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### State v. Davis Appellant's Brief Dckt. 47637

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 47637-2019
Plaintiff-Respondent,	)	
	)	KOOTENAI COUNTY NO. CR28-19-10439
v.	)	
	)	
ROBERT MICHAEL DAVIS,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Robert Michael Davis appeals from the district court's Judgment. Mr. Davis was sentenced to a unified sentence of five years, with two years fixed, for his possession of a controlled substance conviction. He asserts that the district court abused its discretion when it failed to give proper consideration to the mitigating factors present in his case. Additionally, he asserts that the district court abused its discretion in denying his Rule 35 motion for a reduction of sentence.

## Statement of the Facts & Course of Proceedings

On July 9, 2019, an Information was filed charging Mr. Davis with possession of a controlled substance, methamphetamine, and possession of drug paraphernalia. (R., pp.53-54.) The charges were the result of a search conducted after a traffic stop. (PSI, p.5.)<sup>1</sup> Mr. Davis entered a guilty plea to the possession of methamphetamine charge and the remaining charge was dismissed. (R., pp.68, 79.)

At sentencing, the State recommended a unified sentence of five years, with two years fixed. (Tr., p.18, Ls.18-22.) Defense counsel requested that Mr. Davis be placed on probation. (Tr., p.22, Ls.13-15.) The Presentence Investigator recommended that Mr. Davis be placed on a period of retained jurisdiction. (PSI, p.17.) The district court imposed a unified sentence of five years, with two years fixed. (R., pp.81-82.) Mr. Davis filed a Notice of Appeal timely from the district court's Judgment. (R., pp.84-86.) He also filed a timely Rule 35 motion. (R., pp.94-95.) The motion was denied. (Augmentation<sup>2</sup>: Order Denying Defendant's Rule 35 Motion.)

## ISSUES

- I. Did the district court abuse its discretion when it imposed, upon Mr. Davis, a unified sentence of five years, with two years fixed, following his plea of guilty to possession of a controlled substance, methamphetamine?
- II. Did the district court abuse its discretion when it denied Mr. Davis's Idaho Criminal Rule 35 Motion?

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<sup>1</sup> 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.

<sup>2</sup> Mr. Davis's Motion to Augment was granted on 3/27/2020.

## ARGUMENT

### I.

#### The District Court Abused Its Discretion When It Imposed, Upon Mr. Davis, A Unified Sentence Of Five Years, With Two Years Fixed, Following His Plea Of Guilty To Possession Of A Controlled Substance, Methamphetamine

Mr. Davis asserts that, given any view of the facts, his unified sentence of five years, with two years fixed, is 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. Davis does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Davis 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. Davis asserts that the district court failed to give consideration to the mitigating factors that exist in his case and, as a result, did not reach its decision by an exercise of reason.

Mr. Davis asserts that the district court failed to properly consider the mitigating factors that exist in his case. Specifically, he asserts that the district court failed to give proper consideration to his admitted substance abuse problem and desire for 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. Davis began using alcohol, marijuana, and cocaine as a [REDACTED] and methamphetamine at the [REDACTED]. (PSI, p.13.) His drug of choice is methamphetamine. (PSI, p.13.) He was diagnosed with Stimulant Use Disorder – Amphetamine Type, Severe – In a Controlled Environment. (PSI, p.19.) Although he has been able to remain sober for years at a time, before the instant offence, he made some poor choices and relapsed. (PSI, p.13.) He is now about “100% ready to remain abstinent.” (PSI, p.24.) It was recommended that he participate in Level 1 Outpatient Treatment. (PSI, p.28.)

Mr. Davis did not wait to begin treatment, but enrolled in the 24/7 program prior to sentencing. (PSI, p.28.) Mr. Bassett, from the 24/7 program indicated that Mr. Davis was doing well in the program. (Tr., p.21, Ls.24-25.) Mr. Davis was in the middle of the program when he was sentenced and still had eight months of inpatient treatment and six months of outpatient

treatment before completing the program. (Tr., p.22, Ls.1-3.) Mr. Davis also obtained a substance abuse mentor through the St. Vincent program. (Tr., p.22, Ls.4-6.)

Further, Mr. Davis has a job waiting for him upon release. (PSI, p.12.) The Idaho Supreme Court has found that employment opportunities constitute mitigating information. *State v. Shideler*, 103 Idaho 593, 595 (1982). Although he was previously fired due to his use of methamphetamine, Mr. Davis's prior employer, Curtis Kluesner, noted that Mr. Davis "definitely" would be rehired upon release, as long as he maintained his sobriety. (PSI, p.12.) Mr. Kluesner stated that "when [Mr. Anderson] is clean and sober, he has a great work ethic and is a generally a good person." (PSI, p.12.)

Additionally, Mr. Davis has expressed his remorse for committing the instant offense and a willingness to move forward with treatment. 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. Mr. Davis has admitted that he is embarrassed and ashamed about committing the instance offense. (PSI, p.6.) He wants to put his relapse behind him and put everything he can into treatment and his faith so that he will be able to succeed in the future. (PSI, p.15.)

Based upon the above mitigating factors, Mr. Davis 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, employment opportunity, and remorse, it would have crafted a sentence that focused on his further rehabilitation rather than incarceration.

## II.

### The District Court Abused Its Discretion When It Denied Mr. Davis's Rule 35 Motion

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 (2007).

Mr. Davis supplied additional information to the district court through his testimony at the Rule 35 hearing. He noted that he has been unable to qualify for continuing treatment from the Idaho Department of Correction. (2/21/20 Tr., p.6, Ls.16-23.) However, he has completed the program he began in Kootenai County Jail that was provided by Pasto Rick. (2/21/20 Tr., p.6, L.24 – p.7, L.2.) He received a certificate for completing the faith-based one-step recovery program. (2/21/20 Tr., p.7, Ls.6-13.) Mr. Davis discussed the 24/7 program he was enrolled in at the time of sentencing and noted that he was doing well in it and “felt like [he] was getting a lot from it.” (2/21/20 Tr., p.9-14.)

He requested that his sentence either be set to three or three-and-a-half years fixed to allow him to top out and move to out of state to be with his son or, alternatively, that he be allowed to resume his participation in the 24/7 program.

Mr. Davis asserts that in light of the above 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. Davis respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing. 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 9<sup>th</sup> day of June, 2020.

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

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9<sup>th</sup> day of June, 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