’re right where you need to be, don’t do anything different”; and his case manager said, “You’re doing wonderful, don’t do anything different, keep up the good work.” (Tr., p.41, Ls.5-7, 13-15;

*see generally* Tr., p.40, L.17 – p.41, L.24.) Two weeks before it was recommended that the court relinquish jurisdiction, he was placed into the Honors Program within the prison. (APSI, p. 9; Tr., p.39, Ls.16-18; p.41, Ls.8-24.) His attorney reported that he worked “two jobs, not just one” before being placed in the Honors Program. (Tr., p.39, Ls.15-16.) After being returned to the retained jurisdiction program, his case manager reported that, “Mr. Fontno did well in his classes”. (APSI, p.12.) Mr. Fontno “successfully completed both” the Advanced Practices class and Pre-release. (APSI, p.12.) He “achieve[d] the highest level of performance in his role-plays. He put effort into the Pre-release class and completed it in an appropriate time frame. (APSI, p.13.) He also voluntarily “started attending a Mental Health group – Trauma and Resilience.” (APSI, p.12.) He completed five classes, including a trauma class. (Tr., p.51, Ls.21-23.) He began to recognize and acknowledge his problems with introspection, admitting to the court that, “[I] have trouble looking at myself, and sometimes that’s very accurate, I do.” (Tr., p.41, Ls.1-2.) He told the court how he recognized that he “didn’t put forth anywhere near the amount of effort that I did the second time around, and how much I learned the second time and how much I was able to apply to it was an amazing amount of difference.” (Tr., p.53, Ls.18-22.) Mr. Fontno told the court he was able to accomplish all of that despite “people mak[ing] racist and derogatory comments to [him] every single day for almost a year” due to the skills he had learned. (Tr., p.53, L.23 – p.54, L.4.)

Notwithstanding some of the comments from his case manager, Mr. Fontno was, by many measures, very successful during the rider program. He completed the required programming, started attending a voluntary group to get help with his mental health, worked two jobs, and was accepted into the Honors Program. In light of all of this, Mr. Fontno asserts the failure to put him on probation was an abuse of discretion.



## II.

### The District Court Abused Its Discretion When It Denied Mr. Fontno’s Rule 35 Motion For A Reduction Of Sentence In Light Of [New Information Offered]

#### A. Introduction

Mr. Fontno asserts the court abused its discretion when it denied his Rule 35 motion and did not place him on probation. Specifically, he asserts that the new evidence submitted in support of his motion—evidence that he was accepted into the residential treatment program required by the court—should have caused the district court to suspend his sentence and place him on probation.

#### B. Standard Of Review

“A sentencing court's grant or denial of a Rule 35 motion is also subject to the discretionary standard of review.” *State v. Knighton*, 143 Idaho 318, 319 (2006); *see also Lunneborg*, 163 Idaho at 863 (describing factors for determining an abuse of discretion). A Rule 35 motion must be supported by new evidence “that the court could properly consider.” *State v. Huffman*, 144 Idaho 201, 203 (2007).

#### C. The District Court Abused Its Discretion When It Denied Mr. Fontno’s Rule 35 Motion For A Reduction Of Sentence In Light Of New Information Offered About His Acceptance Into The Court’s Required Residential Treatment Program

Mr. Fontno asserts the district court did not properly weigh his acceptance into the residential treatment program it had previously required as a condition. Courts should look at “a willingness to seek treatment for an alcohol [or drug] problem” as a mitigating factor. *State v. Coffin*, 146 Idaho 166, 171 (Ct. App. 2008). From the beginning of this case, Mr. Fontno has acknowledged his need to participate in a more structured recovery program if he wanted to be

successful. He pled guilty and asked the court to retain jurisdiction because “there is learning that can happen that will assist him at a time when he gets back out on probation.” (Tr., p.17, Ls.8-10.) He hoped to “get some more skills to avoid going back into old situations, risky behaviors.” (Tr., p.19, Ls.10-12.) The court told him that if he wanted a chance at probation after the rider, he needed to show he was “in good shape to be successful on probation, and I want to know that long-term plan and whether that’s some sort of faith-based program or something different.” (Tr., p.22, Ls.9-11.) The court said that “regular probation isn’t going to cut it for you. You need something more. You decide what that is. You decide what you need.” (Tr., p.22, Ls.12-14.) When the court held the first jurisdictional review hearing, Mr. Fontno reported that he had applied for “the 24/7 program.” (Tr., p.33, Ls.8-9.) After continuing to retain jurisdiction, the court said, “I’m not going to put you on probation unless you’re in the 24/7 program.” (Tr., p.43, Ls.3-4.) It said it may consider a different program, but it would need to be “about a year and a half of structured living” in order to be “an acceptable risk to put [him] on probation.” (Tr., p.44, Ls.13-16.) The court then clarified that the exact amount of time wasn’t as important as the fact that it needed to be “a long-term structured living arrangement.” (Tr., p.44, L.25 – p.45, L.1.)

As required by the court, Mr. Fontno applied to the 24/7 program before finishing his rider. (R35 Tr., p.5, Ls.5-13.) Counsel for Mr. Fontno confirmed he had completed that application, but they had not yet heard back from the director of the program despite multiple attempts to contact him, something they described as “unusual.” (R35 Tr., p.52, Ls.10-13; p.53, L.1.) Counsel asked for the court to place him on probation and to “set a probation review [hearing] within the next week or week and a half” to confirm that Mr. Fontno had been accepted and placed in the 24/7 program. (R35 Tr., p.52, Ls.20-22.) However, the court said that because

there was “specifically not having something in place with 24/7 at this point in time when I lose jurisdiction tomorrow,” it was not going to place him on probation. (R35 Tr., p.54, Ls.10-12.)

Even after the court had relinquished jurisdiction, Mr. Fontno expressed that it was still his “desire to go into the 24/7 program.” (R35 Tr., p.6, Ls.2-4.) Counsel for Mr. Fontno continued to communicate with the director of the 24/7 program, Mr. Bassett, and confirmed there was a bed available for Mr. Fontno at that moment and that he had been accepted into the program. (R35 Tr., p.7, Ls.4-5, 14-21, p.8, Ls.5-6; *see also* Exhibits, pp.1-2.) Counsel explained that part of the problem with Mr. Bassett getting back to them with an answer regarding Mr. Fontno was because “he was having difficulty reading the application.” (R35 Tr., p.8, Ls.7-8.) A better copy of the application was sent over and Mr. Bassett replied that Mr. Fontno was eligible for the program. (R35 Tr., p.8, Ls.7-13.) Yet, despite that new information regarding Mr. Fontno’s acceptance into the 24/7 program, the State was still unwilling to change its recommendation that his sentence be executed. (R35 Tr., p.9, Ls.8-23.) Counsel for Mr. Fontno reminded the court that a community-based program was “what the Court had originally intended for him to do.” (R35 Tr., p.10, Ls.4-5.) However, the court did not agree and, after reducing Mr. Fontno’s sentence, it denied his request to be placed on probation. (R35 Tr., p.11, L.3 – p.12, L.18.) Mr. Fontno asserts this was an abuse of discretion.

### CONCLUSION

Mr. Fontno respectfully requests that this Court remand his case with instructions that he be placed on probation.

DATED this 12<sup>th</sup> day of May, 2020.

/s/ R. Jonathan Shirts  
R. JONATHAN SHIRTS  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12<sup>th</sup> day of May, 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](mailto:ecf@ag.idaho.gov)

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

RJS/eas