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State v. Smith Appellant's Brief Dckt. 47455

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NOS. 47455-2019 & 47456-2019**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NOS.**
v.	)	**CR01-17-9345 & CR01-18-54728**
	)	
LEE THOMAS SMITH,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE LYNN G. NORTON
District Judge

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STATEMENT OF THE CASE

Nature of the Case

The State charged Lee Smith with multiple offenses in two separate cases. Mr. Smith obtained the charges in the second case while the first case was pending. Both cases arose from traffic stops. In the second case, Mr. Smith moved to suppress evidence obtained from the traffic stop, and the district court denied his motion in part. The district court determined the initial stop was illegal, but Mr. Smith's flight and commission of additional offenses broke the causal chain between the illegal stop and the discovery of evidence after his flight. Later, Mr. Smith pled guilty in both cases. He reserved his right to appeal the district court's partial denial of his motion to suppress in the second case.

On appeal, Mr. Smith argues the district court erred by partially denying his motion to suppress. He argues the evidence obtained after his flight was not sufficiently attenuated from the illegal stop. Accordingly, he respectfully requests this Court reverse the district court's order denying his motion to suppress and remand the case for further proceedings. In addition, in both cases, he argues the district court abused its discretion by imposing excessive sentences and by denying his Idaho Criminal Rule 35 ("Rule 35") motions. He respectfully requests this Court reduce his sentences or, in the alternative, vacate the district court's judgments of conviction or Rule 35 orders and remand both cases for a new sentencing or Rule 35 hearing.

Statement of Facts and Course of Proceedings

In March 2017, the State alleged Mr. Smith committed five offenses: trafficking in marijuana, two counts of possession of a controlled substance with the intent to deliver, resisting

an officer, and possession of drug paraphernalia. (No. 47455 R.,[1] pp.10–12, 27–29.) These charges arose from a traffic stop and search of Mr. Smith's car ("the 2017 case"). (*See generally* No. 47455 Exs., pp.1–15 (preliminary hearing transcript).)

At the preliminary hearing, the magistrate found probable cause for the offenses and bound Mr. Smith over to district court. (No. 47455 R., pp.22–23, 24–26.) The State filed an information charging Mr. Smith with trafficking in marijuana, two counts of possession of a controlled substance with the intent to deliver, resisting an officer, and possession of drug paraphernalia. (No. 47455 R., pp.31–32.) During this time, Mr. Smith was released on bond, and he failed to appear at the arraignment. (No. 47455 R., pp.16, 21, 34.)

About six months later, in November 2018, the State filed a criminal complaint alleging Mr. Smith committed eleven offenses in a new case. (*See* No. 47456 R., pp.11–14.) Eventually, the State proceeded on a second amended complaint with nine offenses: trafficking in marijuana, aggravated battery on a police officer, possession of a controlled substance, resisting an officer, providing false information to law enforcement, misdemeanor possession of a controlled substance, possession of drug paraphernalia, driving without privileges, and failure to provide proof of insurance. (No. 47456 R., pp.25–27.) These charges also arose from a traffic stop. (*See* No. 47456 Exs., pp.1–4 (preliminary hearing transcript).) At a preliminary hearing, the magistrate found probable cause for the offenses and bound Mr. Smith over to district court. (No.

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[1] This is a consolidated appeal with two clerk's records. Citations to each record reference the Supreme Court Docket Number. Accordingly, citations to "No. 47455 R." reference Supreme Court Docket No. 47455, Ada County No. CR01-17-9345. Citations to "No. 47456 R." reference Supreme Court Docket No. 47456, Ada County No. CR01-18-54728.

Each case also contains a separate electronic document with the exhibits. Citations to the exhibits in each case will reference the Supreme Court Docket Number. Similarly, each case contains a separate electronic document with the confidential sentencing exhibits, such as the presentence investigation report ("PSI"). Citations to the confidential exhibits will reference "PSI" along with the corresponding Supreme Court Docket Number.

47456 R., pp.28, 30–32.) The State filed an information that charged Mr. Smith with the nine offenses from the second amended complaint ("the 2018 case"). (No. 47456 R., pp.44–46.)

In the 2018 case, Mr. Smith filed a motion to suppress. (No. 47456 R., p.51.) He argued the police officer did not have reasonable suspicion for the traffic stop. (No. 47456 R., pp.53–60.) Therefore, he asserted all evidence obtained as a result of the stop must be suppressed. (No. 47456 R., p.60.) The State responded in opposition. (No. 47456 R., pp.66–81.) The State argued the officer had reasonable suspicion and, alternatively, the attenuation and inevitable discovery exceptions allowed the admission of any evidence obtained from the stop. (No. 47456 R., pp.74–81.)

The district court held a hearing on Mr. Smith's motion. (No. 47456 R., pp.92–95.) The officer that initiated the traffic stop, Idaho State Police ("ISP") Trooper Cottrell, testified. (Tr.,[2] p.13, L.11–p.66, L.18.) The district court also admitted four photographs from the stop, ISP's inventory policy, the inventory notice for Mr. Smith's car, and the citation for the traffic infractions. (No. 47456 Exs., pp.6–16.) After the hearing, the parties stipulated to the admission of the officer's bodycam video. (Aug. R., State's Ex. 8.)

A few weeks later, the district court issued a memorandum decision and order granting in part and denying in part Mr. Smith's motion to suppress. (No. 47456 R., pp.100–12.) The district court found that Trooper Cottrell stopped Mr. Smith for an obstructed license plate. (No. 47456 R., p.100.) The district court also found, "[I]t is clear that the trooper was able to correctly identify the plate number and that it was from Oregon before he ever initiated the stop." (No. 47456 R., p.101.) The district court explained that Trooper Cottrell thought Mr. Smith had

[2] There are two transcripts on appeal—one for each case—but the transcripts are identical. Both transcripts contain the hearing on Mr. Smith's motion to suppress, the entry of plea hearing, and the sentencing hearing.

violated I.C. § 49-428(2) because a bracket around the license plate obstructed the top and bottom portions of the plate. (No. 47456 R., p.101.) The district court further found, once Trooper Cottrell approached the car and started communicating with Mr. Smith, Trooper Cottrell detected the odor of marijuana. (No. 47456 R., p.102.) Mr. Smith and Trooper Cottrell mostly communicated in writing because Mr. Smith is "deaf or hard of hearing." (No. 47456 R., p.101.) Mr. Smith appeared nervous and was smoking a cigarette. (No. 47456 R., pp.101–02.) About eight minutes into the stop, Trooper Cottrell had Mr. Smith get out of the car. (No. 47456 R., p.102.) The district court then found:

> The Trooper explained to the Defendant that the vehicle would be searched and the Defendant said, "No" repeatedly. The officer asked to pat search the Defendant but the defendant held up his shirt to show his waist area was free of weapons. The Defendant stepped down into the barrow pit with the second officer at about 15 minutes into the video while the Trooper returned to his patrol car. The Trooper testified at the suppression hearing that he was concerned that the Defendant may flee. But the video shows that while in the barrow pit, both officers have their backs to the Defendant while one officer begins searching the vehicle and Trooper Cottrell returns to the patrol car. Within a minute after the search of the vehicle began, the Defendant begins to run.

(No. 47456 R., p.102.) Mr. Smith ran into the interstate and eventually stopped once the officers tased him. (No. 47456 R., pp.102–03.) The district court found, "A scuffle to restrain the Defendant ensues." (No. 47456 R., p.103.) Mr. Smith punched Trooper Cottrell with his metal handcuffs and injured him. (No. 47456 R., p.103.) After about seven minutes, the officers restrained Mr. Smith. (No. 47456 R., p.103.) The officers then conducted an inventory search of Mr. Smith's car and found contraband. (No. 47456 R., p.103.)

After these findings, the district court first determined Trooper Cottrell did not have reasonable suspicion to initiate the traffic stop. (No. 47456 R., pp.105–08.) Accordingly, the district court granted Mr. Smith's motion to suppress any evidence and inculpatory statements by Mr. Smith *before* he fled from the officers. (No. 47456 R., p.108.) Next, the district court

determined the attenuation doctrine and inventory search exception applied to avoid application of the exclusionary rule to any evidence or statements *after* Mr. Smith's flight. (No. 47456 R., pp.108–12.) The district court ruled Mr. Smith's flight and commission of additional crimes (aggravated battery on an officer and resisting an officer) broke the causal chain and sufficiently attenuated any statements made by Mr. Smith after the illegal stop. (No. 47456 R., pp.110–11.) The district court also ruled Mr. Smith's new crimes and subsequent arrest "necessitated that Smith's vehicle be impounded by the police with an inventory search conducted incident to the vehicle being impounded." (No. 47456 R., p.111.) The district court found the officers followed the ISP's inventory policy. (No. 47456 R., p.111.) Accordingly, the district court ruled, "[A]ny contraband seized in the inventory search did not require a warrant and was attenuated from the illegal initial traffic stop." (No. 47456 R., p.111.)

About one month later, the district court held an entry of plea hearing for both cases. (No.47455 R., pp.60–61; No. 47456 R., pp.117–18.) In the 2017 case, Mr. Smith pled guilty to trafficking in marijuana, and the State agreed to dismiss the other counts. (Tr., p.95, Ls.20–21, p.96, L.8–p.97, L.3, p.105, L.24–p.106, L.21; *see also* No. 47455 R., pp.71–72.) In the 2018 case, Mr. Smith entered a guilty plea to trafficking in marijuana and an *Alford*[3] plea to aggravated battery on an officer. (Tr., p.95, Ls.21–24, p.106, L.22–p.112, L.10; *see also* No. 47456 R., pp.128–29.) The State agreed to dismiss the remaining charges. (Tr., p.96, Ls.10–11.) Mr. Smith's plea in the 2018 case was conditional, and he reserved the right to appeal the district court's decision on his motion to suppress. (Tr., p.95, Ls.22–23, p.98, Ls.2–14, p.100, Ls.4–6; No. 47456 R., p.128.) For both cases, the State agreed to recommend an aggregate sentence of

[3] *North Carolina v. Alford*, 400 U.S. 25 (1970).

twenty years, with ten years fixed. (Tr., p.97, Ls.17–23; No. 47455 R., p.71; No. 47456 R., p.128.)

The district court held a joint sentencing hearing. (Tr., p.115, L.6–p.140, L.12.) For the 2017 case, the State recommended the district court impose a sentence of seven years, with two years fixed for trafficking in marijuana. (Tr., p.126, Ls.1–6.) For the 2018 case, the State recommended the district court impose eight years, with three years fixed, for trafficking in marijuana and five years fixed for aggravated battery on an officer. (Tr., p.126, Ls.7–18.) The State recommended the sentences to be served consecutively, for an aggregate sentence of twenty years, with ten years fixed, consistent with the plea agreement. (Tr., p.126, Ls.15–18.) Mr. Smith requested the district court impose a total sentence of ten years, with two years fixed. (Tr., p.133, L.24–p.134, L.2.)

For the 2017 case, the district court sentenced Mr. Smith to five years, with two years fixed, for trafficking in marijuana. (Tr., p.137, Ls.20–23.) For the 2018 case, the district court sentenced Mr. Smith to ten years, with two years fixed, for trafficking in marijuana and seven years, with three years fixed, for aggravated battery on an officer. (Tr., p.138, Ls.6–22.) The district court ordered all the sentences to be served consecutively. (Tr., p.138, Ls.8–15, p.138, Ls.22–25.) The total sentence was twenty-two years, with seven years fixed. Tr., p.139, Ls.13–16.)

Mr. Smith timely appealed from the district court's judgment of conviction in both cases. (No. 47455 R., pp.81–83, 88–89; No. 47456 R., pp.139–42, 147–48.) Mr. Smith also moved for reconsideration of his sentences pursuant to Rule 35. He requested the district court reduce his fixed time in each case to one year. (No. 47455 R., p.99; No. 47456 R., p.157.) The district court denied his motions. (No. 47455 R., pp.109–18; No. 47456 R., pp.167–76.)

ISSUES

I. Did the district court err by denying Mr. Smith's motion to suppress in part because his flight during the illegal traffic stop did not break the causal chain to allow the admission of evidence after his flight?

II. Did the district court abuse its discretion by imposing an excessive aggregate sentence of twenty-two years, with seven years fixed, for aggravated battery on an officer and two counts of trafficking in marijuana?

III. Did the district court abuse its discretion by denying Mr. Smith's Rule 35 motions to reduce his fixed time?

ARGUMENT

I.

The District Court Erred By Denying Mr. Smith's Motion To Suppress In Part Because His Flight During The Illegal Traffic Stop Did Not Break The Causal Chain To Allow The Admission Of Evidence After His Flight

A. Introduction

Mr. Smith maintains the district court erred by denying his motion to suppress his statements made after his flight and any evidence found during the inventory search of his car. Although Mr. Smith recognizes other jurisdictions have held the defendant's commission of new crimes sufficiently attenuates an illegal seizure, he nonetheless maintains his flight and subsequent conduct did the purge the taint of the illegal traffic stop. Therefore, he submits the district court should have fully granted his motion to suppress in the 2018 case.

B. Standard Of Review

The Court uses a bifurcated standard to review a district court's order on a motion to suppress. *State v. Danney*, 153 Idaho 405, 408 (2012). "The Court accepts the trial court's findings of fact if supported by substantial evidence." *State v. Watts*, 142 Idaho 230, 234 (2005). The Court exercises free review of "the trial court's application of constitutional principles to the facts found." *Danney*, 153 Idaho at 408.

C. The District Court Should Have Fully Granted Mr. Smith's Motion To Suppress Because His Flight Did Not Sufficiently Attenuate The Illegal Stop From The Discovery Of Evidence In The Car And His Statements

"The Fourth Amendment of the United States Constitution protects citizens from unreasonable search and seizure." *State v. Hansen*, 138 Idaho 791, 796 (2003); U.S. CONST. amend IV. A warrantless search or seizure is presumptively unreasonable, unless it falls "within

one of several narrowly drawn exceptions." *State v. Anderson*, 154 Idaho 703, 706 (2012); *State v. Green*, 158 Idaho 884, 886–87 (2015). Here, the district court ruled Trooper Cottrell illegally seized Mr. Smith when he initiated the traffic stop for the obstructed license plate. (No. 47456 R., pp.105–08.) The district court further ruled, however, that the attenuation and inventory search exceptions to the warrant requirement allowed the admission of Mr. Smith's statements and the contraband found in his car. (No. 47456 R., pp.108–12.) Mr. Smith respectfully disagrees and argues his flight did not sufficiently attenuate the subsequent discovery of evidence.

Under the attenuation doctrine, "[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (quoting *Hudson v. Michigan*, 547 U.S. 586, 593 (2006)). The attenuation doctrine "evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions." *Id.* The intervening circumstance, which serves to break the causal chain, must be "entirely unconnected" with the illegal act. *Id.* at 2062–63. For example, in *Strieff*, the United States Supreme Court held the existence of a valid arrest warrant, which "predated" the unlawful stop, was "'sufficiently attenuated to dissipate the taint'" of the stop. *Id.* (quoting *Segura v. United States*, 468 U.S. 796, 815 (1984)). Along with the intervening circumstance, the Court also considers two other factors to determine whether the illegal conduct has be sufficiently attenuated from the discovery of evidence. *State v. Cohagan*, 162 Idaho 717, 721–22 (2017). Those factors are "the elapsed time between the misconduct and the acquisition of the evidence"

and "the flagrancy and purpose of the improper law enforcement action." *Id.* at 722 (quoting *State v. Page*, 140 Idaho 841, 846 (2004)).

Although not directly decided by this Court, Mr. Smith acknowledges many state and federal jurisdictions have held, while a defendant's non-violent flight in response to an illegal seizure does not break the causal chain, a defendant's commission of a new crime during that flight or flight that creates a risk to the public can break the chain for subsequently discovered evidence. *See, e.g.*, *United States v. Brodie*, 742 F.3d 1058, 1063 (D.C. Cir. 2014); *United States v. Beauchamp*, 659 F.3d 560, 574 (6th Cir. 2011); *United States v. Dawdy*, 46 F.3d 1427, 1430–31 (8th Cir. 1995); *United States v. Bailey*, 691 F.2d 1009, 1016–19 (11th Cir. 1982); *United States v. Garcia*, 516 F.2d 318, 319–20 (9th Cir. 1975); *Thornton v. State*, 214 A.3d 34, 51–57 (Md. 2019); *State v. Lee*, 498 S.W.3d 442, 454–55 (Mo. Ct. App. 2016); *see also United States v. Gallinger*, 227 F. Supp. 3d 1163, 1172–73 (D. Idaho 2017) (discussing federal circuit court cases). Nonetheless, Mr. Smith argues the district court erred by determining his flight was a sufficient intervening circumstance.

Mr. Smith's flight was not an intervening circumstance because he would not have fled (or committed the additional offenses) but for the initial illegal traffic stop. *Wong Sun v. United States*, 371 U.S. 471 (1963), is instructive. There, one of the defendants, Toy, fled upon a narcotics officer's arrival and identification at Toy's business. *Id.* at 473–74. Multiple officers chased after Toy, cornered him in a bedroom, and arrested him. *Id.* at 474. Toy made incriminating statements to the officers after his flight and arrest. *Id.* at 474–75. The United States Supreme Court first held that "there was neither reasonable grounds nor probable cause for Toy's arrest." *Id.* at 479. Despite the unlawful seizure, the Government argued Toy's statements were admissible "because they resulted from an intervening independent act of a free

will." *Id.* at 486 (internal quotation marks omitted). The United States Supreme Court disagreed. *Id.* The United States Supreme Court held Toy's statements were the "fruits" of the officers' unlawful action. *Id.* at 484, 486. The United States Supreme Court decided the Government's argument took "insufficient account of the circumstances. Six or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping. He had been almost immediately handcuffed and arrested." *Id.* at 486. "Under such circumstances," the United States Supreme Court held, "it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.*

Similar to *Wong Sun*, Mr. Smith's flight was not "an act of free will to purge the primary taint" of the illegal traffic stop. *Id.* Mr. Smith would not have fled but for Trooper Cottrell's pursuit of the traffic stop. As such, Mr. Smith's flight was not "wholly unconnected" to the illegal seizure to break the causal connection between the illegality and the discovery of evidence. *Segura*, 468 U.S. at 814.

Therefore, Mr. Smith maintains the district court erred by applying the attenuation doctrine to avoid the application of the exclusionary rule to his illegal seizure. His flight was connected to his illegal seizure, and the evidence obtained by the police "would not have come to light but for the government's unconstitutional conduct" in the illegal traffic stop. *State v. Wigginton*, 142 Idaho 180, 184 (Ct. App. 2005). Accordingly, Mr. Smith asserts the district court should have fully granted his motion to suppress in the 2018 case. *See Cohagan*, 162 Idaho at 720 ("The exclusionary rule requires the suppression of both 'primary evidence obtained as a direct result of an illegal search or seizure' and, pertinent here, 'evidence later discovered and found to be derivative of an illegality,' the proverbial 'fruit of the poisonous tree.'" (quoting

Segura, 468 U.S. at 804)); *see also Wong Sun*, 371 U.S. at 488 (evidence obtained through unconstitutional police conduct subject to exclusion).[4]

II.

The District Court Abused Its Discretion By Imposing An Excessive Aggregate Sentence Of Twenty-Two Years, With Seven Years Fixed, For Aggravated Battery On An Officer And Two Counts Of Trafficking In Marijuana

"It is well-established 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. Pierce*, 150 Idaho 1, 5 (2010) (quoting *State v. Jackson*, 130 Idaho 293, 294 (1997) (alteration in original)). Here, Mr. Smith's sentences do not exceed the statutory maximums. *See* I.C. § 37-2732B(a)(1)(A), (D) (mandatory minimum of one year, maximum of fifteen years for trafficking in marijuana); I.C. § 18-908 (fifteen year maximum for aggravated battery); I.C. § 18-915 (doubling of sentence if battery against an officer). Accordingly, to show the sentence imposed was unreasonable, Mr. Smith "must show that the sentence, in light of the

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[4] Mr. Smith notes that this case is distinguishable from *State v. Zuniga*, 143 Idaho 431 (Ct. App. 2006), relied on by the district court. (No. 47456 R., p.110.) There, the police unlawfully detained the defendant, and the defendant fled. *Id.* at 733, 736. The defendant dropped contraband during the chase. *Id.* at 736. The Court of Appeals held this evidence was not suppressible because the defendant was not seized when he dropped it. *Id.* The Court of Appeals reasoned:

> Had he been searched at that time and the methamphetamine found, it would have been suppressible as fruit of the poisonous tree due to the unlawful detention without reasonable suspicion. But Zuniga decided to forgo the opportunity to challenge his seizure at that stage. Instead, he chose to terminate the seizure through escape from [the officer's] authority. It would be a fiction for us to hold that Zuniga was still under seizure by [the officer] while he was running away and no longer submitting or yielding to [the officer's] authority.

Id.; *see also California v. Hodari D.*, 499 U.S. 621, 629 (1991) (contraband thrown by defendant during flight not subject to suppression). Unlike *Zuniga*, the officers here did not obtain any abandoned evidence during Mr. Smith's flight.

governing criteria, is excessive under any reasonable view of the facts." *State v. Strand*, 137 Idaho 457, 460 (2002).

"'Reasonableness' of a sentence implies that a term of confinement should be tailored to the purpose for which the sentence is imposed." *State v. Adamcik*, 152 Idaho 445, 483 (2012) (quoting *State v. Stevens*, 146 Idaho 139, 148 (2008)).

> In examining the reasonableness of a sentence, the Court conducts an independent review of the entire record available to the trial court at sentencing, focusing on the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public; (3) possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

Stevens, 146 Idaho at 148. "A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution." *State v. Delling*, 152 Idaho 122, 132 (2011). "The decision of whether to impose sentences concurrently or consecutively is within the sound discretion of the trial court." *State v. Helms*, 130 Idaho 32, 35 (Ct. App. 1997); *see also* I.C. § 18-308.

Here, Mr. Smith asserts the district court abused its discretion by imposing an excessive sentence under any reasonable view of the facts. Specifically, he contends the district court should have sentenced him to a lesser term of imprisonment in light of the mitigating factors, including his tumultuous childhood, minor criminal history, substance abuse issues, letters of support, and acceptance of responsibility and remorse.

First, Mr. Smith's difficult childhood warrants a lesser sentence. The Court of Appeals has recognized that a defendant's "extremely troubled childhood is a factor that bears consideration at sentencing." *State v. Williams*, 135 Idaho 618, 620 (Ct. App. 2001). Here, Mr. Smith's early years of his childhood were positive—he lived with his grandparents, who

were stable and loving. (No. 47456 PSI, p.288.) Mr. Smith participated in his elementary school's Gifted and Talented Education program, as well as Cub Scouts and church activities. (No. 474 PSI, p.304.) Later, Mr. Smith's grandfather died, and Mr. Smith's parents had joint custody. (No. 47456 PSI, p.288.) During this time as a pre-teen and teenager, Mr. Smith's mother was extremely poor and a hoarder, and his father was an alcoholic. (No. 47456 PSI, p.288.) When Mr. Smith lived with his mother, they lived in "squalor" with "junk in deteriorating cardboard boxes stacked in towers" all over the house, and his mother would fluctuate between manic and depressive states. (No. 47456 PSI, p.228–89.) Mr. Smith stated the "last few years with my mother were filled with all kinds of turmoil [and] distressing events." (No. 47456 PSI, p.289.) When Mr. Smith lived with his father, his father would come home "drunk and in a rage" and would "change from yelling to vigorous spankings at the drop of a hat." (No. 47456 PSI, p.288, 289.) Unsurprisingly, Mr. Smith declined in school and started to get in trouble. (No. 47456 PSI, p.289.) He eventually dropped out of high school. (No. 47456 PSI, p.289.) After eighteen years of no contact, Mr. Smith recently reconnected with his father, who is now sober. (No. 47456 PSI, p.289.) Mr. Smith has not had contact with his mother for two years. (No. 47456 PSI, p.289.) Mr. Smith's difficult childhood is a significant mitigating factor in support of a more lenient sentence.

Second, and despite his unstable childhood, Mr. Smith has a minor criminal record. "The absence of a criminal record is a mitigating factor that courts consider." *State v. Miller*, 151 Idaho 828, 836 (2011). "It has long been recognized that '[t]he first offender should be accorded more lenient treatment than the habitual criminal." *State v. Hoskins*, 131 Idaho 670, 673 (Ct. App. 1998) (alteration in original) (quoting *State v. Nice*, 103 Idaho 89, 91 (1982)). Mr. Smith has one misdemeanor conviction as a juvenile after a fight with his mother over her

hoarding. (No. 47456 PSI, p.287.) As an adult, he has one misdemeanor conviction in 2008 for possessing a weapon on campus. (No. 47456 PSI, p.287.) His attorney explained: "I asked Lee what that case was about. And he told me that while he was going to college, he had a penknife to open envelopes and, obviously, was told that was not appropriate and received that charge." (Tr., p.127, Ls.13–16.) The instant offenses were Mr. Smith's first felony convictions. (No. 47456 PSI, p.287.) In light of his minimal criminal history, Mr. Smith asserts the district court did not adequately weigh this mitigating factor when it imposed a sentence of twenty-two years, with seven years fixed, for his first felony convictions.

Third, Mr. Smith's substance abuse issues, the impact of his substance abuse on his behavior, and his need for treatment are strong factors in mitigation. A sentencing court should give "proper consideration of the defendant's alcoholic [or substance abuse] problem, the part it played in causing [the] defendant to commit the crime and the suggested alternatives for treating the problem." *Nice*, 103 Idaho at 91. The impact of substance abuse on the defendant's criminal conduct is "a proper consideration in mitigation of punishment upon sentencing." *State v. Osborn*, 102 Idaho 405, 414 n.5 (1981). Mr. Smith started using marijuana for medicinal purposes, but he recognized "it turned to overuse." (No. 47456 PSI, p.294.) He maintains the marijuana found by the police was for personal use. (No. 47456 PSI, p.295.) However, he reported he wanted to stop using drugs "because of the damage drugs have done to his life." (No. 47456 PSI, p.295.) Mr. Smith submits his substance abuse issues support a more lenient sentence.

Fourth, the support and good character letters from Mr. Smith's family and friends stand in favor of mitigation. *State v. Shideler*, 103 Idaho 593, 594–95 (1982) (family support and good character as mitigation); *see State v. Ball*, 149 Idaho 658, 663–64 (Ct. App. 2010) (district court

considered family and friend support as mitigating circumstance). Mr. Smith's father wrote a letter to the district court that shed additional light on Mr. Smith's difficult childhood, and his father acknowledged he failed Mr. Smith due to his own alcoholism, time in prison, and estrangement. (No. 47456 PSI, pp.304–05.) Mr. Smith's father believed Mr. Smith "would not be here facing this court" if it were not for his traumatic childhood. (No. 47456 PSI, p.305.) Similarly, Mr. Smith's older brother discussed their difficult, tumultuous childhood. (No. 47455 PSI, pp.463–66.) His brother also described their mother's manic-depressive disorder and her hoarding. For example, he explained, as teenagers, they would live with mice because their mother would not let them throw anything away and the mice would hide in the decaying boxes stacked in their house. (No. 47455 PSI, p.464.) His brother also discussed Mr. Smith's prosocial hobbies and interests, such as cooking, playing Dungeons and Dragons, and Buddhism. (No. 47455 PSI, p.465.) He asked the district court to consider that Mr. Smith was "a good man at heart who has made a lot of bad decisions in life," and show leniency at sentencing. (No. 47455 PSI, pp.465–66.) One of Mr. Smith's friends also wrote a letter in support. (No. 47456 PSI, p.306.) He stated Mr. Smith was a kind, caring, and driven person. (No. 47456 PSI, p.306.) Another friend of ten years was surprised to hear of Mr. Smith's legal troubles, and he believed Mr. Smith was otherwise a well-adjusted, smart, and responsible person. (No. 47455 PSI, p.461.) He hoped the district court would show Mr. Smith some leniency because of his good character. (No. 47455 PSI, p.461.) He described Mr. Smith as a kindhearted person who would go out of his way to help others. (No. 47455 PSI, pp.461–62.) Finally, another friend wrote Mr. Smith acted with integrity and kindness toward others. (No. 47455 PSI, p.467.) These letters of support and good character support a lesser sentence for Mr. Smith.

Finally, Mr. Smith expressed remorse for any injuries to the police officers and accepted responsibility for the crimes. Acceptance of responsibility, remorse, and regret are all factors in favor of mitigation. *Shideler*, 103 Idaho at 595. During the presentence interview, Mr. Smith stated on the 2017 case: "After this experience, I have learned how horrid of decisions I have been making, seeing the detriment to my loved ones & the people around me. I am so very sorry my behavior has affected the community & my family so negatively & dramatically." (No. 47456 PSI, p.285.) On the 2018 case, Mr. Smith stated:

> It wasn't my intention, ever, to hurt anyone. I don't even know how he was hurt. I know I didn't strike out at him on purpose, if that's what happened. I am, however, truly sorry he was hurt doing his job. . . . I recognize now what a poor decision that was. These two experiences have shown me just how bad my judgement has been & how selfishly I've been living. The damage these events have caused, not only to myself, but to those I hold most dear has shown me I can't continue living the way I have been.

(No. 47456 PSI, pp.285–86.) He also stated he was "remorseful" and would have never committed the crimes if he knew "how badly this would've affected my family" and that "someone would be hurt." (No. 47456 PSI, p.286.) In addition, Mr. Smith recognized his "selfish thinking" caused his recent legal troubles. (No. 47456 PSI, p.296.) He explained:

> I have lost so much due to that behavior: my work, my health, my possessions, my relationships with loved ones, & now my freedom. Worst of all, while behaving poorly & making bad decisions, people were hurt. Not only was an officer hurt in the line of duty – for which, I cannot regret enough - , but the people I love & once supported are now forced to support me & the burdens I bear. I'm almost [redacted], my life can't continue like this any longer; its my rock bottom. I only want a chance to do better for myself & my family.

(No. 47456 PSI, p.296.) Mr. Smith hoped to serve his prison sentence, pay any fines and restitution, and then start a business and rebuild his family relationships. (No. 47456 PSI, p.296.) Likewise, at the sentencing hearing, Mr. Smith again apologized to the officer and said he "truly never wanted to hurt anyone." (Tr., p.134, Ls.21–23.) He also recognized, "my actions deserve

punishment." (Tr., p.135, Ls.16–17.) These statements of acceptance, remorse, and regret stand in favor of mitigation.

In sum, Mr. Smith submits the district court abused its discretion by imposing an excessive sentence of twenty-two years, with seven years fixed. He asserts proper consideration of the mitigating factors in his case, including his difficult childhood, minimal criminal history, substance abuse issues, letters of support, and acceptance of responsibility and remorse, warranted a lesser sentence.

III.

The District Court Abuse Its Discretion By Denying Mr. Smith's Rule 35 Motions To Reduce His Fixed Time

"A Rule 35 motion for reduction of sentence is essentially a plea for leniency, addressed to the sound discretion of the court." *State v. Carter*, 157 Idaho 900, 903 (Ct. App. 2014). In reviewing the grant or denial of a Rule 35 motion, the Court must "consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence." *Id.* The Court "conduct[s] an independent review of the record, having regard for the nature of the offense, the character of the offender and the protection of the public interest." *State v. Burdett*, 134 Idaho 271, 276 (Ct. App. 2000). "Where an appeal is taken from an order refusing to reduce a sentence under Rule 35," the Court's scope of review "includes all information submitted at the original sentencing hearing and at the subsequent hearing held on the motion to reduce." *State v. Araiza*, 109 Idaho 188, 189 (Ct. App. 1985). "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).

Here, Mr. Smith submits the district court did not exercise reason and thus abused its discretion by denying his Rule 35 motions for a reduction in his fixed time, in light of the new and additional information presented in support of his motions. Mr. Smith provided three letters in support. First, Mr. Smith's father wrote another letter to the district court stating that he was planning to relocate to Idaho, and he would be able to help Mr. Smith find a job and stable housing. (No. 47455 R., p.101.) Second, Mr. Smith's brother wrote another letter to the district court stating that he could help Mr. Smith financially to get him back on his feet. (No. 47455 R., p.102.) His brother also wrote he "would happily assist him on his path to become a law-abiding citizen and productive member of society once again." (No. 47455 R., p.102.) Finally, Mr. Smith wrote a letter to the district court explaining his shift in perspective and his commitment to change his lifestyle. (No. 47455 R., pp.103–05.) He stated he signed up for classes, applied to jobs, and starting writing. (No. 47455 R., p.104.) He also discussed how the reality of his prison sentence had set in, and he was actively working on improving his behavior and thinking errors to prepare for his eventual release. (No. 47455 R., pp.103–05.) These letters provided new and additional information of Mr. Smith's family support and his focus on becoming a productive member of society. Based on this new and additional information, Mr. Smith contends the district court did not exercise reason and therefore abused its discretion by denying his Rule 35 motions. He submits the district court should have reduced his fixed time.

CONCLUSION

In the 2018 case, Mr. Smith respectfully requests this Court reverse the district court's decision denying in part his motion to suppress and remand the case for suppression of all the evidence during the illegal traffic stop. In both cases, Mr. Smith respectfully requests this Court reduce his sentences as appropriate or, in the alternative, vacate his judgments of conviction and remand these cases to the district court for a new sentencing hearing. Alternatively, he respectfully requests this Court reverse or vacate the district court's order denying his Rule 35 motions and remand these cases to the district court for a Rule 35 motion hearing.

DATED this 23rd day of July, 2020.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 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

JCS/eas