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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 47570-2019
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-19-4809
v.)	
)	
DONOVAN EDWIN MARKHAM,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Donovan Edwin Markham pleaded guilty to felony operating a motor vehicle while under the influence of alcohol and/or drugs (one felony conviction within fifteen years). The district court imposed a unified sentence of ten years, with two years fixed. Mr. Markham filed an Idaho Criminal Rule 35 motion for a reduction of sentence, which the district court denied. Mindful of the applicable authorities, Mr. Markham asserts on appeal that the district court abused its discretion when it denied his Rule 35 motion.

Statement of the Facts & Course of Proceedings

Sergeant Nielsen of the Boise Police Department conducted a traffic stop on a van driving at night without its headlights on. (*See* Presentence Report (*hereinafter*, PSI), p.3.) Sergeant Nielsen noticed that the driver of the van, Mr. Markham, had slow, slurred, thick-tongued speech; glassy, bloodshot eyes; and a strong odor of an alcoholic beverage coming from his person. (*See* PSI, p.3.) Mr. Markham would not admit or deny consuming any alcoholic beverages. (PSI, p.3.) Officer Grover arrived on the scene to assist Sergeant Nielsen, and conducted field sobriety tests. (*See* PSI, p.3.) Mr. Markham met the decision points for the walk and turn test, would not follow the instructions for the horizontal gaze nystagmus test, and refused to participate in the one leg stand test. (PSI, p.3.) He also refused to provide evidentiary breath samples or a consensual blood draw. (PSI, p.3.) Law enforcement obtained samples of Mr. Markham's blood pursuant to a search warrant, and his blood alcohol level came back as 0.218. (*See* PSI, p.3.)

The State charged Mr. Markham by Information with felony operating a motor vehicle while under the influence of alcohol and/or drugs (one felony conviction within fifteen years). (R., pp.24-25, 31-32 (Amended Information).) Pursuant to a plea agreement, Mr. Markham agreed to plead guilty to the charge, and the State agreed not to file an Information Part II. (*See* R., pp.28-29, 33-42.) The district court accepted Mr. Markham's guilty plea. (*See* R., p.28.)

The presentence investigator wrote that Mr. Markham had completed two periods of retained jurisdiction, with the last period being in 2010. (PSI, p.17.) The presentence investigator stated, "IDOC has changed its programming since then and I believe Mr. Markham would learn new skills, coping mechanisms, and be able to evaluate his past decisions to turn to alcohol if he were given a period of Retained Jurisdiction at this time." (PSI, p.17.) At the

sentencing hearing, Mr. Markham's counsel recommended that the district court impose a unified sentence of six years, with one year fixed, and retain jurisdiction. (Tr., p.16, L.22 – p.17, L.8.) Mr. Markham requested “a county rider, inpatient VA treatment, then outpatient treatment while living at the Shiphouse or equivalent for at least a year while also working 20 hours a week and while medications are being fine tuned.” (Tr., p.26, Ls.5-9.) The State recommended that the district court impose a unified sentence of ten years, with three years fixed. (Tr., p.10, Ls.12-17.) The district court imposed a unified sentence of ten years, with two years fixed. (R., pp.47-50.)

Mr. Markham subsequently filed a Motion for Reconsideration of Sentence, under Idaho Criminal Rule 35. (R., p.54.) He also requested leave to supplement the motion with further supporting evidence, and the district court granted him an additional thirty days to supplement the motion. (R., pp.54-56.)

The district court then issued an Order Denying Rule 35 Motion for Reconsideration of Sentence. (R., pp.57-60.) The district court stated, “Thirty days have since passed and nothing further has been filed.” (R., p.57.) The district court determined “that the sentence previously imposed remains entirely appropriate and necessary to accomplish the objectives of sentencing” (R., p.59.)

Mr. Markham filed, pro se, a Notice of Appeal timely from the district court's Order Denying Rule 35 Motion for Reconsideration of Sentence. (R., pp.61-64.)

ISSUE

Did the district court abuse its discretion when it denied Mr. Markham's Idaho Criminal Rule 35 motion for a reduction of sentence?

ARGUMENT

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

Mr. Markham asserts the district court abused its discretion when it denied his Idaho Criminal 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) (citation omitted). "The denial of a motion for modification of a sentence will not be disturbed absent a showing that the court abused its discretion." *Id.* "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* "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.*

The Idaho Supreme Court has held that "[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." *State v. Huffman*, 144 Idaho 201, 203 (2007). "An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information." *Id.*

Mindful of *Huffman*, Mr. Markham asserts the district court abused its discretion when it denied his Rule 35 motion because his sentence is excessive. At the sentencing hearing,

Mr. Markham accepted responsibility for his actions and recognized the risk drunk driving presents to the community. (*See Tr.*, p.13, L.24 – p.14, L.3, p.16, Ls.17-19, p.18, Ls.5-6, p.19, L.24 – p.20, L.11.) Mr. Markham suffers from anxiety, bipolar disorder, and borderline personality disorder. (*See Tr.*, p.14, Ls.12-21, p.20, L.21 – p.21, L.10.) He is also a college graduate and veteran, and he worked at the Idaho Youth Ranch for four years before the instant offense. (*See Tr.*, p.14, L.22 – p.15, L.4.) During the sentencing hearing, Mr. Markham explained his plan for addressing his drinking problem and social anxiety, which would include living in a group home, connecting with other veterans at the VA, and fine-tuning his medications. (*See Tr.*, p.23, L.21 – p.26, L.9.) Thus, the district court abused its discretion when it denied Mr. Markham’s Rule 35 motion for a reduction of sentence.

CONCLUSION

For the above reasons, Mr. Markham respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 11th day of March, 2020.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of March, 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

BPM/eas