

LAWRENCE G. WASDEN
Attorney General
State of Idaho

COLLEEN D. ZAHN
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 47570-2019
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR01-19-4809
)	
DONOVAN EDWIN MARKHAM,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Markham failed to show any basis for reversal of the district court's order denying his Rule 35 motion for a reduction of sentence?

Markham Has Failed To Establish Any Basis For Reversal Of The District Court's Order Denying His Rule 35 Motion

Markham pled guilty to felony DUI and the district court imposed a unified sentence of 10 years, with two years fixed. (R., pp. 47-50.) Approximately three months later, on September 16, 2019, Markham filed a timely Rule 35 motion for a reduction of sentence. (R., p.

54.) On October 22, 2019, the district court entered an order denying Markham's Rule 35 motion, noting that the motion was "a bare plea for leniency, offering nothing in the way of new information and no argument or evidence showing that the sentence was unreasonable as imposed in light of the purposes of sentencing." (R., pp. 57-60.) Markham filed a notice of appeal timely only from the district court's order denying his Rule 35 motion. (R., pp. 61-64.)

Mindful of legal authority that forecloses his argument, Markham asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence because, as stated at sentencing, he accepted responsibility, he has mental health issues, he is "a college graduate and veteran, and he worked at the Idaho Youth Ranch for four years," and he "explained his plan for addressing his drinking problem and social anxiety" to the district court. (Appellant's brief, pp. 4-5.) Markham has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion.

If a sentence is within statutory limits, a Rule 35 motion is merely a request for leniency, which is reviewed for an abuse of discretion. State v. Brunet, 155 Idaho 724, 729, 316 P.3d 640, 645 (2013) (citing State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007)). A Rule 35 motion "does not function as an appeal of a sentence." Id. 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." Id. Absent the presentation of new evidence, "[a]n appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence." Id. at 729-30, 316 P.3d at 645-46; State v. Carter, 157 Idaho 900, 903, 341 P.3d 1269, 1272 (Ct. App. 2014).

Markham did not appeal the judgment of conviction in this case, and he provided no new or additional information in support of his Rule 35 motion for a reduction of sentence. (R., pp.

54-59.) On appeal, Markham acknowledges that he provided no new information in support of his Rule 35 request for leniency, but nevertheless argues that the district court abused its discretion by denying his Rule 35 motion in light of information that was before the district court at the time of sentencing. (Appellant's brief, pp. 1, 4-5.) Because Markham presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentence was excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion for reduction of sentence.

Conclusion

The state respectfully requests this Court to affirm the district court's order denying Markham's Rule 35 motion for reduction of sentence.

DATED this 6th day of April, 2020.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of April, 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:

BEN P. MCGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General